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THE INCORPORATED COUNCIL OF LAW REPORTING
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"*Consent*"—Theft Act 1968, s. 12(1)

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- "Inflict"—Offences against the Person Act 1861, s. 20
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- "Issued . . . by or on behalf of . . . government department"—Defamation Act 1952, Sch., Pt. II, para. 12
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- "Local connection"—Housing (Homeless Persons) Act 1977, s. 5(1)(a)(i)
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- "Long tenancy"—Leasehold Reform Act 1967, s. 3(1)
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- "Measures . . . under the law"—Protection of Trading Interests Act 1980, s. 1(1)(a)
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- "Term of years certain"—Leasehold Reform Act 1967, s. 3(1)
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- "To another person"—Army Act 1955, s. 203(2)
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- "Whole case"—Criminal Appeal Act 1968, s. 17(1)(a)
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- "Wound"—Offences against the Person Act 1861, s. 20
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ERRATA

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Page 88D, line 22: *for* “until 1960” *read* “until 1969”

Page 131C, line 17: *for* “Ord. 5” *read* “Ord. 15”

Page 887D, line 30: *delete* “applied”

Page 896B, line 6: *for* “*Power of Trusts—Advancement*” *read* “*Trusts—Power of advancement*”

Page 917H, line 49: *after* “defendant” *insert* “for Bryan”

A

The Weekly Law Reports

B

Volume 3

*Containing those cases which are intended to be included in
The Law Reports*

C

[COURT OF APPEAL]

REGINA v. EWING

D

1982 Dec. 16, 17, 20, 21;
1983 March 11

O'Connor L.J., Parker
and Staughton JJ.

*Crime—Evidence—Handwriting—Comparison of handwriting—
Defendant's handwriting to be compared with handwriting of
disputed documents—Proof of samples of defendant's hand-
writing being genuine—Whether civil or criminal standard of
proof—Criminal Procedure Act 1865 (28 & 29 Vict. c. 18), s. 8*

E

*Crime—Evidence—Documents, admissibility of—Print-out from
computer—Record of bank account—Whether admissible in
evidence—Criminal Evidence Act 1965 (c. 20), s. 1*

F

At the trial of the appellant on 24 counts charging theft, forgery of valuable securities and uttering forged documents, it was disputed that documents bore the appellant's handwriting. The judge stated that he was satisfied on the balance of probabilities that other documents used by handwriting experts to compare the handwriting on the disputed documents were written by the appellant and he ruled that they were admissible in evidence under section 8 of the Criminal Procedure Act 1865.¹ He also ruled that bankers' computer print-outs of statements of accounts relevant to certain of the offences charged were admissible in evidence under section 1 of the Criminal Evidence Act 1965² to prove that specified sums had been credited or withdrawn from the accounts. The appellant was convicted on all counts.

G

On his appeal against conviction, the court allowed the appeal on the first three counts and quashed the convictions on those counts. On the questions of admissibility of documents and computer print-outs:—

H

Held, dismissing the appeal in respect of the further counts, (1) that, under section 8 of the Criminal Procedure Act 1865, it was the judge who had to be satisfied that documents had been written by the appellant; that the standard of proof was the common law standard for a criminal matter and, therefore, the judge had to be satisfied beyond reasonable doubt that the documents used by the handwriting experts as a comparison of the handwriting in the disputed documents were written by the appellant; that, accordingly, the judge in

¹ Criminal Procedure Act 1865, s. 8: see post, p. 4C-D.

² Criminal Evidence Act 1965, s. 1: see post, p. 10D-G.

Reg. v. Ewing (C.A.)**[1983]**

applying the civil standard of proof had erred in law but, if the judge had correctly directed himself on the standard of proof, the court had no doubt that he would have been satisfied that it was the appellant's handwriting on the documents (post, pp. 7B-C, G, 8F).

Blyth v. Blyth [1966] A.C. 643, H.L.(E.) applied.

Reg. v. Angeli [1979] 1 W.L.R. 26, C.A. not followed.

(2) That a computer was a "device" by means of which information was recorded or stored and a print-out, being part of that device, was a statement as defined by section 1 (4) of the Criminal Evidence Act 1965; that, since it was a document produced as part of the record of banking transactions and the operator who fed the information into the computer could not reasonably be expected to have any recollection of that information, the provisions of section 1 of the Act were satisfied and, accordingly, the judge had correctly admitted the print-outs in evidence (post, pp. 10G-11A, C-D, E).

Reg. v. Pettigrew (1980) 71 Cr.App.R. 39, C.A. distinguished.

The following cases are referred to in the judgment on the points covered by this report:

Blyth v. Blyth [1966] A.C. 643; [1966] 2 W.L.R. 634; [1966] 1 All E.R. 524, H.L.(E.).

Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.

Preston-Jones v. Preston-Jones [1951] A.C. 391; [1951] 1 All E.R. 124, H.L.(E.).

Reg. v. Angeli [1979] 1 W.L.R. 26; [1978] 3 All E.R. 897; 68 Cr.App.R. 32, C.A.

Reg. v. Nicholls (1976) 63 Cr.App.R. 187, C.A.

Reg. v. Pettigrew (1980) 71 Cr.App.R. 39, C.A.

Reg. v. Van Vreden (1973) 57 Cr.App.R. 818, C.A.

No additional cases were cited in argument on the points covered by this report.

APPEAL against conviction.

On April 4, 1981, at the Central Criminal Court before Judge Abdela and a jury the appellant, Terence Patrick Ewing, was charged on an indictment alleging 24 counts of theft, forgery of valuable securities and uttering forged documents. During the trial the judge ruled, inter alia, that certain documents used by a handwriting expert for purposes of comparison were admissible in evidence under section 8 of the Criminal Procedure Act 1865, and that computer print-outs of bank account statements were admissible in evidence under section 1 of the Criminal Evidence Act 1965. On May 20 the appellant was convicted on 24 counts and was sentenced to a total of seven years' imprisonment.

He appealed against conviction on the grounds, inter alia, that (i) the judge erred in law in that he held that exhibits PC 1, FM 5 and FM 7 (documents used by handwriting experts for comparison purposes) were written by the appellant on the balance of probabilities and were, therefore, admissible as samples of the appellant's handwriting; and (ii) the judge erred in law in holding that computer print-out bank statements, produced by Richard Addyman on behalf of the Yorkshire Bank Ltd., were admissible under the provisions of the Criminal Evidence Act 1965. The report is confined to matters relating to those two grounds of appeal.

On December 21, 1982, the Court of Appeal allowed the appeal against

3 W.L.R.

Reg. v. Ewing (C.A.)

A conviction on counts 1, 2 and 3 of the indictment and quashed those convictions. On all other counts the appeal was dismissed, for reasons to be given later.

The facts are stated in the judgment of the court.

David Farrington (assigned by the Registrar of Criminal Appeals) for the appellant.

Michael Corkery Q.C. and *John O. Haines* for the Crown.

Cur. adv. vult.

March 11. O'CONNOR L.J. read the following judgment of the court. On May 20, 1981, at the Central Criminal Court, the appellant was convicted on 24 counts of an indictment charging seven counts of theft, nine counts of forgery of a valuable security and eight counts of uttering a forged document. He appeals against conviction on points of law. We concluded the hearing of the appeal on December 21, 1982, having allowed the appeal against conviction on counts 1, 2 and 3 of the indictment and quashed those convictions. We dismissed the appeal against conviction on all other counts. We now give our reasons for so doing.

The appellant, aged 30, is a fraudsman. The offences charged in this indictment were committed between June 1979 and March 1980. The nature of the offences was very simple. On two occasions he altered the amount on cheques payable to him (forgery) and paid them into a bank account in his name (uttering a forged document) and, in due course, drew out the money. In other cases he stole a cheque, opened a bank account in the name of the payee, paid the cheque into it, sometimes altered the amount payable and drew the money out.

In December 1979 the appellant was arrested in connection with an offence committed in October 1979, of altering a Paymaster General draft from £30 to £1,130 and obtaining that sum from the Yorkshire Bank in Cheapside. In due course, he was released on bail and he was finally arrested on March 13, 1980, in Reading.

Originally, three indictments came into existence: the first containing two counts, founded on a committal from the Mansion House to the Central Criminal Court on April 10, 1980; the second containing 15 counts, founded on a committal from the Highbury Corner Magistrates' Court to the Inner London Crown Court on June 13, 1980; and the third containing eight counts, founded on a committal from the Highbury Corner Magistrates' Court to the Central Criminal Court on December 4, 1980. On February 10, 1981, Russell J. gave leave to prefer a voluntary bill in order to amalgamate the three indictments into one.

In the course of his career, the appellant has sought to familiarise himself with, and has gained a certain expertise in, those elements of the criminal law and procedure that concern his particular form of criminality. He is ever anxious to demonstrate his skill in both fields; before the trial started, he gave instructions that no admissions whatsoever were to be made under section 10 of the Criminal Justice Act 1967 and that the prosecution were to be put to strict proof of every ingredient of every single count.

Before we continue, we should like to pay tribute to the integrity and skill of Mr. Farrington, who conducted the appellant's defence and argued his appeal. In this court, he refused to argue hopeless points, despite express instructions from his client.

The trial opened on Monday, April 6, 1981. The first eight days were

occupied with legal submissions and a trial-within-a-trial. The court adjourned for Easter on April 15, and the trial was resumed on Wednesday, April 22, 1981, when a jury was sworn. The prosecution case lasted 14 working days and finished on Wednesday, May 13, 1981. During that time the jury were sent out on 27 occasions whilst submissions in law were made to the judge. After the normal submissions at the end of the prosecution case, the appellant did not give evidence, but made a statement from the dock. The summing up lasted just over a day and after a retirement of four hours and 15 minutes, the jury found the appellant guilty on all counts. No criticism is made of the summing up. The grounds of appeal arise out of matters occurring during the trial and the rulings given by the judge.

[His Lordship then gave the reasons for the court dismissing the appeal on grounds of appeal not covered by the present report, and continued:] The next ground of appeal is that the judge wrongly held that certain documents used by the handwriting expert for purposes of comparison were in the appellant's handwriting. Section 8 of the Criminal Procedure Act 1865 provides:

"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

In *Reg. v. Angeli* [1979] 1 W.L.R. 26, this court held that the standard of proof under this section was the civil standard; on the balance of probabilities. Having said that it was well-established that the criminal standard applied when the judge was ruling on the admissibility of a confession, Bridge L.J. said, at p. 30:

"We are prepared to assume that it is a rule of general application whenever the admissibility of evidence in a criminal trial turns upon some issue of fact and depends upon a rule of common law; but the vital distinction between the kind of decision which the judge has to make in relation to a disputed confession and the decision which the judge had to make as to the admissibility of disputed writings in this case is that whereas the confession evidence and its admissibility depend upon rules of common law, the admissibility of the disputed writings in this case depended wholly upon the application of the statute.

"In our judgment all this court has to do here is to consider the statute which the judge was called on to apply, and it is clear that that is all the judge thought that he was doing. Approached in that light we think the answer to the issue which has been canvassed in this appeal is clear beyond argument. The Criminal Procedure Act 1865, as already stated, applied for the first time to courts of criminal jurisdiction the statutory provision which had already been in operation in civil courts since 1854, under the Common Law Procedure Act of that year; and applied it without change of statutory language. Section 8 itself simply repeats what had been the rule applicable in civil cases for the previous 11 years. It was made applicable to criminal courts by the provisions of section 1 which so far as relevant enact: "the provisions of sections from 3 to 8, inclusive, of this Act shall apply to all courts of judicature. . ." That being the position under the statute, there is in our judgment no ground for construing this provision as having a different application in civil courts from its application in criminal. Whatever was the standard of proof implicit in the words: 'proved

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A to the satisfaction of the judge to be genuine ' when those words applied in civil courts only as they did from 1854 to 1865, the same standard became applicable when the self-same provision was made operative in criminal courts by the enactment of the Act of 1865."

B This decision has been criticised by Sir Rupert Cross and Professor Smith, on the ground that the court was not referred to the decision of the House of Lords in *Blyth v. Blyth* [1966] A.C. 643.

C Before the judge, Mr. Farrington accepted that he was bound by *Reg. v. Angeli* [1979] 1 W.L.R. 26 and that the matter had to be decided on the balance of probabilities. In his ruling in favour of the prosecution, the judge said he had done just that. Before us, Mr. Farrington has submitted that *Reg. v. Angeli* was decided per incuriam, in that it cannot stand with *Blyth v. Blyth* [1966] A.C. 643, and that the criminal standard of proof beyond reasonable doubt is the standard to be applied, and that, in the result, however forgivably, the judge was wrong in law to decide the matter on the balance of probabilities.

D In *Blyth v. Blyth* [1966] A.C. 643, the question was whether the civil or criminal standard of proof should be used in deciding whether adultery had been condoned under section 4 (2) of the Matrimonial Causes Act 1950. That subsection provides:

E "If the court is satisfied on the evidence that—(a) the case for the petition has been proved; and (b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and (c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents; the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: . . ."

F The commissioner who tried the suit had found "on a rather slender balance of probabilities, that the husband did not intend to condone the adultery." The Court of Appeal held that the word "satisfied" in the section meant "satisfied beyond reasonable doubt." The majority in the House of Lords held that this view of the meaning of the section was wrong. Lord Denning said, at p. 667:

G "What is the meaning of the word 'satisfied' in section 4 of the Act of 1950? Willmer and Harman L.JJ. have held that it means 'satisfied beyond reasonable doubt' and that, on the finding of the commissioner, the evidence in the present case did not come up to that standard. I can well understand how, sitting in the Court of Appeal, the Lords Justices took that view. Some years ago in 1950 in *Preston-Jones v. Preston-Jones* [1951] A.C. 391, 417, Lord MacDermott expressed the view that, in respect of a ground for dissolution, the word 'satisfied' was not capable of connoting 'something less than proof beyond reasonable doubt.' Proof beyond reasonable doubt was required. Lord Simonds, at p. 401, expressed his concurrence. And in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, 264 Hodson L.J. said that the House of Lords has held that the words of the Act of 1959 'produce the same result as the rule in criminal cases.' In the present case the Lords Justices took the next logical

H

step. They said that the word 'satisfied' must mean the same throughout section 4. If it meant that the petitioner must prove adultery beyond reasonable doubt, so also it meant that he must prove beyond reasonable doubt that he had not condoned the adultery. A

"The logic of the Lords Justices is impeccable. The error lies in what Lord MacDermott said in 1950. It was said obiter and without argument. I cannot think he would have said it if he had been taken, as your Lordships have been, through the other sections of the Act where the word 'satisfied' is used. It then becomes plain that the word 'satisfied' deals only with the incidence of proof, not with the standard of proof. It shows *on whom* the burden lies to satisfy the court, and not the degree of proof which he must attain. B
The best example of this is in regard to connivance. The court has to be 'satisfied' that the petitioner has not in any manner C
connived at the adultery. That clearly puts the burden on him to prove a negative—to prove that he was not guilty of connivance—to prove that he was innocent of it. Can anyone seriously suggest that he has to prove his innocence beyond reasonable doubt? Surely it is sufficient if the scales tip the balance in his favour."

Lord Denning added, at p. 668: D

"The legislature . . . said *on whom* the burden of proof rested, leaving it to the court itself to decide what standard of proof was required in order to be 'satisfied.'"

Lord Pearce said, at p. 672:

"I think Parliament did not intend the section to define the degree of proof which is necessary to satisfy the court. The section merely informs the court what must be proved and by whom to the satisfaction of the court. I cannot accept the argument that the repetition of the word 'satisfied' in the various sections is a constant reminder of the great weight of the proof to be attached to such serious matters as those with which the various reliefs contained in the Act are concerned. The word 'satisfied' is a neutral word which leaves to the court the duty of assessing its own satisfaction. I would rather regard 'satisfied' as expressing a minimum, such as is needed by any court in giving any relief in any interlocutory, procedural or final matter in civil or other proceedings. And it is, I think, to be found in many statutes or rules of court even in trivial matters. E
F

"It is to the common law and not to the statute that one must look for any authority which binds a judge to be satisfied in certain cases with nothing less than a proof beyond reasonable doubt." G

Lord Pearson, having examined the speeches in *Preston-Jones v. Preston-Jones* [1951] A.C. 391, said, at p. 678:

"This language is consistent with the view that the word 'satisfied' does not, as a matter of interpretation, mean 'satisfied beyond reasonable doubt,' and that the requirement of proof beyond reasonable doubt may be limited to the grounds for dissolution and may not extend to the matters referred to in sub-paragraphs (b) and (c)." H

The majority of their Lordships decided that as a divorce suit was a civil proceeding, it was the civil standard of proof that applied, but, nevertheless, the degree of proof required to satisfy of adultery was very

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A much higher than the degree of proof required to satisfy of the absence of condonation or connivance.

Section 1 of the Criminal Procedure Act 1865 provided "that the provisions of sections from 3 to 8, inclusive, of this Act shall apply to all Courts of Judicature, as well criminal as all others . . ." These sections were in precisely similar terms to sections 22 to 27 of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125). Those provisions of the Act of 1854 were in due course repealed by the Statute Law Revision Act 1892 (55 & 56 Vict. c. 19).

B In our judgment, the words in section 8, "any writing proved to the satisfaction of the judge to be genuine," do not say anything about the standard of proof to be used, but direct that it is the judge, and not the jury, who is to decide, and the standard of proof is governed by common law: see the passage from Lord Pearce's speech in *Blyth v. Blyth* [1966] A.C. 643, 672. It follows that when the section is applied in civil cases, the civil standard of proof is used, and when it is applied in criminal cases, the criminal standard should be used. Were it otherwise, the situation created would be unacceptable, where conviction depends on proof that disputed handwriting is that of the accused person and where that proof depends upon comparison of the disputed writing with samples alleged to be genuine writings of the accused; we cannot see how this case can be said to be proved beyond reasonable doubt, if the prosecution only satisfy the judge, on a balance of probabilities, that the allegedly genuine samples were in fact genuine. The jury may be satisfied beyond a reasonable doubt that the crucial handwriting is by the same hand as the allegedly genuine writings, but if there is a reasonable doubt about the genuineness of such writings, then that must remain a reasonable doubt about the fact that the disputed writing was that of the accused and the case is not proved.

E It is with reluctance, and with all due respect, that we find ourselves unable to agree with the reasoning in the last paragraph of the judgment in *Reg. v. Angeli* [1979] 1 W.L.R. 26, which we have quoted. In our judgment, that reasoning is contrary to the decision of the House of Lords in *Blyth v. Blyth* [1966] A.C. 643, and we are satisfied that it must have been reached per incuriam. We are fortified in our view that different standards of proof must have been envisaged by Parliament when enacting section 1 of the Act of 1865 because sections 3 to 8 extend not only to "all Courts of Judicature as well as criminal as all others," but also to "all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence." We hold that in a criminal trial, where handwriting is to be used for comparison under section 8, it should be proved to the satisfaction of the judge to be genuine, and the standard of proof should be the ordinary criminal standard, namely, proof beyond reasonable doubt.

G We must now consider whether there is any reasonable doubt that the documents used for comparison purposes were in the handwriting of the appellant.

H There is no dispute about the material used by the handwriting expert, Mr. Welch, for he used the statement written by the appellant in the presence of his solicitor and Detective Constable Ralph. That evidence only went to one transaction. The dispute is in respect of two of the documents used by Mr. Ellen, another handwriting expert. It is as well to remember that he had a large quantity of the appellant's writing,

about which there can be no dispute; for example, he had a document which is a handbook for fraudulent operations, setting out 61 different forms of fraudulent operation, covering many pages, all in the appellant's handwriting, as admitted by him. For obvious reasons, this document was never put in front of the jury. He had the appellant's address book; again, a document admitted by the appellant. A

The real complaint is about two exhibits (FM/5 and FM/7), also used by Mr. Ellen. These two exhibits were found by Detective Sergeant May, when he searched an upstairs flat at 73, Streathbourne Road, S.W.7, on March 18, 1980. This was a flat occupied by the appellant and the police gained access to it with a Yale key found on the appellant. Exhibit FM/5 consists of three typescript letters, the only manuscript writing being the signatures "Terence Ewing," and on two of them the addition of "Esq." One manuscript letter was signed "Terence Ewing" and there were a number of sheets of paper in manuscript, all quite obviously in the same hand, including a sheet which contains three draft counts, which might go into an indictment, referring to Terence Patrick Ewing, the other sheets being notes of various cases from law reports. In our judgment, there can be no possible doubt about the genuineness of the manuscript writing in exhibit FM/5. B C

Exhibit FM/7 consists of a typed sheet, being particulars of a house in Tilehurst, from some estate agents. At the bottom of the page are some manuscript entries, including the name "Leo Curran" and "30 Pine Road, Birmingham." This was an address used by the appellant in opening the Leo Curran account with Lloyds Bank in Reading. Once again, there is no reasonable ground for doubting that these entries were made by the appellant. It is to be noted that, in his ruling, the judge was in no doubt about the document, save that he said of FM/7 that he thought it was "highly probable as being in the defendant's writing." D E

It is worth noting that in argument (of which we have a transcript) the judge has said of this document: "Surely the ordinary, natural inference to be drawn from the totality of those circumstances must be such that without some explanation to refute it it must be attributable to him?" If the judge had directed himself that he should apply the criminal standard of proof, we are in no doubt whatever that he must have said that he was satisfied that these documents were in the genuine writing of the appellant, and this ground of appeal must fail. F

The next ground of appeal is that the judge wrongly admitted a number of documents in evidence which he ought to have rejected, on the ground that the production of the documents did not prove the facts recorded on the face of the document. The nature of this complaint is best explained by considering it against individual counts, and we will consider it in relation to counts 7 and 8 of the indictment. Those are the counts alleging the forging and uttering of the Court Funds Warrant for £30, to which we have referred earlier in this judgment. G

For these two counts, the prosecution had to prove (1) the drawing and dispatch of the warrant for £30, on October 19, 1979, to the appellant, at 615(A) Holloway Road, London, N.19. Proved by the witnesses Archibald Martin and Janina Czernecka; (2) that the warrant had been altered to £1,130. Proved by production of the warrant; and, (3) that the alteration had been made by the appellant with intent to defraud (forgery, count 7) and that the appellant had uttered the document H

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A with intent to defraud (count 8). There was no expert evidence as to the handwritten alterations.

The prosecution set out to prove these requirements, by proving (i) that on October 22, 1979, the appellant had opened a bank account (no. 20151) in the name of T. Ewing, of 615(A) Holloway Road, London, N.19, at the Yorkshire Bank, Cheapside, with a deposit of £1. The witness Yvonne Earl proved that this account had been opened by a man she might be able to recognise; (ii) that on October 22, the appellant had paid in the warrant at the National Westminster Bank, Lothbury, by bank Giro credit, for his account at the Yorkshire Bank. The transaction was proved by two National Westminster officials, T. Poulton and Olive Newsome, who identified her initials on the bank Giro credit, which was produced, but they could not identify the appellant; and, (iii) that the sum of £1,130 represented by the above bank Giro credit had been credited to the T. Ewing account at the Yorkshire Bank, Cheapside and that £1,130 had been drawn out of that account. Proved by Richard Addyman, assistant manager of the Cheapside Branch, who produced a computer print-out of the account, which was a blank piece of paper with the following on it: 20151 0.00; 23 10 79 CR. 1.00; 24 10 79 B/G 1130.00; 29 10 79 RPD 1130; 1.78 1.00.

D It is said that the computer print-out was not admissible in evidence; that it should not have been exhibited and, indeed, that Mr. Addyman could not use the document to found his evidence. The payment to the appellant was proved by the witness Paula Ralphs. The technicality of this objection is apparent because all these facts had been expressly admitted by the appellant in the statement which he had made in the presence of his solicitor and Detective Sergeant Ralph, on December 4, 1979. Nevertheless, there is the problem, could the prosecution prove the passage of the sum of £1,130 represented by the bank Giro credit, which had undoubtedly reached the Yorkshire Bank, for Mr. Addyman produced it, into the T. Ewing account (20151)? The judge admitted the print-out under the Criminal Evidence Act 1965. It is submitted that he was wrong to do so. Mr. Farrington relied on *Reg. v. Pettigrew* (1980) 71 Cr.App.R. 39. We will come to that case in a moment, but first we must look to see what it is that the computer does.

F The evidence was given by Mr. Addyman, the assistant manager, who is not a computer expert. We have no transcript of his evidence, but an agreed note by counsel, which we think is more than adequate for the purposes of this case. Mr. Addyman said that the bank had a computer at its head office, that it stored information which was put into it by machines at each of the branches. He said the machine was like a keyboard, operated by a machinist. He said:

G "I think we could ascertain, but with difficulty, and it's not possible to be 100 per cent., who was on the machine on any one day . . . Such an entry as typed out, can be recalled by the computer. The check on the system is done manually."

H The computer can provide a range of services; it can sort out and accept or reject items in a sorting method. He continued:

"I do not take information out of the machine, it is done by a computer operator. Therefore, getting the right answer depends on having an accurate machinist."

The computer print-out was checked at a later date.

The evidence establishes the fact that the computer holds the existence of an account by number in its memory and records movements on that account, doing the arithmetic and, if asked, printing out details of those movements and a balance. The facts in this case further establish, beyond any doubt, that on October 22, Yvonne Earl brought into existence a bank index card (exhibit 26) and that, in the ordinary course of business, the existence of the new account (no. 20151) was fed to the computer by a machine operator at Cheapside, so too the existence of a £1 credit. When the bank Giro credit was received at Cheapside, in the ordinary course of business, the information on it, namely, to credit account no. 20151 with £1,130, would be fed to the computer by an operator. On October 29, when the cashier paid out £1,130 to the appellant, she took a signed receipt from him (exhibit 33) and the information on that, namely, that account no. 20151 was to be debited with £1,130, would be fed to the computer by an operator. Thereafter, as and when the computer was asked for a print-out of the movements and balance on this account, it would be expected that the print-out would read precisely as the print-out (exhibit 29) does read.

The relevant provisions of the Criminal Evidence Act 1965 are contained in section 1:

“(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and (b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied. (2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained . . . (4) In this section ‘statement’ includes any representation of fact, whether made in words or otherwise, ‘document’ includes any device by means of which information is recorded or stored . . .”

The first question is whether the print-out (exhibit 29) is a document which “is, or forms part of, a record relating to any trade or business.” The computer is undoubtedly a “device by means of which information is recorded or stored.” The print-out is part of that device, for there is no other means of discovering the information recorded or stored by the device. The print-out is, therefore, a “document” within the meaning of subsection (4). There is no doubt that the document either is, or forms part of, a record relating to the business of the bank and that it was compiled in the course of business. The record has to be compiled “from information supplied (whether directly or indirectly) by persons

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A who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply.” It will be seen that the record does not have to be compiled by a person who has knowledge of the matters dealt with in the information, so we must return to the earlier part of subsection (1) to discover what persons we are looking for upon whom paragraph (b) of subsection (1) will bite.

B The fact which the prosecution were trying to establish was that the £1,130 in the bank Giro credit was paid into account no. 20151. The person who could give direct oral evidence of that fact would be the operator who put it into the account in the computer, so that (by chance in the present case) the record was compiled by the person who had the information.

C We now turn to paragraph (b) of subsection (1). The judge held that the operator who fed the information into the computer could

“not reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.”

D It will be seen that the provisions of the subsection are disjunctive and, on the evidence of Mr. Addyman, the judge was quite entitled to hold that the person who fed this information into the computer, whoever he was, could not reasonably be expected to have any recollection of it. There was no need for a search to be made for this person, even though a diligent search might have identified the person or persons who were operating the keyboard at the Cheapside Branch at the relevant times.

E Mr. Farrington referred us to a number of cases. In *Reg. v. Van Vreden* (1973) 57 Cr.App.R. 818 (the South African Barclaycard case) no attempt was made to use the provisions of the Criminal Evidence Act 1965 and at p. 823, Lawton L.J. plainly thought that the document in question would have been admissible had the Act been used. In *Reg. v. Nicholls* (1976) 63 Cr.App.R. 187, the trial judge ruled the document
F in under the Act of 1965, at a stage when, apart from the document itself, there was no evidence from which he could reasonably infer that the person supplying the information could not reasonably be expected to have any recollection about the matter. In *Reg. v. Pettigrew* (1980) 71 Cr.App.R. 39, the prosecution wanted to prove that three new £5 notes found on the defendant were part of the proceeds of a burglary in which £650 had been stolen, by proving that the three notes formed part of a
G bundle of £5,000 worth of notes dispatched by the Bank of England to Newcastle, from which the victim of the burglary had drawn £650. For this purpose, the prosecution sought to rely upon a Bank of England computer print-out, listing the serial numbers of a parcel of £5,000 worth of £5 notes dispatched to Newcastle. The machine referred to as a computer had a dual function, one of which was to reject any defective
H notes fed into it and to record the serial numbers of the notes so rejected. This court held that on those facts, there was no person, or persons, who had personal knowledge of the matters within section 1 (1) (a) of the Act of 1965 and, for that highly technical reason, the print-out had been wrongly admitted.

For these reasons, we hold that the print-out of the present appellant's bank account was properly admitted by the judge.

We will deal shortly on this topic with the other counts. Counts

4 and 5 are concerned with a cheque for £100 from Safeway, sent to the appellant on August 8, 1979, altered to read £1,100 and paid in on August 15, at Lloyds Bank, Oxford Street, by Giro credit, for the credit of an account in the name of "Terence Ewing" at Lloyds Bank, Kingsway, which had been opened on August 14, with a deposit of £1. The bank witness, Mr. Peacock, produced a computer print-out of the transactions on the Kingsway Branch Account. The print-out is, for practical purposes, in the same form as that which we have already considered. Mr. Peacock does not appear to have given any evidence about the computer, and it was objected that there was no evidence that the computer might not have functions such as the computer in *Reg. v. Pettigrew*, 71 Cr.App.R. 39. The judge, in our judgment rightly, admitted the document for, on the face of the document itself, it is reasonable to infer that it is of the same nature as the Yorkshire Bank print-out. On these two counts, it is to be noted that at the appellant's premises a torn-up bank account statement of this account, showing these precise details, was found.

Counts 9 to 11 concerned a cheque for £5,072.63, drawn by the Abbey National Building Society in favour of Altman & Co., and dispatched to them on January 7, 1980. That cheque endorsed "A. Willow p.p. Cecil Altman and Co. A. Willow" was paid in on January 7 at Barclays Bank, Oxford Street, by Giro credit note, for the credit of the account of A. Willow at Barclays Bank, 145 Upper Richmond Road; an account which had been opened with a deposit of £5, on August 23, 1978. £5,000 was drawn out of that account on January 14, 1980. The bank evidence was given by Mr. Bashford, who produced a computer print-out which, although in the case of Barclays Bank, is in the more familiar form of a bank statement which showed these transactions. Once again, we are satisfied that this document was properly admitted under the Criminal Evidence Act 1965. In this case the handwriting expert was positive that the Giro credit slip had been completed in the name of A. Willow by the appellant.

[His Lordship then gave the reasons for the court's decision on the other grounds of appeal and the reasons for quashing the convictions on counts 1, 2 and 3 of the indictment.]

*Appeal allowed in part.
Convictions on counts 1, 2 and 3
of indictment quashed.*

Solicitor: *Solicitor, Metropolitan Police.*

[Reported by MISS EIRA CARYL-THOMAS, Barrister-at-Law.]

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[COURT OF APPEAL]

MARSHALL v. OSMOND AND ANOTHER

[1977 M. No. 491]

1983 March 16

Sir John Donaldson M.R., Dillon L.J.
and Sir Denys Buckley

Negligence—Duty of care to whom?—Participants in criminal offence—Youths travelling in car taken without owner's consent—Police vehicle pursuing car—Passenger attempting to escape injured by police vehicle—Police driver's duty of care to person endeavouring to avoid arrest

The plaintiff and a group of youths were travelling in a car in Brockenhurst in the early hours of the morning when two police officers on special observation duty in the area, suspecting that the car had been taken and driven away without the consent of its owner, pursued them in an unmarked police vehicle. The pursuit ended when the car eventually pulled up in a lay-by and its occupants dispersed. The officer driving the police vehicle, intending to draw up alongside the car, braked and skidded into the car. The officer got out and found the plaintiff lying on the ground between the two cars with serious leg injuries. The plaintiff claimed damages against the officer driving the police vehicle and the Chief Constable for that area alleging that his injuries were caused by the negligent driving of the police officer. Milmo J. held that a police officer driving a vehicle in pursuit of a suspected criminal did not owe the same duty of care to that person as he would to a lawful and innocent road user. He found that the plaintiff had sustained his injuries while endeavouring to escape and avoid arrest; that the officer had not intended to injure the plaintiff and concluded that the officer was not guilty of any want of reasonable care in all the circumstances. He dismissed the plaintiff's claim.

On appeal by the plaintiff:—

Held, dismissing the appeal, that the duty owed by a police officer driving a vehicle in pursuit of a suspected criminal was the same as that owed to anyone else, namely, to exercise such care and skill as was reasonable in all the circumstances; that, accordingly, the defence of non fit injuria was not applicable but, in circumstances where the police officer was driving his car alongside the other vehicle in order to effect an arrest, his error of judgment in performing the manoeuvre did not amount to negligence (post, pp. 15F—16C).

Decision of Milmo J. [1982] Q.B. 857; [1982] 3 W.L.R. 120; [1982] 2 All E.R. 610 affirmed on the facts.

No cases were referred to in the judgment of Sir John Donaldson M.R.

The following cases were cited in argument:

Gaynor v. Allen [1959] 2 Q.B. 403; [1959] 3 W.L.R. 221; [1959] 2 All E.R. 644.

Wood v. Richards [1977] R.T.R. 201, D.C.

APPEAL from Milmo J.

By a writ dated March 24, 1977, the plaintiff, Victor Marshall, claimed damages for personal injuries against the first defendant, Sir Douglas Osmond, the Chief Constable of Hampshire, and the second defendant, Maximilian Anthony Needham.

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[1983]

On February 1, 1982, Milmo J. dismissed the plaintiff's claim. He held that a police officer driving a vehicle in pursuit of a person he rightly suspected of having committed an arrestable offence did not owe the same duty of care to that person as he would to a lawful and innocent road user and concluded that, on the facts, the second defendant was not guilty of any want of reasonable care in all the circumstances of the case.

By a notice of appeal dated March 26, 1982, the plaintiff appealed on the grounds, *inter alia*, (1) that the judge ought to have found negligence on the part of the second defendant; (2) that the judge misdirected himself in holding that the test to be applied in this case centred upon a deliberate intention to injure the plaintiff; (3) that the judge misdirected himself in holding that the second defendant had acted reasonably at all material times; (4) that the judgment was against the weight of the evidence.

By a respondent's notice dated January 12, 1983, the defendants sought to affirm the judge's decision on the following additional grounds: (1) that the duty of the second defendant was that he should not deliberately injure the plaintiff unless it was reasonably necessary to do so in order to arrest him or act with reckless disregard for his safety; (2) that the second defendant was not in breach of the duty set out above; and (3) that the plaintiff impliedly consented to running the risk of injury.

John Spokes Q.C. and *Charles Gabb* for the plaintiff.

Ian Kennedy Q.C. and *Richard Denning* for the defendants.

SIR JOHN DONALDSON M.R. This is an appeal from a judgment of Milmo J. [1982] Q.B. 857 given in London on February 1, 1982, following a hearing which took place in Winchester in the autumn of the previous year. By that judgment the judge dismissed the plaintiff's claim for damages for personal injuries which he sustained in what can loosely be described as a motor accident. It was, however, an unusual motor accident arising out of unusual facts.

The first defendant is Sir Douglas Osmond, the Chief Constable of Hampshire, and he features by virtue of his vicarious liability for the second defendant, Police Constable Needham.

P.C. Needham was the driver of an unmarked red Mini in the early hours of the morning of May 2, 1976. He had been dispatched to the Brockenhurst area together with a P.C. Ford to keep special observation because there had been a spate of stealing and taking and driving away of motor cars without the consent of the owners.

Whilst on duty, at 1.10 a.m., he saw a Mk. II Cortina being driven past with a number of youths inside. Bearing in mind the time of night and the previous history of the area, this aroused his suspicions and he started to pursue the Cortina. His plan was not to stop the Cortina at that stage, but to find out which road it was going to take and then radio ahead for assistance from uniformed officers in marked cars to stop it.

However, the Cortina pulled into a lay-by, possibly to ascertain the nature of the car which was following it, and P.C. Needham pulled his car up slightly in front of the Cortina. P.C. Ford got out. At that stage the Cortina reversed at considerable speed. It then drove forward, passing the Mini, and continued down the road. P.C. Ford got back into the Mini, and P.C. Needham set off in pursuit of the Cortina.

After the Cortina had travelled about 400 or 500 yards, it crossed to the offside of the road and stopped in a lay-by. The youths then got out with

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A a view to making themselves scarce. I should say that the whole incident took place on one of the open New Forest roads where there were no houses, and the youths were intending to make their escape across open country.

B P.C. Needham's intention was to draw up alongside the Cortina. He braked, and as he braked he skidded slightly sideways, and his car came into contact with the Cortina, causing damage to his car and no doubt to the Cortina. When he got out he found the plaintiff lying on the lay-by between the two cars. He had a seriously injured leg.

That is a bare outline of the background facts. Against that background, the judge made certain specific findings. He found [1982] Q.B. 857, 862:

C “(1) At all material times the plaintiff was willingly being carried in the Cortina motor car knowing that it had been taken and driven away without the consent of the owner. (2) At the time when he sustained his injury the plaintiff was fully aware of the fact that the police were in hot pursuit of the Cortina and were seeking to stop, question and”—the word is “inevitably” but perhaps “hopefully” is what he meant—“arrest its occupants. (3) The other occupants of the Cortina had already made their getaway into the bushes and it was the plaintiff's intention to do so himself as quickly as possible. (4) The whole incident between the high-speed chase from the first lay-by until the Cortina stopped by the second lay-by took a very short time and the events thereafter occurred in a matter of seconds. (5) When he was endeavouring to make his escape and avoid arrest, the plaintiff sustained the injuries in respect of which he now claims damages by reason of being struck by some part of the police vehicle or by some part of the Cortina after it had been struck by the police vehicle. (6) The defendant did not intend to injure the plaintiff or any of the occupants of the car . . .”

F Those are findings of fact. He then reached his conclusion, which was that the defendant was not guilty of any want of reasonable care in all the circumstances of the case.

G In the course of his judgment the judge adverted to the line of cases which is concerned with spectators attending sporting events. This suggests that the spectator voluntarily takes the risk of injury where a competitor is competing carefully in accordance with the rules but nevertheless causes him injury. There was a plea in this case of *volenti non fit injuria*. For my part I am bound to say that I do not believe that the defence of *volenti non fit injuria* is really applicable in the case of the police pursuing a suspected criminal. I think that the duty owed by a police driver to the suspect is, as Mr. Spokes, on behalf of the plaintiff, has contended, the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in all the circumstances. The vital words in that proposition of law are “in all the circumstances,” and of course one of the circumstances was that the plaintiff bore all the appearance of having been somebody engaged in a criminal activity for which there was a power of arrest.

H Mr. Spokes put forward four propositions, the first of which I have just mentioned. The second was that the police driver might use such force as was reasonable in the circumstances to effect the plaintiff's arrest. Third, the police driver was in breach of his duty as set out in the first proposition,

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and, on the facts, there was a foreseeability of injury which in fact occurred. A
Fourth, there should be no finding of volenti non fit injuria.

From what I have said it will be apparent that I accept the first, second and fourth propositions. As I see it, the sole issue in this appeal is whether there was a breach of the duty of care in all the circumstances.

The judge, who heard and saw the witnesses, held that there was not. We have been taken through the evidence. As I see it, what happened was that this police officer pursued a line in steering his car which would, in the ordinary course of events, have led to his ending up sufficiently far away from the Cortina to clear its open door. He was driving on a gravelly surface, at night, in what were no doubt stressful circumstances. There is no doubt that he made an error of judgment because, in the absence of an error of judgment, there would have been no contact between the cars. B
But I am far from satisfied on the evidence that the police officer was negligent. C
It follows that I would dismiss the appeal.

DILLON L.J. I agree.

SIR DENYS BUCKLEY. I also agree.

Appeal dismissed with costs. D

Solicitors: *Blatch & Co., Southampton; Theodore Goddard & Co. for R. A. Leyland, Winchester.*

[Reported by MRS. MARIA FLEISCHMANN, Barrister-at-Law]

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[EUROPEAN COURT OF JUSTICE]

A. M. & S. EUROPE LTD. v. COMMISSION OF THE
EUROPEAN COMMUNITIES

(Case 155/79)

1980	Nov. 19	President J. Mertens de Wilmars, Presidents of
1981	Jan. 20, 28	Chambers G. Bosco, A. Touffait and O. Due,
	Oct. 27	Judges P. Pescatore, Lord Mackenzie Stuart,
1982	Jan. 26;	A. O'Keefe, T. Koopmans, U. Everling,
	May 18	A. Chloros and F. Grévisse
		Advocate General Sir Gordon Slynn

European Economic Community—Procedure—Disclosure of documents—Legal privilege—Commission's investigation of undertaking's competitive practices—Decision requiring production of documents—Claim of legal privilege—Confidentiality of documents E.E.C. Treaty (Cmnd. 5179-II), arts. 85, 86—Council Regulation (E.E.C.) No. 17/62, art. 14

The Commission decided to carry out an investigation, under article 14 of Council Regulation (E.E.C.) No. 17/62, into the competitive conduct of the applicant undertaking in its production and distribution of zinc metal, alloys and concentrates in order to verify that there was no infringement of articles 85 and 86 of the E.E.C. Treaty. Investigations were carried out at the applicant's premises in England and it was required to produce specified documents for examination by the Commission. It disclosed some of the documents but claimed legal privilege in respect of the remainder. It refused to allow an inspector of the Commission to look at the documents to see if they were privileged and the Commission refused to accept a procedure whereby an independent third party decided whether the documents should be disclosed. The Commission, by decision of July 6, 1979, required the production of the documents.

On the applicant bringing an action for a declaration that the decision of July 6, 1979, was void:—

Held, (1) that a written communication between a lawyer and client arising in the course of the business of an undertaking was not protected from disclosure as it was within the category of business records for the purposes of article 14 (1) of Council Regulation (E.E.C.) No. 17/62 and it was for the Commission alone to determine whether it was necessary for such a document to be disclosed in proceedings brought by the Commission for infringement of articles 85 and 86 of the E.E.C. Treaty; but that the Commission's power to order disclosure under the Regulation was subject to the protection given by the laws of all the member states to the confidentiality of written communications between an independent lawyer and his client made for the purposes and in the interests of the client's rights of defence; and that, therefore, privilege could be claimed for written communications between an independent lawyer and an undertaking, whether made prior to or after the initiation of the administrative procedure by the Commission under the Regulation, provided that it was related to that procedure (post, pp. 61E—62B, D-F, G-H, 63E-F, 64F-G).

(2) That an undertaking, claiming that the principle of confidentiality applied to documents, had to provide the relevant material to the Commission to demonstrate that the

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documents were protected from disclosure; that where the Commission remained unsatisfied that the documents were protected, it should demand production in accordance with article 14 (3) of Council Regulation (E.E.C.) No. 17/62 and, if the undertaking was still unwilling to produce the documents, the undertaking should bring proceedings before the European Court of Justice for the matter to be determined; and that, in the present case, the documents from an independent lawyer entitled to practice his profession in the member state that concerned the applicant's position with regard to Community provisions on competition were protected but the remainder of the documents were to be produced (post, pp. 63H—64A, B—E, G—65B).

The following cases are referred to in the judgment:

National Carbonising Co. Ltd. v. Commission of the European Communities (Case 109/75R) [1975] E.C.R. 1193, E.C.J.

Waugh v. British Railways Board [1980] A.C. 521; [1979] 3 W.L.R. 150; [1979] 2 All E.R. 1169, H.L.(E.).

The following cases were cited in the opinion of Mr. Advocate General Sir Gordon Slynn:

Appraillé case (1952) Recueil des Arrêts du Conseil d'Etat 512.

Assider v. High Authority of the European Coal and Steel Community (Case 3/54) [1955] 63, E.C.J.

Espérance-Longdoz v. High Authority of the European Coal and Steel Community (Case 3/65) [1965] 1065, E.C.J.

Geitling v. High Authority of the European Coal and Steel Community (Cases 36—38 and 40/59) [1960] E.C.R. 423, E.C.J.

Hoffmann-La Roche & Co. A.G. v. Commission of the European Communities (Case 85/76) [1979] E.C.R. 461, E.C.J.

Hoogovens v. High Authority of the European Coal and Steel Community (Case 14/61) [1962] E.C.R. 253, E.C.J.

I.C.I. Ltd. v. Commission of the European Communities (Case 48/69) [1972] E.C.R. 619, E.C.J.

Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle Getreide (Case 11/70) [1970] E.C.R. 1125, E.C.J.

L.T.U. v. Eurocontrol (Case 29/76) [1976] E.C.R. 1541, E.C.J.

Netherlands State v. Rüffler (Case 814/79) [1980] E.C.R. 3807, E.C.J.

Nold v. Commission of the European Communities (Case 4/73) [1974] E.C.R. 491, E.C.J.

Nold v. High Authority of the European Coal and Steel Community (Case 18/57) [1959] E.C.R. 41, E.C.J.

Transocean Marine Paint Association v. Commission of the European Communities (Case 17/74) [1974] E.C.R. 1063, E.C.J.

Werhan v. Council of the European Communities (Cases 63 to 69/72) [1973] E.C.R. 1229, E.C.J.

Zuckerfabrik Schöppenstedt v. Council of the European Communities (Case 5/71) [1971] 975, E.C.J.

ACTION

The applicant, Australian Mining & Smelting Europe Ltd. known as "A. M. & S. Europe Ltd." applied for a review by the European Court of Justice, under article 173 of the E.E.C. Treaty, of the legality of article 1 (b) of Commission decision No. 79/670/E.E.C. of July 6, 1979 (Official Journal No. L199, p. 31) which provided for the production by the applicant, for examination by the Commission of the European Communities, of documents for which the applicant claimed legal privilege.

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A The applicant also applied for a declaration, under article 174 of the E.E.C. Treaty, that article 1 (b) of the decision of July 6, 1979, was void or a declaration that it was void in so far as it required the applicant to produce for examination by the Commission the whole of each of the documents.

B The United Kingdom and the Consultative Committee of the Bars and Law Societies of the European Community ("C.C.B.E.") were granted leave to intervene in support of the applicant's case. The French Republic was granted leave to intervene in support of the Commission's case.

The facts are stated in the judgment.

C *Jeremy Lever Q.C.*, *Christopher Bellamy* and *G. D. Child*, solicitor, for the applicant.

W. H. Godwin, Principal Assistant Treasury Solicitor, acting as agent, and *S. C. Silkin Q.C.* and *D. A. J. Vaughan Q.C.*, for the Government of the United Kingdom.

D. A. O. Edward Q.C., of the Scots Bar, and *T.-R. Thys*, of the Brussels Bar, for the C.C.B.E.

D *J. Temple Lang*, legal adviser, for the Commission.

N. Museux and *A. Cernelutti* for the Government of the French Republic.

January 26, 1982. MR. ADVOCATE GENERAL SIR GORDON SLYNN delivered the following opinion.

E In February 1979, officials of the Commission required the applicant to make available documents which the Commission wished to see in connection with an investigation being conducted pursuant to article 14 (1) of Council Regulation (E.E.C.) No. 17/62 of February 6, 1962 (Official Journal, English Special Edition 1959-62, p. 87). This was said to be an investigation of competitive conditions concerning the production and distribution of zinc metal and its alloys and zinc concentrates in order to verify
F that there is no infringement of articles 85 and 86 of the E.E.C. Treaty. The applicant produced copies of most of the documents. Some, however, were not produced; so far as relevant, on the basis that they were covered by legal confidentiality, which entitled the applicant to withhold them. Following discussion and correspondence, the Commission, by article 1 (b) of a decision dated July 6, 1979, taken pursuant to article 14 (3) of the
G Regulation, required the applicant to produce those documents. The applicant thereupon applied to the court pursuant to article 173 of the E.E.C. Treaty for a declaration that article 1 (b) of the decision was void, or alternatively was void in so far as it necessarily required the applicant to disclose to the Commission's inspector the whole of each of the documents for which the applicant claimed protection on grounds of legal confidence. After the applicant, the Commission, the Consultative Committee of the Bars and Law Societies of the European Community ("the C.C.B.E.") and the Governments of the United Kingdom and France had made written and oral submissions, Mr. Advocate General Warner gave his opinion on January 28, 1981, that article 1 (b) of the decision should be declared void: see [1982] E.C.R. 1575, 1619-1642. The factual background of the dispute in the issues as they then appeared are fully set out in his opinion, and I do not consider that it is of any assistance to the
H court for me to repeat them.

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On February 4, 1981, the court, being of the opinion that certain details (such as the date on which, and the place where, the documents were drawn up, the exact occupation and status of the author and the addressee, and sufficient information as to the nature of the contents of the documents) were not available, made an order that the oral procedure should be re-opened and that the documents should be sent to the court in a sealed envelope, in order that a report might be made on them. A

These documents were sent and the judge-rapporteur and I examined them. A record of the nature of the documents was made, which was communicated to the parties. Although the documents produced fall broadly into the categories summarised by Mr. Advocate General Warner in his opinion, I think that in view of the importance of the case it is proper to identify more particularly the nature of the documents in issue. B

The documents in issue can be divided into the following categories, first those asking for advice, second those giving advice and third those summarising advice: C

A (i) requests for legal advice made by a solicitor employed by a company providing, *inter alia*, legal advice to the applicant ("the service company") destined for two barristers in private practice (document no. 1): (ii) requests for legal advice made by executives of the applicant and sent to a solicitor in private practice in England (document no. 5): (iii) a telex suggesting that legal advice should be sought from solicitors in private practice in a third country relating to the law of that country, sent by an executive of the applicant's immediate parent (document no. 13). D

B (i) a memorandum containing legal advice concerning the law of a third country sent by a solicitor qualified in that country and employed by a member of the group of which the applicant is a part, to the employees of another member of the group other than the applicant (document no. 2): (ii) a letter containing legal advice concerning the law of a third country sent by a firm of solicitors in private practice in that country to a person employed by the applicant's immediate parent in the group (document no. 3): (iii) a letter containing legal advice sent from a solicitor in private practice in England to an executive of a member of the group other than the applicant (document no. 7): (iv) letters containing legal advice sent by a solicitor in private practice in England to various executives of the applicant (document no. 4): (v) a memorandum containing legal advice sent by a solicitor employed by the service company to an executive of the applicant (document no. 10). E

C (i) a memorandum summarising legal advice given by a solicitor employed by the service company and sent by one executive of the applicant to another (document no. 11): (ii) a memorandum summarising legal advice given by a solicitor employed by the service company and sent by an executive of the applicant to an executive of its immediate parent (document no. 16): (iii) a memorandum summarising legal advice given by a solicitor in private practice in England sent by one executive of the applicant to another (document no. 12): (iv) telexes summarising legal advice received from barristers and solicitors in private practice in a third country concerning the law of that country and passing between an executive of the applicant and an executive of its immediate parent (document no. 17). F G H

The parties were invited to state at the re-opened oral hearing their views on the law as to, and legal opinions relating to, the existence and extent of the protection granted in investigative proceedings instituted by public authorities for the purpose of detecting offences of an economic nature, especially in the field of competition, to correspondence passing

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A between (a) two lawyers, (b) an independent lawyer and his client, (c) an undertaking and a lawyer in a permanent contractual relationship, or who is an employee of the undertaking, (d) a legal adviser to, and an employee of, an undertaking or an employee of an associated undertaking, (e) employees of an undertaking, or different but associated undertakings, where the correspondence mentions legal advice given by an independent lawyer or a legal adviser serving one of the undertakings or other undertakings in the same group.

B At the re-opened oral hearing, further submissions were made on behalf of all those who participated in the first hearing, in the course of which counsel dealt not only with the specific matters referred to in the court's order, but, as they were invited to do, with the questions of principle to be decided.

C It seems necessary, first, to decide what really are the issues to be considered in this application at this stage. As Mr. Advocate General Warner shows in detail, the Commission has been prepared to accept that, whatever the strict legal position, it would not *use*, certain documents. In the decision itself, reference is made to the answer, given in reply to written question No. 63/78 in the European Parliament asked by Mr. Cousté, to the effect that the Commission:

D "wishing to act fairly, follows the rules in the competition law of certain member states and is willing not to use as evidence of infringements of the Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence of the firm or association of firms concerned. When the Commission comes across such papers it does not copy them."

E The Commission asserted, however, that the Commission's inspector could look at the documents and ask questions "as far as is necessary for the purpose of establishing whether they should be used or not." By a letter to the applicant's solicitors dated October 31, 1979, the Commission stressed that it had always accepted that the inspector need not read the letters in full. He was to be put in such a position that he would be satisfied "objectively and with reasonable certainty that the document is one which is protected under Community law." By its defence the Commission stated that it is "prepared to give an assurance that inspectors will be instructed not to use any knowledge which they gain as a result of inspecting documents" for the purpose of deciding whether they are protected, and, secondly, that the inspector was authorised to look at documents only so far as was necessary to establish whether or not they should be used as evidence. By its rejoinder the Commission accepted:

G "there is a broad general principle or policy that there is a right to obtain legal advice in confidence, and that this implies some protection from disclosure for the documents seeking or giving that advice."

H It took the position that the sole issue was whether there was a procedure by which the question of protection should be decided and that the only procedure which existed was that the inspector should be left to decide the question for himself. If the document was used and, at the end of the day, a decision was taken that there had been an infringement, the company concerned could apply to the court to annul the decision under article 173 of the Treaty.

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At the first oral hearing the Commission felt it right not to make submissions as to whether a principle of protection from disclosure existed as a matter of Community law. At the second hearing, counsel for the Commission submitted that four principles were relevant to the case, in the present state of Community competition law, as facets of a general "principle of protection of legal confidence." These were (i) documents written to or by a lawyer which deal with the defence of a client in a procedure which has begun may not be used as evidence and may not be disclosed to anyone except the person responsible for deciding whether the document is protected by the principle or not. This principle applies whether the documents are found in the hands of the lawyer or his client and applies only where the lawyer is being consulted qua lawyer. (ii) Documents written to a lawyer or by a lawyer requesting or giving legal advice (even if they are not protected by the first principle), may not be used as evidence if they are found in the hands of the lawyer. Such documents need not be disclosed to anyone except the person responsible for deciding whether the document is protected or not. Such a principle applies only where the lawyer is being consulted qua lawyer and ceases to apply if the lawyer is himself assisting or participating in the unlawful activities of his client. (iii) There must be some person other than the lawyer and his client who is responsible for deciding whether a document is entitled to protection and in the present state of Community law that person is the Commission's inspector. (iv) Where an authority, such as the Commission, has formally stated that it will not use certain documents as evidence (even when it is not prevented by law from using them in that way) enterprises are entitled to rely on that statement (unless it has been amended). If the Commission were in a particular case to use evidence of a kind which it said it would not use, that fact would be a ground for annulling the decision based on the evidence in question, if the evidence was important enough to make annulment of the decision appropriate.

"Lawyer" is accepted by the Commission to cover both a lawyer in private practice and a salaried lawyer, employed by a company, so long as he is effectively subject to a comparable régime of professional ethics and discipline as is the lawyer in private practice in the member state in which he practises.

As I understand the Commission's position, the fourth principle is accepted to be a principle of law as well as the other three, but on the basis of legal certainty or perhaps what in the common law would be called an estoppel. The applicant, whilst no doubt accepting that the first and fourth principles are better than nothing, certainly does not accept the second and third principles as framed. It contends for a wider statement of principle. In this it is supported by the United Kingdom Government and the C.C.B.E. The French Government, whilst accepting the third principle if there is any rule of protection, rejects the others as formulated by the Commission as not being part of Community law.

It is plain that the initial position taken by the applicant and the Commission that this case was solely about procedure, and that issues about the limits of protection could be worked out later, cannot be accepted. Indeed, it seems to me that the C.C.B.E. and counsel for the French Government were right at the outset when they contended that it was necessary to decide whether there existed any right to be protected before any question of procedure arose. The issue broadly is not how what appeared originally to be put forward by the Commission as an administrative concession should be implemented, but whether any principle of

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A protection of legal confidence exists, and if so (a) its scope in relation to the documents in issue here, and (b) how a dispute about the right to claim benefit of that principle should be resolved.

During the second oral hearing, counsel for the Commission stated that the Commission did not any longer wish to use documents numbered 1 to 10 in the list of documents which until then were in dispute. No doubt whatever the outcome of the case they will in fact adhere to that statement.

B At first glance it may seem tempting to take a short cut and to ignore those documents for the purpose of this opinion and for the court's decision. In my view it would be wrong to do so. The parties are still at issue about the real question. The Commission asserts the right to see them, even though it is prepared to waive that right: the company denies that right. Moreover, they belong to a category of documents which is central to the questions which remain to be decided. In view of the time and attention given by the court and the parties to this issue, it is in my view right, and perhaps inevitable, that the documents should be considered as a whole.

C The Commission's investigative powers for the purpose of carrying out the duties assigned to it by article 89 of the E.E.C. Treaty, and provisions adopted under article 87 of the Treaty, are so far as relevant conferred by article 14 of Regulation No. 17. It may "undertake all necessary investigations into undertakings and associations of undertakings" and, to that end, its authorised officials are empowered to examine books and business records, to take copies of them, and to ask for oral explanations. There is no reference to any exemption or protection which may be claimed on the basis of legal confidence. Is that silence conclusive that no such protection is capable of applying in any form and in any situation? In my view it is not. The essential inquiry is, first, whether there is a principle of Community law existing independently of the Regulation, and, secondly, whether the Regulation does on a proper construction restrict the application of that principle. The question is not whether a principle of Community law derogates from article 14, but whether article 14 excludes the application of a principle of Community law.

E Accordingly, as I see it, in order to decide whether article 1 (b) of the Commission's decision should stand it is necessary to resolve the questions: (a) whether there exists a general principle of Community law which, subject to the third question, protects documents containing what have been called legal confidences, and the contents of those documents, from production and use in judicial, quasi-judicial or administrative proceedings; (b) if so, whether the documents in issue in the present case are covered by that principle; (c) whether, properly construed, Regulation No. 17 (and in particular article 14) prevents the principle from applying in the course of an investigation by the Commission; (d) how any question as to whether documents are covered by the principle is to be resolved in the absence of agreement between the Commission and the enterprise concerned.

G That general principles which have not been expressly stated in the Treaty or in subordinate legislation may exist as part of Community law, the observance of which the court is required to ensure, needs no emphasis. This was made clear in an article, "Les droits de l'homme et l'intégration Européenne" by Judge Pescatore to be found in *Les Cahiers de Droit Européen* (1968), p. 629. It does not seem to me that the principle is limited to "fundamental rights" which are more particularly dealt with in the article. It has a broader base. Such indeed appears to be accepted by both parties to this application. The Commission argues that there has to be a consensus among the laws of all the member states, and

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that the court cannot establish a principle which goes beyond that accepted by any one of the member states. It cited no specific authority for that proposition, nor indicated what is the necessary level or degree of consensus required to establish the existence of a general principle. The C.C.B.E., whose views broadly on the point were adopted by the applicant, submits that the aim of Community law is to find the best solution in qualitative terms, having regard to the spirit, orientation and general tendency of the national laws. In support it cites P. Reuter in *Mélanges Rolin* (1964), p. 273; the article by Judge Pescatore in *Les Cahiers de Droit Européen* (1968), pp. 654–655; Ipsen, *Europäisches Gemeinschaftsrecht* (1972), p. 114; W. Ganshof van der Meersch, *L'Ordre Juridique des Communautés Européennes*, (1975), pp. 150 and 163; Louis, *L'Ordre Juridique Communautaire* (1979), p. 164, and Zweigert, *Novelles* (1969), para. 1203.

Mr. Advocate General Lagrange adopted a comparable approach in *Hoogovens v. High Authority of the European Coal and Steel Community* (Case 14/61) [1962] E.C.R. 253, 283–284 and it is reflected elsewhere (see, e.g. *Zuckerfabrik Schöppenstedt v. Council of the European Communities* (Case 5/71) [1971] E.C.R. 975, 989 and *Werhan v. Council of the European Communities* (Cases 63 to 69/72) [1973] E.C.R. 1229, 1259–1260), I do not set out these passages, but it seems to me valuable to remind the court of the views of Judge Kutscher concerning the deduction of general principles of law from a study of the laws of the member states:

“There is complete agreement that when the court interprets or supplements Community law on a comparative law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision. The court has to weigh up and evaluate the particular problem and search for the ‘best’ and ‘most appropriate’ solution.” (“Methods of Interpretation as seen by a Judge at the Court of Justice,” Judicial and Academic Conference 1976, p. 29).

That national law may be looked at on a comparative basis as an aid to consideration of what is Community law is shown in many cases of which *Assider v. High Authority of the European Coal and Steel Community* (Case 3/54) [1955] E.C.R. 63; *L.T.U. v. Eurocontrol* (Case 29/76) [1976] E.C.R. 1541, 1550, para. 3; *Netherlands State v. Rüffer* (Case 814/79) [1980] E.C.R. 3807; *Nold v. Commission of the European Communities* (Case 4/73) [1974] E.C.R. 491, 507, para. 13 and *Espérance-Longdoz v. High Authority of the European Coal and Steel Community* (Case 3/65) [1965] E.C.R. 1065, 1090 may be taken as examples. Such a course is followed not to import national laws as such into Community law, but to use it as a means of discovering an *unwritten* principle of Community law (see, e.g. *Nold v. High Authority of the European Coal and Steel Community* (Case 18/57) [1959] E.C.R. 41, 73–74; *Geitling v. High Authority of the European Coal and Steel Community* (Case 36–38 and 40/59) [1960] E.C.R. 423, 438 and 450 (Mr. Advocate General Lagrange); *Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle Getreide* (Case 11/70) [1970] E.C.R. 1125, paras. 3 and 4 and pp. 1146–1147, Mr. Advocate General Duthéillet de Lamothe.) The suggestions made at times in this case, implicitly if not explicitly, that the applicant was trying to force into an unreceptive mould a purely local rule of the common law seems to me unfair to the argument of the applicant, who was seeking, like the C.C.B.E. and the United Kingdom Government, to distil a principle

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A which is part of Community law by reference to national laws and which, in its detailed application, required adaptation to Community procedures.

In looking at national laws it does not seem to me that it can be a pre-condition of the existence of a rule of Community law that the principle should be expressed identically, or should be applied in identical form, in all of the member states. Unanimity, as to a subject which is relevant to a Community law problem, may well be a strong indication of the existence of a rule of Community law. Total unanimity of expression and application is not, however, necessary. It is at best unlikely, not least as the Community grows in size. It seems to me highly probable that there are differences in the various member states in the application of the principles of "la bonne administration de la justice," rejection of "un deni de justice" and in the "principe de proportionnalité" referred to on p. 643 of the article in *Les Cahiers de Droit Européen*. Yet such differences do not prevent such principles from being part of Community law. Indeed, in *Transocean Marine Paint Association v. Commission of the European Communities* (Case 17/74) [1974] E.C.R. 1063 it was accepted that a right to be heard existed even though Mr. Advocate General Warner found, in the relevant context, that the rule "audi alteram partem" existed only in some of the member states. The fact that proceedings in one member state may be criminal, in others civil, that judicial procedures differ, that for historical reasons different practices are adopted, different conditions apply, makes divergence inevitable. In my opinion, what has to be looked for is a general principle, even if broadly expressed. If that is widely accepted then it may, if relevant, be found to be part of Community law. It is then for the court to declare how that principle is worked out in the best and most appropriate way, to use Judge Kutscher's words, in the context of Community proceedings. Nor is the fact that in some member states the general principle may have been modified or excluded, in certain contexts covered by legislation, fatal to the existence of the principle. It is for the member states and (within their various powers) those who make the Community legislation to decide whether the general principle which exists should be modified or excluded.

F Because of these divergencies in procedure and practice, it is, in my view, important not to fasten too closely on a detailed comparison of particular labels or rules. What matters is the overall picture. Thus the question is not whether "legal professional privilege" (a misnomer and the right of the client) is identical with "le secret professionnel" (the duty, *inter alia*, of the lawyer), which plainly it is not, but whether from various sources a concept of the protection of legal confidence emerges, e.g. in England from the "privilege" and any rules as to the protection of confidentiality, in France from an amalgam of "le secret professionnel," "les droits de la défense" and rules applicable to "le secret des lettres confidentielles."

G The court has received from the parties much detail as to the law and practice in the various member states. I refer to it with some trepidation, partly because each member of the court has infinitely more knowledge of the position in his own member state than a lawyer from another jurisdiction; partly because disagreement as to what is the law of a particular member state arose even during the oral hearing. Counsel for the French Government, apparently, does not accept that the C.C.B.E. have correctly appreciated or stated the law of France and other member states, even though representatives of French Bars and the Bars of other member states are associated with the C.C.B.E., and even though lawyers

from those member states are quoted directly. He says they have got it wrong. For my own part I do not accept his submission that United Kingdom counsel have not correctly stated the effect of the law of the United Kingdom, or his analysis of it. I am quite satisfied that in this particular area, he, in his turn, got it wrong by only looking at one part of the subject. I do not say this in any sense by way of criticism. On the contrary the efforts which he (as well as other counsel) made to deal with the issues before the court deserve tribute. I refer to these divergences only to illustrate the difficulties which the court and the parties encounter if they seek to contrast too minutely the detailed ways in which confidentiality and the right to a fair trial are protected in the member states; ways which are determined by the factors to which I have referred. This however is in no way fatal to the existence of some right of protection for legal documents. It merely emphasises, to use Mr. Advocate General Warner's phrase, that one must go to the heart of the matter.

The court has been provided with extracts from legislation, case decisions and the opinions of academic authors and a welter of case references. Rather than set these out in extenso, I propose to summarise what seem to me to be the relevant features for present purposes, fully conscious of the risks that a summary may oversimplify and is incomplete. I deal first with the general position as to the protection of legal confidence and then consider the position in relation to competition law.

In Belgium, it seems that confidential communications between lawyer and client are protected and cannot be seized or used as evidence. Although the basis of the rule may have been that information confided to the lawyer must be protected, it seems from the opinion of Monsieur l'Auditeur Huberlant and the decision of the Council d'Etat of June 8, 1961 ((1962) 77 Journal des Tribunaux 171), that it also covers confidential advice given to the client. There exists also a more general principle which protects the privacy of correspondence: see articles 10 and 22 of the Constitution.

In Denmark, the rule of the professional secret prevents lawyers from giving evidence of confidential information confided to them in their professional capacity and a lawyer can refuse to produce documents covered by professional secrecy. Communications between an accused person and his lawyer are protected in the hands of the accused under article 786 of the Code of Procedure. This rule seems to apply also in civil proceedings.

In Germany, confidential communications to a lawyer are protected in his hands, and breach of the professional confidentiality by a lawyer is a criminal offence. Thus such documents in the hands of the lawyer cannot be seized (article 97 of the Code of Criminal Procedure). Documents in the hands of the client can, it appears, be seized unless they come into existence after the commencement of criminal proceedings (decision of the Bundesgerichtshof of August 13, 1973, Neue Juristische Wochenschrift, 1973, p. 2035).

In France, breach of the rule of professional secrecy is a criminal offence, and, although it seems that documents may be seized in some circumstances even in the hands of the lawyer, the importance of the rule is stressed in Lemaire, *Les Règles de la Profession d'Avocat* (1966) which has been provided for the court. This rule appears to be closely linked with the right to a fair trial (les droits de la défense).

The principle of the "droits de la défense" appears to cover confidential documents passing in both directions between lawyer and client (see, e.g. the decision of the Cour d'Appel de Paris of November 13, 1979, (1980) 100 Gazette du Palais 200) and includes protection from seizure

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A of legal advice given to the client before commencement of proceedings and found in his possession or in the possession of a person associated with him (Tribunal correctionnel de Nanterre, decision of December 18, 1980, (1981) 101 Gazette du Palais 68—a decision, it should be stated, which is under appeal). There is also it seems a wider protection for confidential letters than exists under the common law systems.

B In view of the attention which has been paid in particular to the law of France during the argument, it is of interest to observe that what I have summarised above is put, perhaps even more strongly, in paragraph 357 of *Droit Européen de la Concurrence* (Plaisant, Franceschelli, Lassier):

C “Sans aucun doute, l'application de la loi française, par exemple, aurait pour effet de rendre inaccessible le dossier détenu par un avocat régulièrement inscrit à un barreau, en raison de ses règles déontologiques et notamment par le respect du secret professionnel prévu par l'article 378 du Code Pénal. De même, les documents adressés par un avocat à ses clients demeurent couverts par le secret professionnel, surtout si la correspondance lui est adressée de manière confidentielle.”

D In Greece it seems that confidential communications in the hands of lawyers are protected in investigative proceedings instituted by judicial or administrative authorities. Documents in the hands of the client are covered by the general principle of privacy defined in article 9 of the Constitution. The power to search the client's premises is circumscribed by articles 253 et seq. of the Code of Criminal Procedure.

E In Ireland and the United Kingdom, although there may be differences in detail, broadly the law of the two member states is the same and it is set out more fully in the opinion of Mr. Advocate General Warner. It should be repeated, however, that it covers both (a) communications between a person and his lawyer for the purpose of obtaining or giving legal advice whether or not in connection with pending or contemplated legal proceedings and (b) communications between a person and his lawyer and other persons for the dominant purpose of preparing for pending or contemplated legal proceedings.

F In Italy, as in most of the member states, the law forbids lawyers from giving evidence of the information confided in them by their clients and entitles them to withhold documents covered by the doctrine of professional secrecy. On the other hand, it seems that, in the case of criminal investigations, documents held by a lawyer may be seized unless they have been entrusted to him for the preparation of his client's defence. Protection is wider in civil proceedings but it does not, in any case, appear to extend to documents in the hands of the client. It seems that, in the case of lawyers, professional secrecy is a reflection of the right to a fair trial guaranteed by article 24 of the Constitution: see de Leone, “Il segreto professionale: limiti e garanzie,” (1978) 21 *Rivista Italiana di Diritto e*

G Procedura Penale, 675.

H In Luxembourg, rules of professional secrecy and “les droits de la défense,” it would seem, protect legal confidences in the hands of the lawyer, and of the client after proceedings have begun, but little case law has been produced showing the application of these rules in practice.

Dutch law forbids the revelation of confidences by persons exercising a profession, such as lawyers. Coupled with this there is a right to refuse to give evidence on matters covered by professional secrecy. These matters

include not only the information revealed by the client but also, in the case of lawyers, the legal advice they have given (see, for example, the decisions of the Gerechtshof of the Province of Drenthe, November 17, 1869, W p. 3161, and the Arrondissementsrechtbank of Rotterdam, October 18, 1954, N.J. 1955 No. 368). Article 98 of the Code of Criminal Procedure provides that, when the premises of someone bound by professional secrecy are searched, the doctrine of professional secrecy must be observed and documents covered by it cannot be seized. There appears to be no authority holding or denying that legal correspondence found in the hands of the client is protected.

This summary is substantially, if not entirely, accepted by the Commission, the applicant and the body representing the Bars of all the member states as being a fair and acceptable statement of the laws of the member states.

It seems to me significant that they were able to reach agreement as to the existence of the principles which are set out in the document which they prepared to read to the court.

From this it is plain, as indeed seems inevitable, that the position in all member states is not identical. It is to my mind equally plain that there exists in all the member states a recognition that the public interest and the proper administration of justice demand as a general rule that a client should be able to speak freely, frankly and fully to his lawyer. As it is put in Lemaire, *Les Règles de la Profession d'Avocat*:

"Il faut que le client 'puisse avoir, en son avocat, une confiance sans limite,' qu'il puisse 'négliger avec lui les précautions qu'on prend dans les affaires ordinaires'; qu'il ne craigne pas 'd'ouvrir son âme tout entière à son défenseur et s'abandonner à sa foi.'"

Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

The fact that this principle of confidentiality between lawyer and client may be given effect to in different ways, and that it is not coextensive in its application at any point in time, in all the member states, does not mean that the principle does not exist. In my opinion it should be declared to be a rule of Community law. The way in which and the extent to which it applies in Community law and in relation to Community transactions and procedures needs to be worked out to achieve the best and most appropriate solution in the light not only of considerations of the practices of the various member states, but the interests of the Community and its institutions, member states and individuals which are subject to its laws.

It is universally accepted that confidential documents of the kind to which I have referred in the hands of the lawyer are protected. If one considers the real purpose of the protection and gets away from labels and procedures, like legal professional privilege and "secret professionnel" which may not give the whole picture, I can for my part see no justifiable distinction between such documents in the hands of the lawyer and in the

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- A hands of the client. If the lawyer has one copy and the client another, both should be protected. The request and the reply, if relating to legal advice, are of the same nature. To tell the client that if he leaves his documents at his lawyer's office they will be protected, but that, if he keeps them himself, they are not seems to me indefensible and likely to encourage, e.g. the giving of oral advice if it is unfavourable advice, and the destruction or transfer to the lawyer's office of documents. It would
- B be quite extraordinary that if the lawyer's documents were, by chance, left at the client's premises, the day the inspector called, they must be produced, but that if the lawyer took his file away with him, they would not. In my opinion the rule covers communications between lawyer and client made for the purpose of obtaining or giving legal advice in whoever's hands they are and whether legal proceedings have begun or not. It covers also the contents of that advice (given orally or in writing),
- C in whatever form it is recorded—whether in a letter or in a summary or in a note or in minutes.

- The position of the lawyer who is employed as such by an undertaking has been much canvassed. As I understand it in some member states full-time employment is incompatible with the full professional status of a lawyer (apparently in Belgium, France, Italy and Luxembourg): in others
- D the employed lawyer remains subject to professional discipline and ethics. Where the lawyer who is employed remains a member of the profession and subject to its discipline and ethics, in my opinion he is to be treated for present purposes in the same way as lawyers in private practice, so long as he is acting as a lawyer. Cases can arise where the lawyer exercises other functions (such as in England those of a company secretary) and of course, any communication in such other capacity would not be covered.
- E A lawyer in private practice who is a member or associate of a large firm may act for long periods for only one client. If his communications are protected, so it seems to me, should be those of the lawyer who is a member of the legal department of a company. I would reject any suggestion that lawyers (professionally qualified and subject to professional discipline) who are employed full time by the Community institutions, by
- F government departments, or in the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the rule. Accordingly I consider that counsel for the Commission is right to accept that, provided he is subject to rules of professional discipline and ethics, the salaried lawyer should for present purposes be treated in the same way as the lawyer in private practice. The same position, it seems to me, ought to apply to
- G confidential communications between a lawyer qualified in one jurisdiction and a lawyer qualified in a different jurisdiction about the affairs of their mutual or respective clients.

- The proper administration of the law and the rights of the individual are not of course the only aspects of the public interest. These may have to be balanced against other aspects of the public interest with which they
- H may, or may appear to, conflict. A legislature may decide that one of these which would otherwise apply, should be cut down or removed in areas where other aspects of the public interest should prevail. The elimination of restrictive practices, or fetters on free competition, is such an interest and, obviously, at the present time an important one. Can it be said that there is a rule widely accepted in the member states that the protection of legal confidence should yield to the powers needed to investigate alleged infringement of competition law?

I am not aware of any provision of national law which expressly excludes all right of legal confidence from competition inquiries or proceedings. A

As I understand it, the Belgian law of May 27, 1960, makes no mention of le secret professionnel. Nor, however, does the statute dealing with criminal investigations. Silence does not remove the right of professional secrecy in the latter context, so that it may be doubted whether it does in the former, although there is, semble, no decided case on the subject. B

In Denmark the relevant legislation gives no right to seize documents and a court order must first be sought in order to obtain their disclosure. So far this has not apparently been necessary because the persons investigated have complied with requests to produce documents. However, since confidentiality in Danish law does not apparently extend to documents in the hands of the client, the limiting or overriding of a principle of confidentiality does not seem to arise. C

According to a letter from the Bundeskartellamt submitted at the hearing, searches and seizures made in the context of "administrative fines" proceedings pursuant to the Gesetz gegen Wettbewerbsbeschränkungen ("G.W.B.") in Germany are expressly subject to the rules set out in the Code of Criminal Procedure. As a result, confidentiality, in so far as it is respected in German law, is upheld and documents found in the hands of the client may not be seized if they came into existence after the commencement of proceedings. On the other hand, investigations under articles 46 and 51 et seq. of the G.W.B., which are similar to proceedings under article 14 of Regulation No. 17, are not subject to any express limitations. It is nevertheless accepted by the Bundeskartellamt and by commentators that confidentiality is protected to the same extent and documents may not in any event be seized without an order of a judge. D E

In France it seems to be accepted that the silence of the law (i.e., article 15 of Ordonnance No. 45/1484) does override professional secrecy (see the decision of the Conseil d'Etat in the *Appraillé* case, (1952) *Recueil des Arrêts du Conseil d'Etat* 512) unless the correspondence in question is "liée d'une défense." The liberal interpretation given to this expression by the Tribunal Correctionnel de Nanterre in its decision of December 18, 1980, if upheld on appeal, would bring the position in France broadly into line with that in Germany and, it seems, Belgium. This decision has been criticised, however. F

Articles 25 and 26 of the Greek Law No. 703/1977, which empower the Service for the Protection of Competition to obtain any necessary information and to search premises, expressly preserve confidentiality, referring to article 9 of the Constitution and articles 212 and 253 et seq. of the Code of Criminal Procedure. G

Paragraph 7 (2) of Schedule 1 to the Restrictive Practices Act 1972 of Ireland expressly subjects the powers of the Restrictive Practices Commission, to examine witnesses on oath and require them to produce documents, to the doctrine of legal professional privilege. The Examiner of Restrictive Practices has extensive powers similar to those in article 14 of Regulation No. 17 but section 15 of the Restrictive Practices Act 1972 allows a person under investigation to apply to a court for a declaration that the exercise of the examiner's powers are not warranted by "the exigencies of the common good." The Irish concept of legal professional privilege, like the English, is justified as being in the public interest (and may therefore be held to be for the common good) but the Restrictive H

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- A Practices Act seems to require the Irish courts to assess the public interest for and against the exercise of the examiner's powers.

There is it seems no relevant legislation in Italy so the situation does not arise. It appears, however, that in the case of investigations in the context of administrative proceedings, where legislation often does not contain detailed provisions relating to powers of inspection, it has been speculated that the rules relating to criminal and civil investigations (which

B do preserve confidentiality) would apply, depending on the nature of the proceedings (see Giannini, *Diritto Amministrativo*, vol. II (1970), p. 970 et seq.). This view again is challenged.

- Article 5 of the Law of June 17, 1970, of Luxembourg gives the Commission des Pratiques Commerciales Restrictives wide powers of investigation. Under article 6 it may also request the Ministre de l'Economie
- C Nationale to undertake an inquiry, the Ministre designating the officials responsible for the investigation. Their powers are defined by reference to article 8 of the Law of June 30, 1961, which concerns price controls. That article gives the Office des Prix "Le droit d'investigation le plus large." Neither article 5 of the Law of June 17, 1970, nor article 8 of the Law of June 30, 1961, contains any express limitations on the powers of investigation given by them and there is, it seems, no relevant case law
- D as to whether any rule of legal confidence would apply in competition matters. It is however relevant to observe, as I understand it, that the Commission des Pratiques Commerciales Restrictives is purely a fact-finding body with no decision-making power: article 3 of the Law of June 17, 1970. Its function is to carry out investigations at the request of the Ministre and to draw up a report (which may contain the dissenting opinions of the members of the Commission). Enforcement of the law is a
- E matter for the Ministre and, from his decisions, an appeal lies to the Conseil d'Etat. The Ministre cannot directly impose a fine; at most he can prohibit a particular practice and penal sanctions may be imposed if his decision is not complied with: articles 7 and 8. As a result, the position in Luxembourg is different from that obtaining under Regulation No. 17. The Commission is both investigator and judge and can impose fines.

- F In the Netherlands, article 25 of the Wet Economische Delicten provides that, unless stated otherwise, economic offences are subject to the rules in the Code of Criminal Procedure (which, as has been seen, appears to uphold confidentiality). Article 19 of the Wet deals with powers of inspection but expressly preserves confidentiality. Article 18 of the Wet Economische Mededinging is to the same effect.

- G Legislation in the United Kingdom expressly preserves confidentiality: see section 85 of the Fair Trading Act 1973; section 37 of the Restrictive Practices Act 1976 and section 3 of the Competition Act 1980. It seems likely that, in England, an express provision would be required in order to restrict or override legal professional privilege.

- It thus seems clear that there is no universal, or even widely accepted, rule that such protection of legal confidence, as exists is excluded in competition matters. At most, there is doubt in some cases; the general rule is that the protection continues.
- H

On behalf of the French Government it has been said that article 14 of Regulation No. 17, properly construed, gives the Commission powers of investigation that are completely unlimited, and unfettered by any principle of confidentiality.

It is said that silence regarding the principle of confidentiality indicates that it is overridden entirely. Reliance has been placed on the legislative

history of Regulation No. 17 to show that the Council considered the question of limiting the Commission's powers in this way and then rejected it. While entertaining doubts as to whether it is permissible to interpret a regulation by reference to its legislative history, Mr. Advocate General Warner took the view that the Council had not deliberately decided against the application of any principle of confidentiality. At the second hearing, his conclusion was attacked by counsel for the French Government and the Commission.

Whilst I share those doubts, in view of the second hearing it is necessary to consider again whether the legislative history of Regulation No. 17 in any event clearly expresses the intention of the draftsmen. The preamble states that the Commission must have the power to require production of the information and carry out the investigations necessary to bring to light the restrictive practices prohibited by the Treaty. The Regulation contains four provisions giving effect to this, articles 11 to 14. As can be seen from a comparison of the original draft, the amendments proposed by the Parliament's Internal Market Committee (both to be found in the Deringer Report, European Parliament Document 57/1961, *Assemblée Parlementaire Européenne*, Documents de Séance, 1961-62), the Parliament's amendments (J.O.C.E. No. 73 of November 15, 1961, p. 1409) and the final version, extensive changes were made to what is now article 11 but, apart from a redrafting of article 14 (6), only minor textual amendments were made to article 14 (2), (3) and (5). As far as these articles were concerned, the committee raised several points concerning the general principle observed by states founded on the rule of law. In this context, it said:

"toute personne tenue de fournir des renseignements doit avoir le droit de refuser le témoignage tout comme le secret professionnel, par exemple des avocats et des experts-comptables, doit être garanti. En cas de perquisition, il faut prévoir l'intervention du tribunal du fait que d'après la loi fondamentale allemande, par exemple, des perquisitions ne peuvent être faites que sur mandat du juge. La possibilité pour l'intéressé d'introduire un recours devant la Cour de Justice contre la décision de la Commission ne remplace pas le mandat de perquisition du juge, car le renversement de la charge de la demande restreint d'une façon inadmissible la défense de l'intéressé" (paragraph 121).

The only proposed change, however, was to the draft article 11, to which the following paragraph was added:

"Sont tenus de fournir les renseignements demandés les propriétaires d'une entreprise ou leurs représentants et, dans le cas de personnes morales, de sociétés ou d'associations n'ayant pas la personnalité juridique, les personnes chargées de les représenter selon la loi ou les statuts. Les personnes tenues de fournir les renseignements peuvent refuser de répondre aux questions lorsque ladite réponse risque de les exposer elles-mêmes ou d'exposer une des personnes pouvant refuser de témoigner en vertu du code national de procédure, ou les entreprises ou les associations d'entreprises qu'ils (sic., représentent, à des sanctions pénales."

When Regulation No. 17 was adopted, the second sentence was omitted. It is quite clear that this sentence corresponds to no known doctrine of professional secrecy in any of the member states. Its closest resemblance is to the rule, recognised in German law (and also English law for that

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A matter), that a person may refuse to answer incriminating questions. Paragraph 121 of the Deringer Report shows the close attention being paid to German law.

B Not all the report's recommendations were proposed as amendments to the draft and it is possible that the wish that professional secrecy be protected had the same fate as the suggestion that searches should be subject to the issue of a judicial warrant. Nevertheless, if the Parliament's proposed amendment to article 11 could be construed as a reference to professional secrecy, the question arises, why no similar amendment was proposed in relation to article 14? There is no clear answer.

C Such information as to the legislative history as is available is far from giving a clear indication of the intentions of the draftsmen. The most that I think can be said is that a limitation on the Commission's powers of investigation relevant to this case occurred to the Parliament's Internal Market Committee but that it proposed no amendment to give effect to such a limitation. There is no indication that either the Commission or the Council thought of it or, if they did, what they thought. The legislative history does not, therefore, in my view, offer any useful guidance to the interpretation of article 14.

D It is impossible to accept the argument put forward that disclosure of documents to an authorised official pursuant to article 14 does not in any way breach the confidence widely protected in member states, as has been shown from the summary already given. Nor do I accept the argument that proceedings under article 14 are purely administrative and fact-finding so that the rule cannot apply in any event. There is no clear cut division in the procedure under Regulation No. 17 between a fact-finding and a quasi-judicial stage in the investigation. The same Directorate-General is involved throughout. I refer in any event to what was said by the court in *Hoffmann-La Roche A.G. v. Commission of the European Communities* (Case 85/76) [1979] E.C.R. 461, para. 9, p. 511:

F "Observance of the [right to a fair trial] is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings."

In my opinion, therefore, the rule of protection is not excluded by the nature of the process.

G In his paper on methods of interpretation in 1976, Judge Kutscher said, at p. 38, that a measure adopted by a Community institution:

H "is to be interpreted—if at all possible—so that it is compatible with the superior law of the Treaties and the general principles of law which, too, are attributed a status superior to that of subordinate law. Other interpretations which would lead to incompatibility with the superior law, and thus to the inapplicability or to the invalidity of the measure adopted by the institution, are to be disregarded."

I am fully alive to the importance of enforcing articles 85 and 86 of the Treaty, to the need to obtain all information as to what has been done by those concerned and to the difficulties of obtaining evidence to establish the truth. Nonetheless on its proper construction, article 14 does not, in my opinion, empower the Commission to examine documents covered by the general principle of confidentiality as I consider that it is to be found in Community law.

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I am accordingly of the opinion that the view taken by the Commission that as a matter of law it cannot be said that there is no rule for the protection of legal confidence in Community law, was correct. That rule, however, is wider, as I have described earlier, and, in my view, more logical than the limited rule proposed by the Commission. It is a general rule of Community law to be derived from a consideration of the general principle applied, albeit in different ways, in the member states. It does not depend on an administrative concession, nor is it derived from any concept of estoppel flowing from an answer given to a Parliamentary question, and which, in theory at any rate, it might one day be said could be abrogated for the future. It is not excluded in the area of competition investigations: nor does article 14 prevent it from applying.

It follows that in my opinion the views expressed by Dr. Ehlermann and Dr. Oldekop (which are set out in Mr. Advocate General Warner's opinion [1982] E.C.R. 1575, 1623 and to which, albeit they were writing in a personal capacity, I would attach considerable weight) were substantially correct. Those views in essence are shared by J. Sedemund "Due process in Community law" and in other articles to which the court has been referred.

One particular problem in this case relates to the documents prepared by or for members of the Rio Tinto Zinc Group other than the applicant. As the court indicated in *I.C.I. Ltd. v. Commission of the European Communities* (Case 48/69) [1972] E.C.R. 619, 662, the reality of the relationship between the members of a group of companies forming one economic unit may mean that their separate legal personality has to be treated as a formal rather than a substantial distinction, particularly in the field of competition. Moreover, legal advice prepared by either lawyers employed or those in private practice retained by one member of the group may in fact be requested on behalf of all the members of the group. This is certainly the case where there exists, as here, one member of the group whose function it is to supply legal advice to the group as a whole. In this situation it seems right that the common interest of all the members of the group should be regarded as justifying the retention of confidentiality in respect of documents drawn up by or for one member of the group and found in the possession of another.

Some of the documents, e.g. document no. 13 contain matter not falling within the categories of (a) communications between lawyer and client (or lawyer and lawyer) and of (b) records of such communications to which I have referred. Those parts must be produced. There is not in practice any real difficulty in covering up the parts which are protected. This apart, I consider that all the documents which remain in issue are protected from production to the Commission.

Although the procedural question ceased to be the primary question, it remained an important part of the Commission's case that (a) whether documents are protected cannot depend on the ipse dixit of the undertaking and (b) that in the present state of Community law the inspector himself must decide the question, subject to his right to consult with his colleagues in general terms, if he is in doubt. I agree with the first part of the contention. I find the second wholly unacceptable. It seems to me that in a number of member states the decision as to whether a document is protected is not left to be decided by the enforcing and investigating authority, and such a course would be unacceptable. I do not repeat the views expressed by Mr. Advocate General Warner on this aspect of the matter but I adopt them. I agree with him that an inde-

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A pendent tribunal must decide the question. It is too simplistic a view to say that the inspector can put out of his mind, wholly, any protected material which he may read in the course of making his decision. Judges sometimes have to do it, but their training is different and even for them it is not always an easy task. The English position has been overstated in the arguments on behalf of the French Government since not infrequently a decision as to whether documents are protected is taken as a
 B separate process and by a different judge from the trial judge. Moreover in this area it seems to me that it is important to have regard to the sense of injustice which may be felt by those who are subject to investigation. The enterprise concerned will no doubt often be left uncertain as to whether the inspector really has put the matter aside or whether consciously or not he has gone on to ask questions or pursue inquiries which
 C can only have been derived from protected information. This is in no sense a reflection on the good faith or intention of the inspector. It derives simply from the difficulty of knowing whether he has been influenced unconsciously by what he has read and which *ex hypothesi* he should not have seen.

In this context I find the answer to Mr. Cousté unsatisfactory—the Commission's undertaking is only not to *use* the document. It seems to
 D me that if the protection has come into existence the Commission should not *see* the document. The public interest which gives rise to the principle of confidentiality comes into existence at the moment when advice is required and given, and it continues thereafter irrespective of when the question of production for inspection arises.

I cannot share the equanimity with which the Commission suggests that all can be put right in the end. It is said that, if protected information is used to lead to a decision that there has been an infringement, that decision may be set aside by the court. Such an approach to my
 E mind leaves out of account important considerations. The protected information (*ex hypothesi* wrongly used), may be the cornerstone of the Commission's case; it may appear at an early stage in the inquiry; the inquiry may be—and often is—lengthy, demanding great time and effort
 F on the part of the Commission's staff. The cost to the Community, and therefore eventually to the taxpayer, and to the private enterprise concerned, may be huge. It is to my mind more satisfactory, more fair and more efficient if this kind of point can be resolved at an earlier stage. Unless Community legislation establishes that it is not possible to resolve such issues at an earlier stage, I consider the arguments in favour of
 G obtaining a ruling before the documents are seen and used, to be overwhelming. It is in any event wrong that such protected information should continue to be used if means of deciding whether it is protected are available. I do not consider that for such a ruling to be given at an early stage involves a conflict between the functions of the Commission and whatever is the appropriate judicial tribunal. The functions of the two in achieving the true aims of the Treaty and Community law are
 H complementary and not conflicting.

Mr. Advocate General Warner has put forward a number of considerations in favour of the matter being resolved by national courts as a matter of Community law, although he rejects, as I would reject, the suggestion put forward that protection should depend on the national law of the member state in which the documents are found. The course he has suggested is obviously one possible course, although some difficulty may arise from the fact that in some jurisdictions it appears that it is

the Bâtonnier, rather than a court, who decides whether the documents are privileged. A

There seems to me an alternative course which I do not consider to be subject to all the disadvantages which have been attributed to it. It seems to me that once the question of principle has been decided by the court, the issues in most future cases are likely to be short. In the majority of cases the parties are likely to be able to reach agreement as to whether a document in fact is within the principle, the undertaking's lawyer being able to satisfy the inspector as to the nature of the document, without disclosing the contents. If disputes arise, the Commission, if not satisfied can take a decision which can be referred to the court, as was done in this case, and perhaps be dealt with by a chamber. In the light of experience in comparable matters, I do not accept that the floodgates would be open as is contended. Nor should any weight be attached to the references made to delays and tactics which it is said occur in American proceedings. American lawyers are the first to point out that such delays do not form part of the United Kingdom system. The court has methods available to it to curb unmeritorious applications. Even if costs against the undertaking do not deter, few lawyers acting in this kind of work are likely to risk serious criticism by the court in its judgment by bringing hopeless disputes as to the documents before it. Accordingly, it seems to me that the better course is that when a dispute does arise the matter should be referred to this court as has been done in the present proceedings. B C D

It is, then, my opinion that, subject to what I have said about parts of the documents in dispute, article 1 (b) of the Commission's decision of July 6, 1979, should be declared void and the Commission should be ordered to pay the applicant's costs. There is no reason derived from the subsequent proceedings, in my view, to depart from Mr. Advocate General Warner's recommendation that the Commission should also pay the costs of the successful interveners, the United Kingdom Government and the C.C.B.E., and that the French Government should bear its own costs. E F

May 18, 1982. The following judgment was delivered in open court in Luxembourg.

FACTS AND ISSUES

I. Facts and written procedure

The applicant, A. M. & S. Europe Ltd. ("A. M. & S.") is a company incorporated in England. It has a subsidiary which owns and operates a zinc smelter at Avonmouth. On February 10, 1978, the member of the Commission responsible for competition policy directed investigations to be made of various undertakings, including the applicant, pursuant to article 14 of Council Regulation (E.E.C.) No. 17/62. G

On February 20 and 21, 1979, three officials of the Commission carried out an investigation at the applicant's premises in Bristol the purpose of which, as stated in the mandates which the officials produced, was to investigate: H

"competitive conditions concerning the production and distribution of zinc metals and its alloys and zinc concentrates in order to verify that there is no infringement of articles 85 and 86 of the E.E.C. Treaty."

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A At the conclusion of that investigation those officials left the premises of A. M. & S. taking with them copies of a certain number of documents and leaving with A. M. & S. a written request for further specified documents.

B By letter of March 26, 1979, A. M. & S. sent to the Commission photocopies of certain documents but at the same time refused to make available others which its legal advisers considered were covered by legal privilege, that is to say, the principle of legal professional privilege or confidentiality as understood in common law jurisdictions. The applicant further suggested that contact might be made with its solicitors should the Commission need further confirmation regarding the documents for which privilege was claimed.

C The Commission did not accept that invitation. Instead, by decision of July 6, 1979, taken under article 14 (3) of Regulation No. 17, it required A. M. & S. to submit to a fresh investigation at its premises at Bristol and Avonmouth and to produce certain business records which were divided into three groups (article 1 (a) (b) and (c) of the decision). Article 1 (b) concerns "all documents for which legal privilege is claimed, as listed in the appendix to A. M. & S. Europe Ltd.'s letter of March 26, 1979, to the Commission."

D On July 25, 26 and 27, 1979, two officials of the Commission proceeded to carry out a further investigation at A. M. & S.'s premises in Bristol pursuant to the decision of July 6, 1979. On that occasion A. M. & S. made it clear that it was unwilling to show to the inspectors the entirety of the documents for which privilege was claimed but that, without prejudice to any argument that it might wish to raise disputing the rights of the Commission to look at any part of the documents which the applicant regarded as covered by privilege, A. M. & S. was prepared to permit part of the documents to be seen so that the inspectors might reasonably satisfy themselves that the documents were indeed privileged. The solicitors for A. M. & S. offered, moreover, to come to Brussels in order to put their arguments to the appropriate departments of the Commission.

F The Commission's inspectors thereupon stated that they would stop the investigation as far as it concerned the documents for which privilege was claimed but that the Commission reserved all rights relating to those documents. As for the meeting sought by the solicitors for A. M. & S., they stated that for various reasons a meeting could not be held until after September 7, 1979.

G On August 23, 1979, the solicitors for A. M. & S. wrote to the Director of Directorate A of Directorate General IV (Competition) to ask him to fix a date for a meeting at which the question of the privileged documents might be discussed. Following upon that letter a meeting was arranged which took place in Brussels on September 18, 1979, and at which were present counsel for A. M. & S. and its solicitors and, for the Commission, Mr. Riboux, Head of Division, in the absence of the Director of Directorate A, along with other officials.

H At that meeting A. M. & S. expressed its desire to reach agreement on a procedure whereby two conflicting interests might be reconciled, namely, (i) the Commission's desire to be satisfied that a document was indeed privileged and (ii) the need to maintain the secrecy of communication passing between legal advisers and clients for the purpose of obtaining legal advice. The procedure suggested was, in essence, that of allowing to be seen certain parts of the document in question which, according to A. M. & S., would enable its character to be clearly identified. The Commission

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representatives refused to accept the proposal made by A. M. & S. They stated that they were bound by the decision of July 6, 1979, which they interpreted as meaning that an inspector must have the right, if he chose to exercise it, to read the whole of a document. A

By application of October 4, 1979, which was registered at the Registry of the Court of Justice on the same date, A. M. & S. commenced the present action. By applications lodged on February 15 and March 5, 1980, respectively the United Kingdom and the French Republic asked to intervene in the proceedings. By order of February 27, 1980, the court granted the United Kingdom's application to intervene and by order of March 12, 1980, granted that of the French Republic. By application lodged on March 3, 1980, the Consultative Committee of the Bars and Law Societies of the European Community asked to intervene in the proceedings. That application to intervene was granted by order of the President of the Court of May 1980. B
C

After hearing the report of the judge-rapporteur and the views of the advocate general, the court decided to open the oral procedure without any preparatory inquiry. However, it invited the parties and the governments which had submitted observations:

“to express their views at the hearing as to the existence and scope of the principle of professional privilege in Community competition law, on which the Consultative Committee of the Bars and Law Societies, intervening, has given a full statement of its views.” D

II. Conclusions of the parties

A. M. & S. claims that the court should (1) declare article 1 (b) of the decision of July 6, 1979, void; (2) alternatively, declare article 1 (b) of the decision of July 6, 1979, void in so far as it necessarily requires the disclosure to the Commission's inspector of the whole of each of the documents for which the applicant claims protection on grounds of legal confidence; (3) in either event, order the Commission to pay the costs; and (4) order such other relief as may be lawful or equitable in all the circumstances. E

The Commission of the European Communities contends that the court should: (1) reject the application; (2) order A. M. & S. to pay the costs. F

III. Submissions and arguments of the parties

In its application A. M. & S. stresses at the outset that the matter which is the subject of the dispute is one of procedure. That matter is the extent to which, if at all, the Commission is entitled to look at a document in order to determine whether a claim to privilege for certain documents passing between lawyer and client is a valid claim. This procedural issue arises in connection with the principle that the confidential relationship between lawyer and client is entitled under Community law to protection from disclosure. According to A. M. & S., the principle is not in dispute in the present case. The parties are at issue, not over the principle, but over the procedure to be adopted in order to apply it. G
H

In that regard, A. M. & S. submits that until, on the initiative of the Commission, the Council of Ministers makes a regulation for the verification of claims for protection on grounds of legal privilege it is incumbent on both the party claiming protection and the Commission to take reasonable steps to agree upon a means of verification without the Commission being entitled to see the contents of the material for which protection is claimed.

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A In the ultimate event of disagreement between the parties, it is only the Court of Justice which is in a position to inspect the documents and adjudicate upon the dispute.

Indeed, if the Commission could inspect those documents and use the knowledge gained thereby, the confidentiality of the documents would be destroyed and the protection rendered largely valueless. In the member

B states where parties to an action have the right to see each other's documents some procedure is provided for the independent verification of claims to privilege for documents relating to legal advice and assistance. The procedure suggested by A. M. & S. would only very rarely oblige the parties concerned to call upon the court to adjudicate upon the nature of a document for which privilege is claimed. Moreover, even the Commission's position does not rule out the possibility of the court having ultimately to rule upon the character of a document where the undertaking concerned refuses on the ground that the document is privileged to give a copy of it to the Commission and the Commission seeks by means of a decision to compel the undertaking to do so. In such a case, however, even if the court were to uphold the claim to privilege for the document, the protection would already have been rendered nugatory by the fact that the Commission had in any event gained knowledge of the content of the document.

D What is involved, therefore, is the defining of a verification procedure given that, as A. M. & S. readily accepts, the undertaking in question may not confine itself simply to claiming that a document is privileged but must also provide proof of its claim. That procedure could be specified by the Community institutions, if necessary by means of a Council regulation.

E At the present time, in the absence of any Community provision dealing with such a procedure, A. M. & S. suggests that the undertaking concerned may demonstrate that the document is privileged by showing a part of the document to the Commission in order to establish its nature. For example, a British undertaking might show the Commission the "backsheet" of the "Instructions to Counsel" sent by the solicitor to counsel and the heading to the first page thereof. If that were thought insufficient, the task of verifying the document could be entrusted to a reputable, experienced and wholly independent lawyer chosen by agreement between the parties. No doubt other possibilities exist, such as a statutory declaration of affidavit and so forth. If, on the other hand, an undertaking were to decline to adduce, in whatever manner may be appropriate, sufficient proof to establish that the document was protected, it would have little prospect of successfully contesting a Commission decision imposing a fine or penalty upon it.

F In these circumstances few undertakings would risk making unwarranted claims to privilege and applications to the Court of Justice for an adjudication on claims for protection would not occur very frequently. On the other hand, were the court to uphold the Commission's argument, there would be no possibility whatever of maintaining the confidentiality even of documents of which the protected nature is wholly indisputable.

G The second submission advanced by A. M. & S. is concerned with the principle of proportionality, which has long been recognised in the Community case law and which the Commission is said to have infringed by demanding the production in their entirety of documents for which protection has been claimed when the public interest involved would have been fully, satisfactorily and practicably met by other means, without the inspector having had to be given access to the contents of the documents.

H The Commission submits a defence falling into two parts. In the first part the Commission examines the question of the protection of legal con-

fidence in Community law in order to show that, contrary to the argument of A. M. & S., that principle is nowhere an absolute rule with fixed, clear limits which overrides other legal principles when they conflict, but one of several legal principles which can be differently regulated and reconciled according to circumstances. In the second part the Commission sets forth its point of view in regard to the manner in which verification of the nature of the documents for which protection has been claimed should be carried out and raises numerous objections, including those of a practical nature, to the procedure suggested by A. M. & S.

(i) *The question of protection of legal confidence in Community law*

The proposal for the Commission's first regulation implementing articles 85 and 86 of the E.E.C. Treaty, which was to become Council Regulation (E.E.C.) No. 17/62, contained no provisions on the subject of privilege or "secret professionnel." Although an amendment to the effect of including a provision protecting legal confidence in that proposal had been approved by the Parliament, the Council did not accept that suggestion in the final version of Regulation No. 17. It is therefore clear that the Community legislature considered the question whether legislation should provide for protection of legal confidence and decided that it should not.

The lack of any legislation dealing with the question seems to have caused no real difficulty in practice for many years. However, the subject was debated more frequently after the accession of the three new member states in 1973.

On June 22, 1978, in answer to a written question (No. 63/78) by Mr. Cousté, a member of the European Parliament, the Commission, after recalling that Community legislation did not provide for any protection for legal papers, stated that the Commission, wishing to act fairly, follows the rules in the competition law of certain member states and is willing not to use any such papers as evidence of infringements of the competition rules but that, subject to review by the Court of Justice, it is for the Commission to determine the nature of such papers.

On the other hand, it is true that in a paper delivered by Dr. Ehlermann, Director General, and Dr. Oldekop, a member of the Legal Service of the Commission, to the conference held in June 1978 in Copenhagen by the Fédération Internationale du Droit Européen (F.I.D.E.) the existence of a general principle of Community law ensuring professional privilege within certain limits was envisaged.

The Commission's decision of July 6, 1979, was of course based on the view of the position under existing Community law set out in the answer to the question by Mr. Cousté.

It is, in fact, extremely difficult to detect a single principle of protection of legal confidentiality which is valid for all the member states. Even the report on this matter compiled by Mr. D. A. O. Edward Q.C. and published by the Consultative Committee of the Bars and Law Societies of the European Community points out, inter alia, that the protection of advice given by a lawyer in the hands of his client is only ensured in the common law jurisdictions whereas in the six original member states protection is only given to documents in the possession of the lawyer and that protection is not absolute in all cases.

According to the Commission, there are two basic reasons possible for accepting a doctrine of protection of legal confidence in Community law. The first is based on the view that there is a general principle of law

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A governing the right to obtain legal advice which implies, as a consequence, some protection for the documents relating to that advice. The second is that the interest of the communities in permitting undertakings to obtain legal advice on their obligations under Community rules must outweigh the interest in being able to use as evidence documents relating to that advice.

As to the first argument, even if there is a general principle of law on the right to obtain legal advice, the extent of the legal protection which
 B should be given to documents relating to legal advice is not at all clear. The Commission, for its part, considers that that extent cannot be deduced from the principle itself but must be determined by practical considerations in the light of all the circumstances. The protection given to communications between lawyer and client varies considerably from one member state to another and there is no absolute or unqualified rule. The extent to
 C which protection is given, and whether it is given at all, depends on the purpose for which disclosure of the document is required. The greater the importance of that purpose the less the document is protected.

As for the second argument, it is based on the assumption that most undertakings honestly wish to comply with Community law and that most lawyers honestly help their clients to comply with its provisions. That assumption is no doubt correct in the majority of cases but there are
 D certainly exceptions. The question whether compliance with Community law is more effectively obtained by disclosure or by protection from disclosure cannot be decided by reference to general principles but according to circumstances. Since that argument presupposes that abuse is very rare it would, according to the Commission, be greatly strengthened were the Bars and national law societies explicitly to recognise that it is contrary to professional ethics and a matter for disciplinary action for a lawyer to help
 E his client to make arrangements which are reasonably clearly contrary to the law which is to be complied with—in this case, Community law.

Another important factor which must be taken into account is the extent to which lawyers consider that they have a duty to ensure that their clients disclose all the documents which they are obliged to disclose. If lawyers in all the member states regarded themselves as bound so to act
 F it would be reasonable to give wider scope to the protection of legal confidence.

But, at the present time, there is reason to think that the position of the legal profession in the Community, or at least a part of it, on the two questions mentioned above is not as clear and unqualified as the Commission would wish.

The Commission then observes that even in the United Kingdom it is
 G accepted that the extent of the protection of legal confidence must depend on circumstances. To that effect the Commission cites a passage from the Law Reform Committee's report on privilege in civil proceedings and the judgment of the House of Lords in *Waugh v. British Railways Board* [1980] A.C. 521 from which it appears that the principle of protection only overrides the principle that all relevant evidence should be submitted to a
 H court if the document was written for the *dominant* purpose of obtaining legal advice.

In its answer to Mr. Cousté's question the Commission gave the assurance that it would not use as evidence strictly legal papers written with a view to seeking or giving opinions on points of law to be observed which are in the possession of the undertaking as well as documents relating to the defence. By so doing the Commission in practice treats as protected all documents which would be protected under the British and Irish doctrine

of privilege, even where such documents would not be protected under the principle of "secret professionnel" or the corresponding rules observed in the other member states. In the absence of any Community provision expressly governing this field, the Commission's assurance is a very considerable benefit to undertakings compared with their position under the law of certain member states. A

The Commission considers that it was not possible for it to go further without opening the door to abuses. B

(ii) *The issues in this case*

The Commission states first of all that it agrees with A. M. & S. that the dispute concerns entirely a question of procedure and not the question whether any particular document falls within the scope of the protection of legal confidence but that that is entirely without prejudice to the position which it may adopt on the substantive question in any given case. That said, the Commission then sets forth its objections in principle to the argument advanced by A. M. & S. In the Commission's view, the protection of legal confidence is not an absolute or rigid rule with clear limits which overrides other legal considerations, but one of several objectives which have to be reconciled as far as possible in particular situations. In particular, two other principles are important, namely, that all relevant evidence should be submitted to the court and that, if a claim is made that some undoubtedly relevant evidence should not be disclosed to the court, that claim should be upheld only if it is clearly proved. Observance of both principles may only be ensured by the procedure followed by the Commission. Since the Commission does not use a protected document as evidence of an infringement and since, moreover, it undertakes not to permit its decision to turn on knowledge acquired through reading the document, the interests of an undertaking cannot be affected in any way by an examination of the document which is carried out for the sole purpose of seeing whether it may be used or not. C D E

It is because existing Community legislation, in contrast to the position in certain member states, does not make provision for any procedure of independent verification, that the Commission has gone so far in giving all the assurances which it believes can reasonably be required. According to the Commission, no method which does not involve an examination of the documents for which protection is claimed can be satisfactory. A. M. & S. appears, in fact, to accept that where the attitude of the undertaking is one of refusal the documents may be examined by the court. However, the weakness of the argument of A. M. & S. lies precisely in the fact that the Court of Justice is not a court which may decide questions of fact. F G

It is true that, if an undertaking refused to disclose a document and the Commission adopted a decision ordering disclosure of that document, the undertaking could bring a direct action under article 173 of the Treaty before the Court of Justice but the court could only decide the issue whether the reasons given for the decision were sufficient and not whether the document was protected. Not having been able to see the document, the Commission would not be in a position to state the grounds upon which it considered that the document is not protected and its decision would therefore be liable to be declared void. In practice, the undertaking would often be allowed to determine for itself whether a document H

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A was disclosed or not, because the undertaking would decide what to tell the Commission about the document and the Commission would have no method of verifying what it said.

However, it is not certain that if an undertaking were quite simply to refuse to produce the document that would be sufficient ground for a decision by the Commission. Assuming that it were, it is none the less the case that the dispute brought before the court would concern the stated grounds of the decision and not whether the document was protected. The truth of the statements made by the undertaking could only be tested by the court if the court were to look at the document. However, **A. M. & S.** has not explained how it would be competent for the court to examine the document itself in the context of proceedings concerning the validity of a decision of the Commission.

C The Commission submits that no procedure could be satisfactory in which the issues before the court would not be the real issue between the Commission and the undertaking, that is to say, whether a document is protected. The dispute cannot, however, be put directly before the court by means of any of the remedies available under the Treaty as it now stands.

D The argument advanced by **A. M. & S.** implies that, should the case arise, the court would act as a court of first instance. But, as **A. M. & S.** concede, where an undertaking and the Commission cannot agree on whether a document is protected, the matter may only be brought before the court under article 173 which makes provision for a procedure in which the court is not called upon to decide questions of fact. Moreover, even if that contradiction could be resolved, it is none the less the case that the court would be acting as a court deciding questions of fact, which does not accord with its role as defined by the E.E.C. Treaty.

E If proof of that statement were needed it may be found in the order of the President of the Court, R. Lecourt, in *National Carbonising Co. Ltd. v. Commission of the European Communities* (Case 109/75R) [1975] E.C.R. 1193. That order states, at p. 1202:

F “it would in fact be contrary to the balance between the institution which derives from the Treaty for the judge hearing the proceedings for the adoption of interim measures to substitute himself for the Commission in the exercise of a power which belongs primarily, subject to review by the court, to the Commission . . .”

In the Commission's opinion the same principle applies to any other preliminary question, including disclosure of documents.

G The Commission then turns to the facts of the case in order to illustrate some of the difficulties to which the theory propounded by **A. M. & S.** would give rise in practice. According to the argument of **A. M. & S.**, the Commission's inspector should confine himself to reading the title page or cover and the heading of the first page of the document for which protection is claimed. However, it must be borne in mind that many documents have neither covers nor headings and that documents which have them do not necessarily correspond, in all their parts, to their covers or headings. In addition, the adoption of a procedure such as that proposed by **A. M. & S.** would allow dishonest persons to conceal under a misleading cover or title documents which in truth are in no way protected by legal privilege. In general, irrespective of the way in which documents may be drawn up, the Commission considers that simply looking at some superficial parts of a document would not give a true impression of its

nature and that, therefore, put shortly, it would be the undertaking which would decide whether or not a document is protected. A

Several practical reasons lead the Commission to reject the procedure suggested by A. M. & S. The first is that that procedure could easily be abused by dishonest undertakings. Secondly, if the Commission could only rely on statements made by the undertaking's lawyer, it would be placed in the invidious and indeed impossible position of having to decide whether it could trust this lawyer or that lawyer. That would be so unless and until all the Bars of the member states accept that certain conduct directed towards protecting the client's interest at all costs is unprofessional and a matter for professional discipline. Thirdly, if the inspector were to consider (as well he might) that what he had been allowed to see was insufficient to convince him that the contents of the document were protected, the issue to be brought before the court would not be whether the document was protected but, rather, whether that portion of the document which had been disclosed was sufficient to convince a reasonable person that the document was entitled to protection. That also raises a question of fact and not of law. Finally, it may be necessary to decide related questions which can be resolved only if the document can be read as a whole. Such would be the case where, in order to decide whether a document is protected, it is necessary to check whether the person who wrote it or the person to whom it is addressed is a lawyer qualified to practise; whether the lawyer was assisting, or participating in illegal activities, so that protection would not apply; whether he was acting as lawyer or in some other capacity; and whether the document had been written exclusively, primarily or only partly for the purposes of legal advice or litigation. B C D

Therefore the court, even if it was in a position to look at the document in question under the procedure suggested by A. M. & S., would also be compelled in some cases to act as a tribunal of first instance to decide related questions of fact which could only be resolved by the production of evidence and the hearing of witnesses. E

The Commission considers that it is worth stressing all these aspects because, in practice, the court will be called upon to adjudicate on every document for which protection is claimed even if it should subsequently transpire that the document is of wholly insignificant importance. F

A. M. & S. attempts to counter that objection, which it has already foreseen, by stating that the court would not be involved in numerous and trivial cases because "the Commission would in practice almost certainly wish to propose a Council regulation so that a proper statutory machinery for verification would be obtained" but in so saying, A. M. & S. admits, in effect, that the procedure which it suggests would indeed be "intolerable" unless it were changed by regulation. G

Finally, in regard to the submission which A. M. & S. base on the alleged infringement of the principle of proportionality, the Commission states that it claims for its inspector only the right to see the document in so far as necessary for the purpose of verifying that the claim to privilege is justified. It may often be the case that the inspector will consider that it is not necessary to look at the whole document. The principle of proportionality requires that the means used must not go beyond what is necessary to achieve the objective sought. It cannot, on the other hand, be a justification for making verification ineffective or impossible, nor can it be used as a guise for permitting the undertaking itself to decide whether a document is protected. H

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A In its reply, A. M. & S. observes that, despite some equivocation, the Commission appears to accept the existence of a principle of Community law concerning legal confidence. In these circumstances the protection of legal confidence constitutes a substantive rule of law and may not depend on the Commission's discretion. If it were not so, the "right" to protection would be devoid of legal content. It is not necessary in this case to determine the scope and extent of that principle. That may be done in
B the context of another action, should the question arise.

It is common ground between the parties that the Commission will not use protected documents as evidence. Thus the only question which falls for decision in this case concerns the appropriate procedure for verification of claims for protection and on that issue the difference between the parties is narrow, but crucial.

C In regard to the procedure proposed by the Commission, A. M. & S. considers that that procedure still does not ensure protection of legal confidence, even though the Commission has stated in its defence that its inspectors will be instructed not to use the knowledge gained from protected documents.

First, such an assurance by a body which combines the investigating, prosecuting and adjudicating roles is no substitute for objective rules of law
D for the protection of legal rights. Moreover, it puts the Commission's inspectors in an almost impossible position. They are, in effect, required to put out of their heads certain material gained from the documents which they have seen, whereas they are employed to discover facts, to draw inferences, to follow up clues and to build up a case. In any event, the Commission has not stated what would be the practical consequences of
E an inspector's, consciously or subconsciously, disregarding the assurance given by the Commission. Moreover, even if there were any legal consequences, an undertaking would not normally be in a position to establish that the inspector had used the protected knowledge.

A. M. & S. is also of the view that the Commission has not considered the practical implications of the assurance which it has offered, late in the day, in an effort to deal with one of the defects in its position. It could
F be, for example, that after having looked at a document the Commission's inspector may decide that that document is not protected. In those circumstances, even if it considered the document to be covered by legal privilege, the undertaking cannot prevent the Commission from using it as it sees fit.

Further, if the protection of legal confidence is to be safeguarded by rules of law, those rules must ensure, not only that the law is upheld, but
G that the law is seen to be upheld. That is not so if the documents which an undertaking claims are protected must be inspected by the Commission, that is to say, by the very party against whom the protection is claimed.

A. M. & S. makes the observation that it is a denial of the principle of protection of legal confidence to permit protected documents to be inspected, in breach of legal confidence, by the same prosecuting authority against whom the law seeks to uphold the protection. Unquestionably, in
H the present state of Community law, the procedure suggested by A. M. & S. is an improvised procedure, but that arises quite simply from the omission to date by the Commission to exercise its power of initiative and to propose a regulation providing, in a manner that conforms to the law of the Community, for a procedure for use in these cases.

As for the objections raised by the Commission in regard to the procedure put forward by A. M. & S., those objections are unreal and unfounded. To the first of those objections it may be answered that it is

not correct that the argument of A. M. & S. makes the undertaking itself the only arbiter of whether or not a document is protected. A. M. & S. observes that the Commission has a *prima facie* right to see documents held by an undertaking and that the undertaking will not therefore be able to attack a Commission decision requiring it to produce certain documents unless it has provided the Commission with sufficient material to satisfy the Commission that those documents are protected, or in the last resort, has agreed to permit an independent third party to verify the relevant facts.

If an enterprise were to challenge a decision taken by the Commission on the basis of a verification carried out by an independent third party, the court would have to rule on whether the documents are protected but it would deliver that ruling as a court of review and not a court of first instance. If an undertaking were to decline to agree to have resort to an independent third party, it would not be open to it subsequently to contest a Commission decision ordering it to produce the documents. It could merely challenge the Commission's final decision in application of article 85 or article 86 of the E.E.C. Treaty by claiming that that decision is based on a wrongful use of protected documents. On the other hand, the Commission's standpoint has the disadvantage of not giving an undertaking any effective means of redress if the inspector wrongly decides that a document is not protected.

The Commission's second objection consists in saying that the argument of A. M. & S. would compel the court to act as a court of first instance. In fact, under the procedure proposed by A. M. & S. it is still the Commission which takes the decision whether the documents are protected or not, but on the basis of a description of the documents verified, if the Commission so requires, by a third party of unimpeachable quality and repute. It is therefore impossible to see how that solution compels the court to act as a court of first instance. Nor is it correct that under that solution the document itself would never have to be disclosed: at the first stage it would, if the Commission so required, have to be disclosed to the independent third party and, if the contents were relevant when the matter reached the court, the court could request their disclosure pursuant to measures of inquiry.

Finally, according to the Commission, the procedure described by A. M. & S. could be abused by unscrupulous lawyers or could lead to some kind of malpractice. So far as that argument is concerned, it should be noted first of all that the question whether legal privilege protects documents involving improper conduct by a lawyer is a question of substance and not of procedure. In any event, that question may be resolved by laying down (as the court might do, were the issue before it) that improper conduct by a lawyer removes any protection of legal confidence. The next question is whether adoption of the procedure advocated by A. M. & S. would increase the risk of concealment or suppression of documents which the Commission is legally entitled to inspect. A. M. & S. considers, on the contrary, that if an undertaking or its lawyers intend unscrupulously to keep documents back, it will do so by destroying or removing the documents in question and not by giving the documents a misdescription which will be bound to be exposed on the carrying out of the verification by an independent third party.

However, if it is deontological considerations which are the Commission's main concern, A. M. & S. suggests in the alternative that in member states which have appropriate deontological rules the verification procedure should at least conform to those rules. Such a solution would at

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A the same time avoid serious difficulties that would arise for national authorities. Under article 14 of Council Regulation (E.E.C.) No. 17, the competent authority of the member state in whose territory an investigation is being made may, and sometimes must, assist the officials of the Commission in carrying out their duties. In the United Kingdom, however, it would be wholly contrary to fundamental principles of national law if the competent authorities were required to render assistance under article 14 (5) or (6) of Council Regulation (E.E.C.) No. 17/62 to enable the Commission's inspectors to breach the confidential relationship between lawyer and client.

B Finally, A. M. & S. disputes certain points raised by the Commission in its defence. Thus A. M. & S. observes that, whilst the Commission accepts the existence of the principle of "secret professionnel" in Community law, it states that that principle is not expressly mentioned in Regulation No. 17. However, it was unnecessary to make any express provision concerning "secret professionnel" because that concept was already recognised in the laws of all the member states and had automatically become part of the fundamental rights of the Community legal order. That position was in no way altered following the accession of the United Kingdom and Ireland since all common law jurisdictions follow the general principle that a general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that matter.

C In regard to the assertion that for many years the absence of Community legislation on the protection of legal confidence seems to have caused no real difficulty in practice, A. M. & S. points out that the Commission did not take any decisions imposing fines until 1969 and that the gradual realisation by undertakings of the problem of legal confidence took place particularly in the 1970s when, on the one hand, the Commission began to "flex its muscles" in the field of competition and, on the other hand, since Community law was becoming increasingly complex, undertakings felt an increased need to obtain detailed written legal advice. With the accession of the common law countries, in which the protection of legal confidence has a long historical tradition, it was inevitable that the issue should have assumed increasing prominence in recent years. The procedure proposed by A. M. & S. is indeed one which would not give rise to difficulty, as is demonstrated by the national systems, such as those of the United Kingdom, where similar procedures operate.

E F As for the distinction between *lex lata* and *lex ferenda*, it is true that, in the relatively undeveloped stage of the Community legal order at the present time, the law must be ascertained in the light of general principles and of a consideration of practical consequences: but that fact does not mean that one is speaking *de lege ferenda* and not *de lege lata*.

G H The references in the Edward Report ["The Professional Secret, Confidentiality and Legal Professional Privilege in the nine member states of the European Community," by D. A. O. Edward Q.C., Scottish Bar (1976), published by the Consultative Committee of the Bars and Law Societies of the European Community (the C.C.B.E.).] to diversity of substantive rules of national law in the field of legal confidence result in part from the fact that that report, as the C.C.B.E. now recognises, does not take full account of the methods of interpretation and application of legal texts in the original six member states. On a matter of detail, A. M. & S. states that it is not correct that the concept of "secret profes-

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sionnel' in national law can never protect advice or information communicated by a lawyer to his client and it cites in this regard several decisions given by national courts. A

As to the justification for protecting legal confidence, it appears clear that the Commission accepted that principle because it considers that the advantage accruing to the Community of an undertaking being able to obtain legal advice outweighs any other advantage which may result from using confidential legal papers as evidence. By contrast, however, the procedure proposed by the Commission has the result of discouraging undertakings from obtaining written legal advice and even more so from preserving that advice. B

In its rejoinder the Commission disputes in turn the contentions by A. M. & S. that (1) in Community law there is no procedure for deciding whether a document is protected; (2) the assurances given by the Commission on several occasions are only statements of intention and, moreover, may not be observed without putting the Commission's inspectors in an "impossible" position; (3) there would be no safeguards for undertakings if an inspector improperly used information obtained through looking at a document in order to decide whether it is privileged or if he wrongly decided that a document is not protected; (4) the procedure advocated by the Commission is not such as to give the public the impression that legal confidence is protected even if in fact the procedure were to protect it. C
D

On the first point, the Commission observes that the procedure to be followed in a case such as the present is merely the procedure used in the context of Regulation No. 17 where an inspector and an undertaking do not agree on whether a given document or file is covered by an investigation decision taken under article 14 of that regulation. That procedure must be used unless and until it is altered by Community legislation. E

In regard to the matter of the assurances which it has given, the Commission, after having pointed out that they are not mere statements of intention but statements which clarify and confirm the law, states that those assurances do not place its inspectors in any dilemma. In fact, under the system operated by the Commission, an official never performs in turn the functions of inspector and rapporteur in the same case. Consequently, an inspector never has the opportunity of using knowledge acquired through looking at a protected document. If he were to attempt to use it as a basis for a statement in his report on the evidence he had collected, he could not, of course, indicate that his knowledge was obtained from a protected document. And the rapporteur would therefore be obliged to reject the statement as being unsupported. If, on the other hand, he used it to guide him to other, unprotected, evidence two possibilities would arise, namely, that those documents are within the scope of the investigation decision and are in the offices in which the investigation is to take place, in which event it may be supposed that the inspector would have found them anyway, or that they are not in those offices, in which event the inspector could not obtain them in disregard of the scope of the investigation decision. F
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In regard to the contention that an undertaking has no opportunity of preventing an inspector from improperly using knowledge derived from a protected document or from wrongly deciding that a document is not protected, it is clear that the undertaking's interests are adversely affected only by a decision whereby the Commission holds that the undertaking

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A has infringed the Treaty. However, that decision may be contested by the undertaking concerned and if it were proved that the decision is based on information contained in a protected document the decision may be declared void by the Court of Justice.

B Finally, the fact that the inspector who sees a document is not the person who subsequently decides whether there is sufficient evidence that the undertaking has infringed the Treaty not only ensures that the principle that legal confidence should be protected is in fact observed but makes clear even to the public at large that there is no possible opportunity for abuse.

C Having thus answered the criticisms made by A. M. & S., the Commission, in its turn, criticises the procedure proposed by A. M. & S. According to the Commission, every procedure for verification of claims to protection must meet two requirements: (1) it must ensure that documents which are protected are not improperly used as evidence; (2) it must enable claims to be properly decided.

D The Commission considers that "its procedure," as already described, satisfies both the first and second requirement whereas the procedure contended for by A. M. & S. only satisfies the first. Indeed, the need for an agreement between the Commission and the undertaking implies that the latter may refuse to agree to conditions which do not suit it or, even more so, delay giving its agreement or make its agreement subject to a body of conditions of a different character. If confronted with such an attitude, the only answer open to the Commission is to adopt a decision stating, without any evidence, that the document is not protected. Yet another serious objection is that, if the procedure contended for by A. M. & S. had to be operated, the Commission would have to negotiate an agreement with every enterprise making a claim that any document in its possession was protected and with whoever was chosen to act as the independent third party. It stands to reason that those negotiations would be time-consuming for the Commission and greatly hinder it in its work.

F The fundamental flaw in the proposal of A. M. & S. is that it would make it necessary in certain circumstances for the Commission to adopt a decision declaring the document to be unprotected, without the Commission ever being in a position to know the facts. Everything would then be reduced to a device for raising the issue before an appeal tribunal. But Community law should not depend on such procedural contrivances. A. M. & S. accepts, it is true, that a purely formal claim to privilege is insufficient to prevent the Commission looking at the document and that the Commission must nevertheless be allowed to see certain parts of the document in order that it may reasonably satisfy itself that the document is protected. The Commission, however, is of the view that the nature of a document can only be properly established by its content, since the heading and a description of its subject matter are not always conclusive.

G A. M. & S. then states that it is possible to resort to an independent third party and that, in any event, if the Commission were to disagree with the conclusion reached by the third party, a decision might be taken holding the document to be unprotected. In that regard, the Commission asks how it would be able to find reasons for a decision disagreeing with the finding of the third party when A. M. & S. has not suggested that the third party should give reasons for his conclusion and still less that he should include in such reasons the evidence and the arguments favourable to the Commission.

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Finally, A. M. & S. states that the Court of Justice may look at the document and that in that event the court is not acting as a court of first instance. The Commission knows of no procedure provided for in the Treaty in the context of which the court has such jurisdiction. Moreover, even if the court could look at the document, it would necessarily be the first court or judicial body to examine the principal evidence allowing the question whether or not the document is protected to be decided. But, according to well settled case law of the court, it is the Commission and not the court which must be the tribunal of first instance in all competition questions.

In these circumstances the conclusion must be reached that the procedure suggested by A. M. & S. is not capable of permitting the soundness of a claim to protection to be verified. It may be added, in answer to all of the arguments of A. M. & S., that that procedure does not prevent possible dishonest conduct by lawyers and that, as appears from the legislation of the United Kingdom and the decisions of its courts, the fundamental principles of law in Britain are not in conflict with the procedure described by the Commission.

As for the submission based on infringement of the principle of proportionality, the Commission observes that the procedure which it applies is "objective," provides for an effective review by the court and allows it to be seen that justice has been done. Those, however, are precisely the requirements which A. M. & S. considers must be met if the principle of proportionality is to be observed.

Intervening in support of A. M. & S., the United Kingdom states that it is not correct in principle, and that the relevant Community rules do not require, that verification of the soundness of a claim to legal privilege should be carried out using procedures which either allow the party seeking disclosure of a document to see that document before the verification has been effected and with the view to making that verification itself or allow the party resisting disclosure to determine the validity of its own claim without any possibility of independent review.

From that it follows that, provided Community legislation permits, the verification procedures should: (i) provide for the party claiming privilege to disclose sufficient details of the character of the documents concerned and the nature of the claim (without disclosing the documents themselves) to enable the party seeking disclosure to raise any apparent legal issues before the Court of Justice and to enable the court to determine those issues; (ii) provide that the parties may by agreement submit any dispute (whether in respect of law or application of the law) to the decision of an independent person or body, who would, for the sole purpose of so deciding, be entitled to inspect the document in question; (iii) enable the parties, so far as may be necessary, to have the assistance of the court to make a final determination, and enable the court to inspect the document for that purpose alone. The United Kingdom considers that the relevant Community legislation permits such procedures.

Since the present case is concerned solely with a question of procedure, it is not necessary to consider the existence or scope of the principle that legal confidence should be protected or the limitations to which it may be subject. The United Kingdom considers none the less that it is important to state its position on the substantive law and to make clear that the protection of legal confidence is part of Community law within the meaning of article 164 of the Treaty. It therefore rejects any possible interpretation to the effect that observance by the Commission of legal confidence is

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A merely an example of "fair play" and not a legal obligation to which that institution is subject under Community law.

It is true that there is no harmonised concept of legal professional privilege in all the member states. That, however, does not prevent the principle itself from being accepted throughout the Community and from forming part of Community law. The basis of the principle lies in the recognition of the fact that the interests of justice and good administration require that persons should be able to seek and obtain legal advice. That aim cannot be pursued if the confidential relationship is weakened or destroyed or even if it were thought that it might be. On the other hand, any abuse of the protection accorded to that relationship must be prevented.

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C For those reasons the United Kingdom is of the view that the procedure to be followed must respect that confidential relationship otherwise legal confidence cannot be protected. The procedure must: (i) be fair and be seen to be fair; (ii) be carried out by persons who are qualified and impartial; (iii) exclude any risk (and even the appearance of a risk) of information obtained in the course of verification being used in breach of legal privilege.

D The United Kingdom thereafter considers, in the light of the above-mentioned criteria, the procedures proposed by the Commission and A. M. & S. respectively.

In regard to the procedure suggested by the Commission, the United Kingdom observes, on the one hand, that in order to determine whether a document is protected, the Commission's inspectors may be called upon to resolve very complicated legal issues which they may not be sufficiently qualified to decide and that, on the other hand, since they are at the same time investigators they cannot appear in the eyes of the parties concerned to be impartial persons. That procedure therefore does not ensure the purpose of the privilege and does not appear to be capable of ensuring it either.

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F The assurance given by the Commission that its inspectors will not use the knowledge gained from looking at protected documents does not alter that state of affairs. In fact, a person who has acquired certain knowledge is never able to obliterate it, with the result that it is impossible to exclude that person using that knowledge, if not deliberately, then at least subconsciously. Moreover, it is impossible to discover whether the knowledge has been used or not.

G On the other hand, the procedure proposed by A. M. & S. respects not only the principle of legal privilege but also the interests of justice, the duties of the Commission and the interests of the Community. That procedure would also make applications to the court less frequent.

Finally, it should be remembered that the powers conferred on the Commission by Regulation No. 17 are limited to that which is "necessary" for the attainment of the results provided for and the fact that a document or information has some significance for the purposes of an inquiry does not inevitably involve an obligation to make disclosure. In cases such as the present, a principle of very great importance, that of legal confidence, lies on the other side of the scales. In these circumstances, in establishing whether communication is truly necessary, regard must be had to the principles of proportionality or the balancing of conflicting principles.

H It would also be possible. in so far as there is no sufficient corpus of Community legislation in this field. to apply, in regard to the Commission, national laws on the protection of legal confidence in so far as those laws

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may be pleaded against national authorities. It is true that such a solution would produce some divergences (but not arbitrary discrimination) in the treatment of undertakings, but at the same time it would provide the necessary impetus for the search for a Community solution to the problem. A

Intervening in support of the Commission, the French Republic is of the opinion that in its present state Community law contains no provisions conferring protection on documents passing between a legal adviser and his client. The legal privilege claimed by A. M. & S., whilst being comparable in certain respects with certain doctrines of member states other than the United Kingdom, is not, however, a principle "common to the laws of all the member states." It follows that the Commission's inspectors must be in a position to exercise fully and in normal course the powers which they possess under article 14 of Regulation No. 17, which authorises them, *inter alia*, to "examine the books and other business records." However, nothing allows acceptance of the view of A. M. & S. to the effect that documents of a legal nature drawn up "for the purpose of . . . obtaining or giving legal advice" do not constitute business records within the meaning of the aforementioned article 14. B
C

It is to be noted, moreover, that this case does not raise the question of protection from disclosure of documents in the possession of a lawyer or of communications between lawyers, but only of documents in the possession of the undertaking. D

According to the French Republic, a principle of national law such as "legal privilege" cannot stand in the way of the direct and uniform application in all the member states of the provisions of Regulation No. 17. If it were accepted that papers covered by such "privilege" may constitute an exception to article 14, a distortion would be created which is incompatible with article 189 of the E.E.C. Treaty and with the well settled case law of the court on the uniform and directed applicability of regulations in the law of the member states. Undertakings would then be treated differently depending upon whether the law of the member state where they are established does or does not confer (or confers subject to stricter limits) protection for certain documents. In fact, the laws applying in the various member states to documents passing between an adviser and his client are very different. To be persuaded of this, it is sufficient to note the difference which exists between the concept of the "secret professionnel," common to the laws of the six original member states, and that of "legal professional privilege" as that has been laid down by decisions of the British courts. E
F

Even though a certain amount of protection is to be found in the laws of all the member states, it varies so much in its content that it is difficult to elevate that protection into a "principle common to the laws of the member states" and even more questionable to turn it into a rule of law capable of altering the meaning of Community texts, which long-standing practice of the Commission has observed. G

In the context of the E.E.C. Treaty, the role of the Commission is that of seeing that competition in the Common Market is not distorted. The Community has therefore an interest in seeing the Commission exercise its powers of investigation in accordance with the applicable system of Community rules. That interest is not protected under the system proposed by A. M. & S., which may be shown to be contrary to the Treaty not only because it creates a new procedure based on rules of law which do not exist at the present time in Community law (the opportunity of claiming an exception to the duty to disclose all business records provided for by H

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A article 14 of Regulation No. 17; the need for an agreement between the parties on the procedure to be followed in verifying the nature of the documents and the opportunity for the undertaking to judge at first instance whether or not a document is of "privileged nature") but also because it would alter the institutional balance of the Treaty.

B Under the scheme proposed by A. M. & S., the Court of Justice would be vested with jurisdiction to rule whether a document sought by the Commission ought, or ought not, to be "protected." Under the scheme established by Regulation No. 17 for competition matters, however, it is for the Commission to investigate matters connected with the question whether free competition has been infringed and it is difficult to maintain that that power of investigation does not include that of examining documents in their entirety and of deciding whether the claiming of some protection or other is, or is not, well-founded. The only power which the court has in this field is that of reviewing the legality of Commission decisions where an application within the meaning of article 173 of the Treaty is brought.

C Showing itself conscious of the fact that in several member states legal rules protect the confidentiality of information passing between an adviser and his client, the Commission has acted within the framework of the powers conferred on it by Regulation No. 17. But it would be contrary to that regulation to infer from it that the Commission may not have access to the whole contents of a document in order to check whether the protection claimed is well-founded. To decide otherwise would be to open the door to abuses, which are always possible.

D In short, the French Republic considers that it is not in accordance with Community law to make the legal adviser and the undertaking which is the subject of competition proceedings the arbiters of whether or not a document is protected.

E Intervening in support of A. M. & S., the Consultative Committee of the Bars and Law Societies of the European Community (hereinafter referred to as "the C.C.B.E.") observes that, as both parties accept, the question raised in this case is concerned only with procedure and consists in ascertaining the appropriate method for verifying whether a document may be protected by legal privilege. However, the conclusions reached by the parties are different because A. M. & S. and the Commission are not at one on the definition of the principle of substantive law in the context of which the question is raised. According to A. M. & S., Community law has in fact a principle of legal privilege which affords a right to protection for confidential documents. The Commission's position, on the other hand, is less clear-cut. Some of its statements appear to concede the existence of a principle recognising a right which affords protection against the disclosure of documents concerning legal advice; others appear to deny the existence of a single, generally accepted, clear principle of protection. The argument which the Commission advances in order to demonstrate the merit of its own procedure appears, more-
 F over, to presuppose a right to protection against the use of certain documents, but not against their disclosure. It is accordingly not possible, or it is at least unsafe, to proceed on the assumption that the Commission concedes the existence of a doctrine or principle of legal privilege in Community law.

G In the view of the C.C.B.E., the procedural question may only be answered once it has been decided whether the principle relied upon exists. In that regard, the C.C.B.E. contends that there is a doctrine or

principle of legal privilege in Community law. It can hardly be denied that, in the form of protection against the disclosure of confidential communication between lawyer and client, the principle of legal privilege forms part of the law of every member state. The argument of the Commission and the French Republic that there is no doctrine or principle common to all the member states because the method and scope of protection can be shown to be different cannot be accepted. If the argument were correct, it would be necessary to deny the existence of common principles in the field of human rights as well. In truth, the mere existence of procedural differences, or even of differences as to the limits of application, does not by itself prove that there is no principle common to all the member states. A B

The argument of distortion put forward by the French Republic is not valid either. If it is assumed that there is a principle of legal privilege in the law of some member states but not in that of others, its acceptance as a principle of Community law leads to the result that it applies to all undertakings in the Community whereas its rejection would have the result of depriving undertakings in some countries of a right recognised by their national law. C

Since the aim of Community law is to find the best solution having regard to national laws, it is necessary to examine the spirit, orientation and general tendency of the national laws on legal privilege. The C.C.B.E. submits that on this matter there can be no doubt. As appears from the Edward Report, not only do all member states afford some protection to confidential relations between lawyer and client, but there is a remarkable consistency in the explanations of the ratio legis and a clearly discernible tendency to extend rather than to reduce the scope of that protection. Finally, a study of comparative law shows that the protection of legal confidence is a characteristic feature of democratic systems and that, on the other hand, it has little place in the law of absolutist or totalitarian states. D E

To a marked and increasing extent, legal privilege is seen as a practical guarantee of fundamental, constitutional or human rights. This conclusion has been reached both by legal writers and decisions of the courts, in particular the decisions of the European Court of Human Rights. The C.C.B.E. therefore submits: that the confidentiality of communication between lawyer and client is recognised as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognised; and that as such, this right should be recognised and applied as part of "the law" in terms of article 164 of the E.E.C. Treaty; or alternatively, that, in so far as it cannot be affirmed that such a right exists independently, a doctrine or principle of legal privilege protecting the confidential character of communications between lawyer and client is a necessary corollary of fundamental, constitutional or human rights which are expressly recognised and protected; and that as such, a doctrine or principle of legal privilege should be recognised and applied as part of Community law; and that, in either case, the law affords protection, as of right, against disclosure of confidential communications between lawyer and client. F G H

If those submissions are correct, it is irrelevant that Council Regulation (E.E.C.) No. 17/62 makes no reference to the protection of legal privilege. As part of "the law," the right to such protection must be assumed to form part of the legal context in which that regulation was adopted.

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A If there is no principle of legal privilege in Community law, a lawyer could be required to give evidence or to disclose documents in direct violation of his obligations under national law. The only way of escape from that conclusion is to assume that the principle of legal privilege is part of the general law subsumed in the Treaty and in all Community legislation.

B The nuances of the application of that principle in the various member states depend on the fact that legal privilege is not, in any member state, a static concept but is continually evolving particularly because of modern developments in the methods of communication between lawyer and client. The general tendency of the national laws of the member states is, however, in the direction of protecting the confidential character of the lawyer-client relationship in itself and not any particular means of communication. That approach allows the problem of the differing scope or limits of legal privilege in the various member states to be resolved, since a document is protected by reason of its confidential character and not by reason of its having certain physical characteristics or being in the possession of a particular person.

C In regard to the question at issue, the C.C.B.E. considers that it is not a matter of whether the theory of A. M. & S. is correct but whether the theory of the Commission is correct. In that regard, the C.C.B.E. adopts the practical and legal objections formulated by A. M. & S. The C.C.B.E. considers in particular the position which would arise if a Commission inspector wrongly decided that a document is not protected. In that event, the document would have been put on the Commission's file. The fact that, in that way, the document may be read by anyone having access to the file amounts in itself to a breach of legal confidence.

E Moreover, however, the Commission's theory may be found wanting if tested by criteria of principle. First, if legal privilege is a right, its existence or non-existence in a particular case ought to be determined by a person whose constitutional function is to determine such questions, namely, in the absence of agreement between the parties concerned or a regulation which duly safeguards fundamental rights, by a judicial tribunal. Secondly, if the purpose of legal privilege is to preserve the confidentiality of communications, the procedure adopted must be such as to guarantee that confidentiality to the maximum extent consistent with the need to be satisfied that the claim of confidentiality is justified. Morevoer, that procedure must not only guarantee confidentiality but must be seen to guarantee it. Thirdly, bearing in mind that the Commission and its inspectors have a positive duty of investigation, the procedure adopted should not be such as to create for them another duty (verification of privilege) which is potentially in conflict with that duty. Fourthly, in so far as the Commission has an interest in disclosure of the documents in question, the maxim *nemo debet iudex esse in causa propria* applies.

G The foregoing considerations apply with all the greater force if legal privilege is considered as enhancing fundamental, constitutional or human rights since the general interest in the right which the procedural safeguard is designed to protect is greater than any public or private interest in the result of the particular case. It is characteristic of procedural safeguards for such rights that the consequences of their non-observance cannot be elided on pragmatic grounds or by reference to whether non-observance has produced injustice or prejudice in the particular case. Consequently, so far as legal privilege is concerned, it is necessary to

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prevent not only actual misuse of confidential information, but the mere opportunity for misuse. A

Subject always to its stand on the issue of principle, the C.C.B.E. has the following observations on the practicability of procedures alternative to that of the Commission. A distinction must be drawn between a requirement to produce documents and a requirement to disclose their contents. Taking as an example the practice adopted by the Scottish courts, it is possible to produce documents in a sealed envelope which may be opened only by the person called upon to decide whether the documents are confidential. In the absence of agreement between the parties or a regulation which safeguards fundamental rights, there is no alternative to a disputed claim of privilege being submitted for decision to a judicial tribunal. That tribunal would not necessarily be the Court of Justice since it ought to be possible, by invoking the assistance of national authorities, to bring a disputed question of legal privilege before an appropriate national court, which would be bound to apply Community law in deciding the question. But even if it should be that observance of the law may only be ensured by an application to the Court of Justice for recognition of a claim of privilege, it ought to be accepted that that court has jurisdiction by virtue of article 164 of the Treaty which provides that: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." Moreover, from a practical point of view, article 49 of the Rules of Procedure allows the court to appoint an expert to examine the documents in question. B C D

In so far as it is appropriate for the C.C.B.E. to propose a procedure, it suggests first a procedure involving an examination carried out by an "expert," who could confine himself to describing the documents or, on the other hand, could give an opinion as to whether the documents were entitled to protection or not. If an "expertise" were not possible in the framework of the Community rules in force at the present time, a dispute about documents could always be settled by the parties agreeing to arbitration on the same basis as suggested above. E

The C.C.B.E. therefore suggests for consideration a procedure which would: (a) involve the immediate production of disputed documents in a sealed package which would put them out of the control of the undertaking under investigation, while not requiring disclosure of their contents to the inspectors; and (b) provide for arbitration where agreement is possible within a reasonable time and an "expertise" where it is not. F

The C.C.B.E. states that it is ready to discuss with the Commission the methods and criteria of selection of a panel of independent "experts/arbitres," and the rules and criteria to be followed by them. G

If a regulation is necessary, the C.C.B.E. believes that it should be limited to matters of procedure and should not attempt to define the doctrine of legal privilege, its scope or its limits.

In Appendix IV to its observations, the C.C.B.E., after pointing out that the issues raised by the Commission in regard to rules of professional conduct for lawyers are irrelevant to this case, sets forth the reasons for which it is not prepared to take the steps in regard to the definition of rules of professional conduct which the Commission desiderates. H

IV. *Oral procedure*

1. A. M. & S. Europe Ltd., the Commission of the European Communities, the United Kingdom, the French Republic and the Consultative

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A Committee of the Bars and Law Societies of the European Community presented oral argument at the sitting on November 19, 1980. The Advocate General delivered his opinion at the sitting on January 20, 1981.

B 2. However, noting that for fortuitous reasons the composition of the court on that occasion was not the same as it had been at the commencement of the proceedings and for the oral procedure, the court re-opened the oral procedure by order of January 21, 1981.

The Advocate General delivered his opinion at the sitting on January 28, 1981.

3. On February 4, 1981, the court made an order as follows:

C "1. The oral procedure in Case 155/79 shall be re-opened; the parties shall be notified of the date of the hearing.

"2. The applicant shall send to the court, within three weeks after notification of this order and under confidential seal, the documents referred to in article 1 (b) of the contested decision and listed in the appendix to A. M. & S. Europe Ltd.'s letter of March 26, 1979, to the Commission.

D "3. The court shall, before the date of the hearing, draw up a report on those documents in the form which it considers appropriate so as not to prejudice its final decision; this report shall be notified to the parties.

"4. The applicant, defendant and interveners shall be heard at the hearing on questions which shall be specified at a later date."

E 4. On March 9, 1981, the applicant lodged at the court a sealed envelope containing a number of documents, in accordance with paragraph 2 of the above-mentioned order. The envelope was opened on April 2, 1981, by the Judge-Rapporteur and the Advocate General in the presence of the Assistant Registrar. Minutes of the proceedings were taken and the nature of the documents contained in the sealed envelope was recorded therein.

F 5. The report on those documents, drawn up pursuant to paragraph 3 of the above-mentioned order, was forwarded by the court in a sealed envelope to the main parties and to the interveners with a covering letter dated July 17, 1981. The letter notified the main parties and the interveners that the hearing was to be held on October 27, 1981. They were invited to state orally at that hearing their views on the legislation, academic opinion and case law in the various member states relating to the existence and extent of the protection granted—in investigative proceedings instituted by public authorities for the purpose of detecting offences of an economic nature, especially in the field of competition—to correspondence passing between: (1) two lawyers; (2) an independent lawyer and his client; (3) a lawyer and an undertaking, where the lawyer is bound to the undertaking by a permanent contractual relationship or as an employee; (4) a legal adviser of an undertaking and an employee of that undertaking or of an associated undertaking; (5) employees of the same undertaking or of different undertakings linked to each other as associated undertakings, where the correspondence passing between those employees mentions legal advice given either by an independent lawyer or by a lawyer or legal adviser in the service of one of those undertakings or in the service of other undertakings associated in the same group.

H Finally, the letter stated that as the composition of the court had been altered since the first sitting on November 19, 1980, the parties

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might, if they considered it appropriate, put afresh on October 27, 1981, the arguments relating to fact and to law which they had advanced during the first sitting. A

6. In a letter dated August 21, 1981, W. H. Godwin, Principal Assistant Treasury Solicitor, acting as agent for the United Kingdom Government, intervening, requested clarification from the court of the words "lawyer" (avocat) and "legal adviser" (juriste) used in the letter of July 17, 1981, and asked whether the word "parties" in the last paragraph of the letter included the interveners. He requested also a copy of the letter in French. B

The court replied by letter on September 3, 1981, confirming that the word "parties" included the interveners, and enclosing a copy of the letter of July 17, 1981, in French.

7. On September 10, 1981, Messrs. Slaughter and May, solicitors for the applicant, requested the court by telex message to allow the applicant, the defendant and the Consultative Committee of the Bars and Law Societies of the European Community, one of the interveners, to lodge a written memorandum on the questions put by the court in its letter of July 17, 1981, and to allow them until December 31, 1981, to do so. C

In a letter of September 11, 1981, Mr. D. Edward, President of the Consultative Committee of the Bars and Law Societies of the European Community in his capacity as representative of that body informed the court of exceptional circumstances which might prevent him from attending the sitting. D

The court replied to the telex message and the letter referred to above by letter dated September 23, 1981, confirming the date fixed for the sitting as October 27, 1981.

8. The agents for the Government of the French Republic, N. Museux and A. Carnelutti, asked the court for permission to lodge a written memorandum in reply to the questions put in the letter of July 17, 1981, in preparation for the hearing on October 27, 1981; the court informed them by letter dated October 9, 1981, that it was open to them to send the document to all the parties to the case and to ask their agreement to its being lodged at the hearing, and that if there was no objection from the parties the document would be accepted by the court. E

9. A. M. & S. Europe Ltd., the Commission of the European Communities, the United Kingdom, the French Republic and the Consultative Committee of the Bars and Law Societies of the European Community presented oral argument at the sitting on October 27, 1981. F

The Advocate General delivered his opinion at the sitting on January 26, 1982. G

DECISION

1. By application lodged at the Court Registry on October 4, 1979, Australian Mining & Smelting Europe Ltd. (hereinafter referred to as "A. M. & S."), which is based in the United Kingdom, instituted proceedings pursuant to the second paragraph of article 173 of the E.E.C. Treaty to have article 1 (b) of an individual decision notified to it, namely, Commission Decision No. 79/670/E.E.C. of July 6, 1979 (Official Journal No. L199, p. 31), declared void. That provision required the applicant to produce for examination by officers of the Commission charged with carrying out an investigation all the documents for which legal privilege was claimed, as listed in the appendix to A. M. & S.'s letter of March 26, 1979, to the Commission. H

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A 2. The application is based on the submission that in all the member states written communications between lawyer and client are protected by virtue of a principle common to all those states, although the scope of that protection and the means of securing it vary from one country to another. According to the applicant, it follows from that principle which, in its view, also applies "within possible limits" in Community law, that the Commission may not when undertaking an investigation pursuant to article 14 (3) of Council Regulation (E.E.C.) No. 17/62 of February 6, 1962 (Official Journal, English Special Edition 1959-62, p. 87), claim production, at least in their entirety, of written communications between lawyer and client if the undertaking claims protection and takes "reasonable steps to satisfy the Commission that the protection is properly claimed" on the ground that the documents in question are in fact covered by legal privilege.

C 3. On the basis of that premise the applicant contends it is a denial of the principle of confidentiality to permit an authority seeking information or undertaking an investigation, such as the Commission in this instance, against which the principle of protection is relied upon, to inspect protected documents in breach of their confidential nature. However, it concedes that "the Commission has a prima facie right to see the documents . . . in the possession of an undertaking" by virtue of article 14 of Regulation D No. 17 and that by virtue of that right "it is still the Commission that takes the decision whether the documents are protected or not, but on the basis of a description of the documents" and not on the basis of an examination of the whole of each document by its inspectors.

E 4. In that respect the applicant accepts that initially the undertaking claiming protection must provide the Commission with sufficient material on which to base an assessment: for example, the undertaking may provide a description of the documents and show the Commission's inspectors "parts of the documents," without disclosing the contents for which protection is claimed, in order to satisfy the Commission that the documents are in fact protected. Should the Commission remain unsatisfied as to the confidential nature of the documents in question the undertaking would be obliged to permit "inspection by an independent third party who will verify the description of the contents of the documents."

F 5. The contested decision, based on the principle that it is for the Commission to determine whether a given document should be used or not, requires A. M. & S. to allow the Commission's authorised inspectors to examine the documents in question in their entirety. Claiming that those documents satisfy the conditions for legal protection as described above, G the applicant has requested the court to declare article 1 (b) of the above-mentioned decision void, or, alternatively, to declare it void in so far as it requires the disclosure to the Commission's inspector of the whole of each of the documents for which the applicant claims protection on the grounds of legal confidence.

H 6. The United Kingdom, intervening, essentially supports the argument put forward by the applicant, and maintains that the principle of legal protection of written communications between lawyer and client is recognised as such in the various countries of the Community, even though there is no single, harmonised concept the boundaries of which do not vary. It accepts that the concept may be the subject of differing approaches in the various member states.

7. As to the most suitable procedure for resolving disputes which might arise between the undertaking and the Commission as to whether certain documents are of a confidential nature or not, the United Kingdom proposes

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that if the Commission's inspector is not satisfied by the evidence supplied by the undertaking, an independent expert should be consulted, and, should the dispute not be resolved, the matter should be brought before the Court of Justice by the party concerned following the adoption by the Commission of a decision under Regulation No. 17. A

8. The view taken by the Consultative Committee of the Bars and Law Societies of the European Community ("C.C.B.E."), which has also intervened in support of the applicant's conclusions, is that a right of confidential communication between lawyer and client (in both directions) is recognised as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognised, and that as such that right should be recognised and applied as part of Community law. After pointing out that the concept is not a static one, but is continually evolving, the C.C.B.E. concludes that if the undertaking and the Commission cannot agree as to whether a document is of a confidential nature or not, the most appropriate procedure would be to have recourse to an expert's report, or to arbitration. Assuming, moreover, that the court is the sole tribunal with jurisdiction to settle such a dispute it ought in that case to be necessary for it only to determine whether or not the contested documents are of a confidential nature on the basis of an expert's report obtained pursuant to an order under article 49 of the Rules of Procedure. B
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D

9. To all those arguments the Commission replies that even if there exists in Community law a general principle protecting confidential communications between lawyer and client, the extent of such protection is not to be defined in general and abstract terms, but must be established in the light of the special features of the relevant Community rules, having regard to their wording and structure, and to the needs which they are designed to serve. E

10. The Commission concludes that, on a correct construction of article 14 of Regulation No. 17, the principle on which the applicant relies cannot apply to documents the production of which is required in the course of an investigation which has been ordered under that article, including written communications between the undertaking concerned and its lawyers. F

11. The applicant's argument is, the Commission maintains, all the more unacceptable inasmuch as in practical terms it offers no effective means whereby the inspectors may be assured of the true content and nature of the contested documents. On the contrary, the solutions which the applicant proposes would have the effect, particularly in view of the protracted nature of any arbitration procedure (even assuming that such a procedure were permissible in law) of delaying considerably, or even of nullifying, the Commission's efforts to bring to light infringements of articles 85 and 86 of the E.E.C. Treaty, thereby frustrating the essential aims of Regulation No. 17. G

12. The Government of the French Republic, intervening in support of the conclusions of the Commission, observes that as yet Community law does not contain any provision for the protection of documents exchanged between a legal adviser and his client. Therefore, it concludes, the Commission must be allowed to exercise its powers under article 14 of Regulation No. 17 without having to encounter the objection that the documents whose disclosure it considers necessary in order to carry out the duties assigned to it by that regulation are confidential. To permit the legal adviser and the undertaking subject to a proceeding in a matter concerning H

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A competition to be the arbiters of the question whether or not a document is protected would, in the opinion of the French Government, not be compatible with Community law and would inevitably create grave inconsistencies in the application of the rules governing competition.

13. It is apparent from the application, as well as from the legal basis of the contested decision, that the dispute in this case is essentially concerned with the interpretation of article 14 of Council Regulation (E.E.C.) No. 17 of February 6, 1962, for the purpose of determining what limits, if any, are imposed upon the Commission's exercise of its powers of investigation under that provision by virtue of the protection afforded by the law to the confidentiality of written communications between lawyer and client.

14. Once the existence of such protection under Community law has been confirmed, and the conditions governing its application have been defined, it must be determined which of the documents referred to in article 1 (b) of the contested decision may possibly be considered as confidential and therefore beyond the Commission's powers of investigation. Since some of those documents have in the meantime been produced to the Commission by the applicant of its own volition, the documents to be considered now are those which were lodged in a sealed envelope at the Court Registry on March 9, 1981, pursuant to the court's order of February 4, 1981, re-opening the oral procedure in this case.

(a) *The interpretation of article 14 of Council Regulation (E.E.C.) No. 17/62*

15. The purpose of Regulation No. 17 of the Council which was adopted pursuant to the first sub-paragraph of article 87 (1) of the Treaty, is, according to paragraph (2) (a) and (b) of that article, "to ensure compliance with the prohibitions laid down in article 85 (1) and in article 86" of the Treaty and "to lay down detailed rules for the application of article 85 (3)." The Regulation is thus intended to ensure that the aim stated in article 3 (f) of the Treaty is achieved. To that end it confers on the Commission wide powers of investigation and of obtaining information by providing in the eighth recital in its preamble that the Commission must be empowered, throughout the Common Market, to require such information to be supplied and to undertake such investigations "as are necessary" to bring to light infringements of articles 85 and 86 of the Treaty.

16. In articles 11 and 14 of Regulation No. 17, therefore, it is provided that the Commission may obtain "information" and undertake the "necessary" investigations, for the purpose of proceedings in respect of infringements of the rules governing competition. Article 14 (1) in particular empowers the Commission to require production of business records, that is to say, documents concerning the market activities of the undertaking, in particular as regards compliance with those rules. Written communications between lawyer and client fall, in so far as they have a bearing on such activities, within the category of documents referred to in articles 11 and 14.

17. Furthermore, since the documents which the Commission may demand are, as article 14 (1) confirms, those whose disclosure it considers "necessary" in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it.

(b) *Applicability of the protection of confidentiality in Community law* A

18. However, the above rules do not exclude the possibility of recognising, subject to certain conditions, that certain business records are of a confidential nature. Community law, which derives from not only the economic but also the legal interpretation of the member states, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. B

19. As far as the protection of written communications between lawyer and client is concerned, it is apparent from the legal systems of the member states that, although the principle of such protection is generally recognised, its scope and the criteria for applying it vary, as has, indeed, been conceded both by the applicant and by the parties who have intervened in support of its conclusions. C

20. Whilst in some of the member states the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law, in other member states the same protection is justified by the more specific requirement (which, moreover, is also recognised in the first-mentioned states) that the rights of the defence must be respected. D

21. Apart from these differences, however, there are to be found in the national laws of the member states common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment. E

22. Viewed in that context Regulation No. 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the member states. F

23. As far as the first of those two conditions is concerned, in Regulation No. 17 itself, in particular in the eleventh recital in its preamble and in the provisions contained in article 19, care is taken to ensure that the rights of the defence may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights. In those circumstances, such protection must, if it is to be effective, be recognised as covering all written communications exchanged after the initiation of the administrative procedure under Regulation No. 17 which may lead to a decision on the application of article 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking. It must also be possible to extend it to earlier written communications which have a relationship to the subject matter of that procedure. G H

24. As regards the second condition, it should be stated that the requirement as to the position and status as an independent lawyer, which

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A must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest

B by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the member states and is also to be found in legal order of the Community, as is demonstrated by article 17 of the Protocols on the Statutes of the Court of Justice of the E.E.C. and the E.A.E.C., and also by article 20 of the Protocol on the Statute of the Court of Justice of the E.C.S.C.

C 25. Having regard to the principles of the Treaty concerning freedom of establishment and the freedom to provide services the protection thus afforded by Community law, in particular in the context of Regulation No. 17, to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the member states, regardless of the member state in which the client lives.

D 26. Such protection may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession as laid down in Council Directive of March 22, 1977 (77/249/E.E.C.) (Official Journal No. L78, p. 17), which is based in its turn on the mutual recognition by all the member states of the national legal concepts of each of them on this subject.

E 27. In view of all these factors it must therefore be concluded that although Regulation No. 17, and in particular article 14 thereof, interpreted in the light of its wording, structure and aims, and having regard to the laws of the member states, empowers the Commission to require, in the course of an investigation within the meaning of that article, production of the business documents the disclosure of which it considers necessary, including written communications between lawyer and client,

F for proceedings in respect of any infringements of articles 85 and 86 of the Treaty, that power is, however, subject to a restriction imposed by the need to protect confidentiality, on the conditions defined above, and provided that the communications in question are exchanged between an independent lawyer, that is to say one who is not bound to his client by a relationship of employment, and his client.

G 28. Finally, it should be remarked that the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so.

(c) The procedures relating to the application of the principle of confidentiality

H 29. If an undertaking which is the subject of an investigation under article 14 of Regulation No. 17 refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission's authorised agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection as defined above, although it is not bound to reveal the contents of the communications in question.

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30. Where the Commission is not satisfied that such evidence has been supplied, the appraisal of those conditions is not a matter which may be left to an arbitrator or to a national authority. Since this is a matter involving an appraisal and a decision which affect the conditions under which the Commission may act in a field as vital to the functioning of the Common Market as that of compliance with the rules on competition, the solution of disputes as to the application of the protection of the confidentiality of written communications between lawyer and client may be sought only at Community level.

31. In that case it is for the Commission to order, pursuant to article 14 (3) of Regulation No. 17, production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission's view, is not protected in law.

32. The fact that by virtue of article 185 of the E.E.C. Treaty any action brought by the undertaking concerned against such decisions does not have suspensory effect provides an answer to the Commission's concern as to the effect of the time taken by the procedure before the court on the efficacy of the supervision which the Commission is called upon to exercise in regard to compliance with the Treaty rules on competition, whilst on the other hand the interests of the undertaking concerned are safeguarded by the possibility which exists under articles 185 and 186 of the Treaty, as well as under article 83 of the Rules of Procedure of the court, of obtaining an order suspending the application of the decision which has been taken, or any other interim measure.

(d) *The confidential nature of the documents at issue*

33. It is apparent from the documents which the applicant lodged at the court on March 9, 1981, that almost all the communications which they include were made or are connected with legal opinions which were given towards the end of 1972 and during the first half of 1973.

34. It appears that the communications in question were drawn up during the period preceding, and immediately following, the accession of the United Kingdom to the Community, and that they are principally concerned with how far it might be possible to avoid conflict between the applicant and the Community authorities on the applicant's position, in particular with regard to the Community provisions on competition. In spite of the time which elapsed between the said communications and the initiation of a procedure, those circumstances are sufficient to justify considering the communications as falling within the context of the rights of the defence and the lawyer's specific duties in that connection. They must therefore be protected from disclosure.

35. In view of that relationship and in the light of the foregoing considerations the written communications at issue must accordingly be considered, in so far as they emanate from an independent lawyer entitled to practise his profession in a member state, as confidential and on that ground beyond the Commission's power of investigation under article 14 of Regulation No. 17.

36. Having regard to the particular nature of those communications article 1 (b) of the contested decision must be declared void in so far as it requires the applicant to produce the documents mentioned in the appendix

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A to its letter to the Commission of March 26, 1979, and listed in the schedule of documents lodged at the court on March 9, 1981, under numbers 1 (a) and (b), 4 (a) to (f), 5 and 7.

B 37. Nevertheless, the application must be dismissed inasmuch as it is directed against the provisions in the above-mentioned article 1 (b) relating to documents other than those referred to above, which are likewise listed in the above-mentioned appendix and schedule and which have not yet been produced to the Commission.

Costs

C 38. Under article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Under article 69 (3) the court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

39. Since the parties to the action and the interveners have failed on some heads they must bear their own costs.

D On those grounds, the court hereby (1) declares article 1 (b) of Commission Decision No. 79/670 of July 6, 1979, void inasmuch as it requires the applicant to produce the documents which are mentioned in the appendix to the letter from the applicant to the Commission of March 26, 1979, and listed in the schedule of documents lodged at the court on March 9, 1981, under numbers 1 (a) and (b), 4 (a) to (f), 5 and 7; (2) for the rest, dismisses the application; (3) orders the parties to the action and the interveners to bear their own costs.

E Solicitors: *Slaughter & May*; *Treasury Solicitor*.

H. J.

[PRIVY COUNCIL]

F GEOFFREY HARGREAVES AND OTHERS . . . APPELLANTS

AND

CHURCH COMMISSIONERS . . . RESPONDENTS

1983 Feb. 22;
April 12

Lord Keith of Kinkel, Lord Scarman
and Lord Brightman

G *Ecclesiastical Law—Pastoral scheme—Appeal—Scheme providing for union of benefices—Incumbent to reside in less populous parish—Whether decision of Church authorities disclosing error of judgment—Pastoral Measure 1968 (No. 1), s. 8 (2)*

H The Church Commissioners published a draft scheme, under the Pastoral Measure 1968, relating to two adjoining parishes. The scheme provided for the union of the two benefices and that the incumbent of the united benefice should reside in the parish having the smaller population. When the scheme was published the appellants with other parishioners of the larger parish objected to the scheme and mounted a campaign against it. It then became clear that there was a considerable body of public opinion within the parish which was opposed to the scheme. One of the appellants' grounds of objection was that the future incumbent of the united benefice ought to reside in the vicarage of the

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larger parish so as to be closer to the growing centre of population. After further consultation and consideration the Church Commissioners made the scheme.

On appeal by the appellants asking that that part of the scheme relating to the place of residence of the incumbent should be returned to the Church Commissioners for re-consideration:—

Held, dismissing the appeal, that an appeal against a pastoral scheme was a genuine appeal on the merits and a change of circumstances or the emergence of fresh evidence after the scheme was made could in a proper case constitute grounds for allowing the appeal; that, as the evidence gathered after the publication of the draft scheme showed, there were valid grounds for selecting the vicarage in the larger parish as the residence of the incumbent, but, in such circumstances, the appellants had to show that there had been an error of judgment on the part of the church authorities; that, since the church authorities had considered the merits of both parishes and for cogent reasons selected the smaller parish as the parish in which the incumbent should reside, the appellants had not shown that there had been an error of judgment and the scheme should be confirmed (post, pp. 68E–F, 69F—70C, 71C–D, H—72A).

Elphick v. Church Commissioners [1974] A.C. 562, P.C. and *Little Leigh Parochial Church Council v. Church Commissioners* [1960] 1 W.L.R. 567, P.C. considered.

The following cases are referred to in the judgment of their Lordships:
Elphick v. Church Commissioners [1974] A.C. 562; [1974] 2 W.L.R. 756, P.C.

Little Leigh Parochial Church Council v. Church Commissioners [1960] 1 W.L.R. 567, P.C.

Parochial Church Council of the Parish of Holy Trinity, Birkenhead v. Church Commissioners (unreported), May 6, 1974, P.C.

Pim v. Church Commissioners (unreported), March 20, 1975, P.C.

Rogers v. Church Commissioners (unreported), February 11, 1980, P.C.

The following additional case was cited in argument:

Dawson v. Church Commissioners (unreported), February 11, 1980, P.C.

APPEAL by Captain Geoffrey Hargreaves, Ted Puntis, David Hornsby and Roy Farmers on behalf of themselves and other parishioners of St. Mary's, North Eling (otherwise known as Copythorne), in the diocese of Winchester, against part of a pastoral scheme made by the respondents, the Church Commissioners for England, for the union of the benefices of Copythorne and Minstead.

The facts are stated in the judgment of their Lordships.

The appellants in person.

Spencer Maurice for the Church Commissioners.

Cur. adv. vult.

April 12. The judgment of their Lordships was delivered by LORD SCARMAN.

The pastoral scheme against which this appeal is brought was made by the Church Commissioners on June 2, 1981, and relates to the two parishes and benefices of St. Mary, North Eling (otherwise known and

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A now generally referred to as Copythorne) and Minstead in the diocese of Winchester. The scheme provides for the union of the two benefices but the two parishes "shall continue distinct." The new benefice is to be named "The benefice of Copythorne and Minstead." The scheme further provides that the parsonage house of Minstead shall be the place of residence of the incumbent of the new benefice and that the parsonage house of Copythorne shall be transferred to the Diocesan Board of Finance for disposal.

B Petitions of appeal against the scheme have been duly lodged with the Clerk of the Privy Council by Captain Geoffrey Hargreaves, Mr. Ted Puntis, Mr. David Hornsby and Mr. Roy Farmers acting on behalf of themselves and some 400 other parishioners of Copythorne. They petition not that the scheme shall be of no effect but only that Her Majesty be graciously pleased to return it to the commissioners for reconsideration. Their real objection is to that part of the scheme wherein it is proposed that the incumbent of the new benefice shall reside not in Copythorne but at Minstead.

C Much of the very full and carefully prepared evidence presented by the appellants to the Board is, however, concerned with other matters, which plainly have caused concern among some of the parishioners of Copythorne. Protest has been voiced and a campaign "Save the Parish of St. Mary's" was developed against the union of the benefices. The fact that the two parishes are to remain distinct has not dissuaded some from believing that the parish of St. Mary, Copythorne is in danger of extinction. But this is now in the past. Wisely, albeit reluctantly, the appellants accept the union of the two benefices. Their Lordships do not, therefore, review the arguments for and against the union.

E A very considerable volume of evidence and argument has been directed to the proposition that there has been on the part of the Church authorities inadequate consultation between them and the parishioners of Copythorne. Their Lordships are, for the reasons which they will briefly outline, satisfied that the Church authorities have complied with the requirements of the Pastoral Measure 1968: indeed, they have done more than the minimum required by the Measure.

F Under the Pastoral Measure 1968 it is the duty of the Diocesan Pastoral Committee from time to time to review the arrangements for pastoral supervision and to make recommendations to the bishop: section 2 (1). Before deciding to make recommendations, the committee shall "so far as may be practicable ascertain the views of the interested parties": section 3 (1). The interested parties are the incumbents of any benefices affected, the patrons, the parochial church councils affected, the archdeacon, the rural dean and the local planning authority: section 3 (2). This was done. Before the committee made its recommendations, the Bishop of Southampton and the Archdeacon of Winchester met the Copythorne Parochial Church Council on April 24, 1980. On July 24, 1980, a sub-committee of the Diocesan Pastoral Committee met the Copythorne Parochial Church Council when two votes were taken which at the very least revealed that a majority of the council (as then constituted) objected neither to the union of the benefices nor to the residence of the incumbent being at Minstead. The figures of the two votes were: (a) union of the benefices: 11 in favour (or, at least, not objecting); four against; one abstention. (b) Incumbent at Minstead: 10 in favour; four against; two abstentions. When, therefore, the Bishop of Winchester submitted his proposals, based on the committee's recommendations, to

the commissioners on September 19, 1980, the requirement of section 3 of the Measure that the committee do ascertain the view of the parochial church council of Copythorne had been met.

The Church Commissioners accepted the bishop's proposals and published the draft of the scheme on October 24, 1980. A campaign to oppose it was organised and attracted considerable support. One of the victories of the campaign was to secure a majority on the parochial church council against it. Undoubtedly many believe or were persuaded into thinking that the future of St. Mary's as a parish was in danger. And there was a powerfully voiced opposition to the new vicar residing in Minstead. On November 24, 1980, the campaign committee submitted to the commissioners its "Original Case," a formidable document covering with its annexures 27 pages. It was the duty of the commissioners to consider the representations contained in this document: section 5 (4). They also had the power, though there was no obligation, to afford an opportunity to its signatories and also to other persons to make oral representations to them: section 5 (4). This they did in March 1981 when a sub-committee of the Commissioners' Pastoral Committee attended an open meeting at Copythorne Parish Hall and later met the parochial church councils of the two parishes affected by the draft pastoral scheme. Their Lordships do not doubt the commissioners were fully informed and well aware of the arguments of the appellants and their supporters in the parish of Copythorne before they made the scheme, which they did on June 2, 1981. Any conceivable doubt that there could have been on this score was, or ought to have been, dispelled by their very full written statement of June 1, 1981, in which they gave their reasons for making the scheme. Accordingly their Lordships reject the submission that there was inadequate consultation before the scheme was made.

Before turning to the real issue between the parties their Lordships think it may be helpful to review the relevant law. A right of appeal against a pastoral scheme is given by section 8 (2) of the Pastoral Measure 1968 to any person who has made written representations. The exercise of the right leads to a genuine appeal process: that is to say, it is not to be compared with judicial review under R.S.C., Ord. 53, notwithstanding certain superficial similarities. It follows that an appellant is entitled to have his appeal heard on its merits. Their Lordships would repeat, and respectfully endorse, what Lord Wilberforce, delivering the opinion of the Board, said in *Pim v. Church Commissioners* (unreported), March 20, 1975:

"If objections are genuinely brought forward and supported by factual evidence, their Lordships must take them into account. They will not lose sight of the fact, as underlined above, that the scheme has the support of responsible bodies within the Church of England, which, in some cases, may well have considered the very objections now urged and weighed them up. But it is not enough, their Lordships would venture to state, for the Church Commissioners to rest upon general assertions in the face of specific objections, where these seem to be of a concrete and relevant character."

Nevertheless, the elaborate process of making a scheme set out in sections 3 to 7 of the Measure, a process which begins with a review by the pastoral committee of the diocese, requires the approval by the bishop of the committee's recommendations, and the decision of the Church Commissioners first to prepare a draft scheme and later, after considering any written representations made to them, to make the scheme itself, underlines the very

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A careful consideration demanded of the Church authorities throughout all its stages. By the time a scheme is brought to the attention of the Judicial Committee on appeal it will represent, unless there has been some irregularity or departure from the statutory process, the fully considered view of those charged by law with providing for the cure of souls in the diocese and with protecting, so far as practicable, the traditions, needs and characteristics of individual parishes, which are the two matters to which the Measure requires the pastoral committee to have regard "at all times": section 2 (2). In this process the bishop of the diocese has the vital role: no scheme can go forward without his approval.

It is not surprising, therefore, that successive Boards have emphasised the importance to be attached to the view of the Church authorities. In *Elphick v. Church Commissioners* [1974] A.C. 562, 566, Lord Diplock, delivering the opinion of the Board, quoted with approval the warning given in an earlier case under the legislation which preceded the Pastoral Measure of 1968:

"This does not, however, mean that their Lordships should not be slow to dissent, save for the most cogent reasons, from the recommendations embodied in a scheme regularly brought into existence with the concurrent approval of the pastoral committee, the bishop and the Church Commissioners . . .":

Little Leigh Parochial Church Council v. Church Commissioners [1960] 1 W.L.R. 567, 568.

The adjective "cogent" has assuredly become part of the case law in this field; "repeated to the point of tedium" according to Lord Lane in *Rogers v. Church Commissioners* (unreported), February 11, 1980. But important though the word is, it should not be allowed to mask the truth, namely that appeal to the Judicial Committee is an appeal on the merits. And in some contexts it can be misleading. For instance, frequent reference is made in the cases to a dictum to be found in the Board's opinion in *Parochial Church Council of the Parish of Holy Trinity, Birkenhead v. Church Commissioners* (unreported), May 6, 1974, to the effect that their Lordships will not refuse to confirm a scheme "unless for irregularity of procedure, for excess of jurisdiction, or on cogent evidence of erroneous judgment." This is helpful, so far as it goes. But it is not, nor no doubt was it intended to be, a complete statement of the law. Change of circumstances, or the emergence of fresh evidence, can in a proper case constitute grounds for allowing an appeal, even though there was no question of any erroneous judgment by the Church authorities at the time they made the scheme. *Rogers'* case was one in which there was shown to have been a sufficiently significant change of circumstance (the provision by voluntary contributions of the finance necessary to maintain a second church, which the scheme had declared redundant). And, if the appellants are right, it must be part of their case that the gathering of evidence and the growth of hostile parish opinion since the publication of the draft scheme should cause the Church Commissioners, if the scheme be returned to them, to consider it afresh so far as the residence of the incumbent is concerned.

The appellants argued their case in person. Captain Hargreaves accepted the suggestion put to him by one of their Lordships that the most effective formulation of their case was that they were able to show that, in selecting Minstead rectory as the place of residence of the new incumbent, the Church authorities had made a serious error of judgment and

that this view was strongly reinforced by the evidence which, after publication of the draft scheme, the campaign committee had succeeded in gathering together. It is not, however, enough to show that a reasonable person, or body of people, could reasonably have reached the conclusion that Copythorne vicarage was better suited than Minstead rectory as the residence of the vicar of the two parishes. If there is room for two reasonable opinions, the fact that the Church authorities have adopted one will almost always be decisive against the other. In the present case their Lordships accept that two views were and are possible. There is a reasonable case, as will emerge when their Lordships outline the facts, for selecting Copythorne: but is the evidence such as to ground an inference that it would be an error of judgment to select Minstead? That is the true issue. The appeal cannot succeed unless it can be shown either that it was an error of ecclesiastical judgment to choose Minstead or that circumstances have changed so significantly since Minstead was chosen that the commissioners and the bishop ought to reconsider this part of the scheme.

Their Lordships propose now to outline the salient features of the appellants' factual case. Copythorne is a parish of scattered settlements in a rural setting lying close to the northern perambulation of the New Forest and only a few miles west of the centre of Southampton. Its eastern boundary is adjacent to the largely suburban Totton. The parish is divided into two parts by the motorway M27. North of the motorway the parish consists of farm and park land and two villages, Newbridge and Ower (with Wigley). South of the motorway are the townships of Cadnam and Bartley, which grew up as a ribbon development along the A336. St. Mary's Church and, at a little distance from it, Copythorne vicarage, are somewhat isolated, being a mile or so to the north-east of Cadnam. The south-west boundary of the parish marches with the perambulation of the New Forest. The population of Copythorne is about 2,700 and growing.

Minstead is a small parish adjacent to the south-west boundary of Copythorne. Part of the New Forest lies between Cadnam and Bartley in Copythorne, and Minstead village where the church (a historic and beautiful building) and the rectory are to be found. The distance between the village and the developed area of Copythorne is between $2\frac{1}{2}$ and 3 miles. The parish's population is 710 and static (or diminishing).

The two parishes are very different in character, in size and in the age structure of their populations. Minstead tends to be elderly: but it is admitted to be a compact little community supportive of its church and vicar. And the rectory is close to the historic church, which in summer attracts many visitors.

Copythorne parish, particularly south of the motorway, is an active bustling place. Community activities, with clubs for young and old, abound. There is a vigorous scout movement. There are two good Church of England schools. The church is well supported: and the vicarage was built some 13 years ago with the aid of voluntary contributions. Some parishioners feel this gives them a claim on it for meetings. Although this cannot be so, it is the fact that it has been the practice of the vicar until recently to allow it to be used for church and other meetings.

The foregoing is the barest summary of the very full and helpful evidence prepared by the appellant, Mr. Hornsby, himself a professional surveyor. The evidence justifies his conclusion that the great preponderance—he put a figure on it of 90 to 95 per cent.—of activity, business, industrial, social and religious of the new benefice will be in the parish of

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A Copythorne. He thought it totally illogical that the vicar should reside elsewhere than in the parish and at the Copythorne vicarage. This short, and by no means complete, outline of the facts presented to their Lordships by the appellants is certainly sufficient to show that there exists a reasonable case for selecting Copythorne as the place of residence of the new incumbent.

B The Church authorities, however, rejected it. They accepted the differences in structure and population of the two parishes. Of the parish of Minstead they said, correctly, that it contains a homogeneous village of which the church and the parsonage house form an integral part. Copythorne they described, also accurately, as consisting of six scattered settlements with no identifiable centre. They were satisfied that one priest, whether his residence be at Minstead or Copythorne, would not have too difficult a task in ministering to two parishes consisting of some seven settlements. They concluded (and this was the firm opinion of the bishop of the diocese) that the incumbent should be housed at Minstead where there was a supportive community and where he would be able to carry out his ministry efficiently and contentedly.

C In their Lordships' view it cannot be said that the Church authorities were guilty of any error of judgment. They plainly weighed up the respective merits of the two places of residence and chose Minstead for reasons which their Lordships think were cogent. Inevitably the new incumbent will have to travel daily if he is to minister effectually to the scattered inhabitants of the two parishes. It will make little difference to the time and money spent on travel whether his home be at the Copythorne vicarage or the Minstead rectory. Both are some distance from the centres of habitation, though Copythorne is nearer. It is, however, very important that the incumbent should be housed agreeably so that he may minister to his parishioners "efficiently and contentedly." The Copythorne house is, no doubt, entirely suitable. But the Minstead house has the edge for the reasons given by the Bishop of Winchester. In his affidavit he listed four reasons: (a) the parsonages committee thought Minstead was marginally the "nicer" house; (b) the Minstead house is more pleasantly situated; (c) the Copythorne house is "rather isolated," whereas the house at Minstead is next door to the church, with which and the village it forms a compact entity; (d) the Minstead church attracts many visitors who, though the duty owed to parishioners comes first, represent an opportunity for extending the incumbent's ministry. The bishop concluded this part of his evidence with these words:

G "... I regard it as of considerable importance that any incumbent should have in the place where he resides a friendly and supportive community amongst whom he and his family feel happy."

H In their Lordships' view the bishop is not to be criticised for bearing in mind the welfare of his clergy as well as that of the inhabitants of his diocese or for his reasons in choosing Minstead.

Their Lordships fully understand the feelings of the appellants and their supporters. They have shown that genuine grounds for wishing their vicar to be in Copythorne exist. It is not an unreasonable view. But they have shown no error of judgment on the part of the Church authorities. Had the two opposing views been evenly balanced, their Lordships would have thought it right to uphold the view of the Church authorities for the reasons earlier developed. But the balance is, in

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their Lordships' considered opinion, in favour of the bishop's firmly expressed choice of Minstead. A

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed and the scheme confirmed. The Church Commissioners have, very properly, withdrawn their claim to costs. There will, therefore, be no order as to costs.

Solicitors: *Radcliffes & Co.*

T. J. M. B

[COURT OF APPEAL] C

ATTORNEY-GENERAL'S REFERENCE (No. 1 of 1982)

1983 March 21; 30

Lord Lane C.J., Taylor
and McCowan JJ.

Crime—Conspiracy—Conspiracy to defraud—Conspiracy in England to be wholly performed abroad—Consequential economic loss to English company—Whether indictable offence in England D

The defendants were charged with conspiracy to defraud by conspiring in England together and with others to defraud such companies and persons, and in particular X company, as might be caused loss by the unlawful labelling, sale, supply or marketing of whisky purporting to be that of X label products, X company being the proprietors of the labelled products and owning the copyright in the labels. The prosecution case was that the defendants had arranged for labels, purporting to be those of X company, to be printed and brought to London for transmission to Frankfurt where they were to be fixed on to bottles of whisky already in Frankfurt. The whisky was then to be sent to the Lebanon and sold there as X's product. The German authorities seized the whisky before the plan could be implemented. At the close of the prosecution case the judge upheld the defendants' submission that the court had no jurisdiction to try the indictment on the ground that a conspiracy in England to commit a crime abroad was not indictable here unless the crime contemplated was one for which an indictment would lie in England. E

The Attorney-General referred for the opinion of the court the questions whether on a charge of conspiracy to defraud where the conspiracy was to be carried out abroad it was indictable if its performance (a) would cause economic loss and damage to the proprietary interests of a company within the jurisdiction or (b) would injure a person or company here by causing him or it damage abroad:— F

Held, answering the questions in the negative, (1) that, although the effect of the conspiracy might cause economic loss to X company, the true object of the conspiracy was to defraud potential purchasers abroad; that, since an incidental consequence of the agreement could not form the basis of an indictable offence, the alleged conspiracy was not an indictable crime in England (post, p. 76E–G). G

(2) That where a conspiracy entered into in England was to be carried out abroad the fact that its performance would injure a person or company in England by causing him or it damage abroad did not make the conspiracy indictable in this country (post, p. 77F–G). H

Board of Trade v. Owen [1957] A.C. 602, H.L.(E.) applied.

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A.-G.'s Reference (No. 1 of 1982) (C.A.)

- A The following cases are referred to in the opinion of the court:
Board of Trade v. Owen [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411, H.L.(E.).
Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.).
Reg. v. Allsop (1976) 64 Cr.App.R. 29, C.A.
Reg. v. Doot [1973] A.C. 807; [1973] 2 W.L.R. 532; [1973] 1 All E.R. 940, H.L.(E.).
- B *Reg. v. Scott* [1975] A.C. 819; [1974] 3 W.L.R. 741; [1974] 3 All E.R. 1032, H.L.(E.).

No additional cases were cited in argument.

C REFERENCE by the Attorney-General under section 36 of the Criminal Justice Act 1972.

The Attorney-General referred points of law for the opinion of the Court of Appeal in the following terms:

“(1). (i) Whether on a charge of conspiracy to defraud where the conspiracy is to be carried out abroad, it is indictable if its performance will cause economic loss and damage to the proprietary interests of a company within the jurisdiction. (ii) Whether on a charge of conspiracy to defraud where the conspiracy is to be carried out abroad, it is indictable if its performance would injure a person or company here by causing him or it damage abroad.

“(2) The material facts of the case which give rise to the reference are (i) X company are the proprietors of a certain product varieties of which are sold under different labels, one variety being the largest selling product of its kind in the world and another being one of the largest selling products of its kind in the world. X company own the copyright in and claim the exclusive use of the labels. The labels and ‘get up’ are protected by trade marks registration virtually throughout the world and in particular in the United Kingdom, Germany and the Lebanon. (ii) A and B were directors of Y company which set out to deal in a similar product. The X and Y companies had no business dealings together. (iii) Through an overseas agent A and B arranged to sell to L a quantity of this product purporting to be that produced by X company. The contract was finalised in London and the price was paid in U.S. dollars, part of this £75,475.11 being credited to the bank account of the Y company. (iv) Telexes found at the premises of Y company indicated the ultimate destination of the product to be the Lebanon. A draft contract was also found which acknowledged the illegality of the original contract and referred inter alia to the sale of 12,000 cases and the ultimate point of delivery to be Piraeus. (v) The actual product to be supplied was already in Frankfurt but had no labels. Perforated sheets of labels purporting to be those belonging to X company were brought to Y’s premises in London. Individual labels were pressed out by A, B and C and employees at the premises. (vi) The product was seized by the German authorities. (vii) X company had reasonably substantial sales of its product in the Lebanon and evidence was given that X’s interests would suffer if a counterfeit product were sold there because their own sales could be less, because their trade marks, one of their most valuable assets would be infringed and because their reputation might suffer. (viii) A, B and C were arrested (as also was D in respect of whom the trial judge ruled there was no case to answer on a submission that in any event he was not a party to the conspiracy). A told

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the police in answer to questions that the labels, which were not supplied by X had come to the office, were pressed out and taken to Frankfurt to be put on a product which was not supplied by X. A agreed that he had gone to Frankfurt but had not gone to the warehouse. He explained that 'we were just agents for the buyers and sellers.'

"(3) The indictment contained one count alleging conspiracy to defraud, the particulars being that A, B and C (and D) on divers days between May 1, 1976, and December 31, 1976, conspired together and with other persons to defraud such companies and persons, and in particular X Co. Ltd., as might be caused loss by the unlawful labelling, sale, supply or marketing of a product purporting to be X label products, the said X Co. Ltd. being the proprietors of the labelled products and owning the copyright in the labels (the product and labels were named in the indictment).

"(4) At the close of the Crown case, after hearing submissions, the judge directed the jury to acquit the accused. He ruled that the court had no jurisdiction to try the indictment since a conspiracy in England to commit a crime abroad is not indictable in England unless the crime contemplated is one for which an indictment would lie in England.

"(5) It is submitted that a conspiracy to defraud does not necessarily involve the commission of a substantive offence. Although the immediate object was to make money out of the sale of a spurious product, the object alleged by the prosecution was the putting at risk of X's economic interests by endangering their sales and reputation or by infringing their trademarks, and this object would be within their jurisdiction. Alternatively it is submitted that the court has jurisdiction because the performance of the conspiracy albeit abroad, would injure X in England where X has proprietary interests by causing X damage abroad."

Ann Goddard Q.C. and *P. C. Ader* for the Attorney-General.
Colin Dines for the defendants A and C.

Cur. adv. vult.

March 30. LORD LANE C.J. read the following judgment of the court. This is a reference by Her Majesty's Attorney-General under section 36 of the Criminal Justice Act 1972. The defendants were charged with conspiracy to defraud. The particulars of the offence were that they had conspired together and with others to defraud such companies and persons, and in particular X Co. Ltd., as might be caused loss by unlawful labelling, sale, supply or marketing of whisky purporting to be that of X label products, the said X Co. Ltd. being the proprietors of the labelled products and owning the copyright in the label.

At the conclusion of the Crown case, the judge upheld submissions on behalf of the defendants that the court had no jurisdiction to try the indictment, because a conspiracy in England to commit a crime abroad is not indictable here unless the crime contemplated is one for which an indictment would lie in England.

The points of law referred for consideration by this court are as follows:

"(i) Whether on a charge of conspiracy to defraud where the conspiracy is to be carried out abroad, it is indictable if its performance will cause economic loss and damage to the proprietary interests of a company within the jurisdiction. (ii) Whether on a charge of

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A conspiracy to defraud where the conspiracy is to be carried out abroad, it is indictable if its performance would injure a person or company here by causing him or it damage abroad."

The relevant facts are as follows: X company distil and market whisky. Their registered offices are in England. Two of their brands or labels are world famous. They own the copyright in and claim the exclusive use of those labels. Their labels are protected by trade marks registered in almost all countries, and in particular in England, Germany and the Lebanon. Two of the defendants, A and B, were directors of Y company. That company had no business dealings with X company.

The prosecution case was that A and B arranged to sell to "L" a large quantity of whisky, the ultimate destination of which was to be the Lebanon. The contract was concluded in London. The whisky was in Frankfurt. Perforated sheets of labels imitating those of X company were printed and brought to Y company in London, where A and B and C (another defendant) prepared them for transmission to Frankfurt, where they were to be fixed to the bottles of whisky, prior to the whisky being shipped to the Lebanon and sold as the X company's product.

The German authorities then seized the whisky before the plans could be further implemented.

X Co. Ltd. had appreciable sales in the Lebanon, and it was likely that if the defendants' whisky, masquerading as that of X company, had been sold in the Lebanon, X company would have suffered loss of trade, quite apart from the infringement of their trade marks and possible injury to their reputation generally.

Miss Goddard for the Attorney-General asserts that the indictment was drawn with the intention of alleging against the defendants a conspiracy to defraud the X company and/or its parent or subsidiary companies. It was not intended, despite its wording, to allege a conspiracy to defraud any possible purchasers of the whisky in the Lebanon. Indeed she expressly disavowed any reliance on a conspiracy to obtain money by deception. Her argument stood or fell on her contention that what was proved here was a conspiracy formed in this country to defraud the X company or its associates by the dishonest use of its labels. Thereafter she advances two separate propositions.

Her starting point is, as it must be, the decision of the House of Lords in *Board of Trade v. Owen* [1957] A.C. 602. That case decided that a conspiracy in England to commit a crime abroad is not indictable in England unless the crime contemplated is one for which an indictment would lie in England. On the facts of that case no such indictment would lie, since the conspiracy was not to commit a crime but to obtain a lawful object by unlawful means both of which were outside the jurisdiction.

Miss Goddard's first argument is this. Accepting the test in *Board of Trade v. Owen*, although no indictment would lie in England for a substantive crime if this conspiracy was carried out, the conspiracy itself was indictable here because its ultimate object was to injure the X company in England, albeit by acts done abroad. It was a conspiracy to defraud the X company in England by infringing their copyright abroad.

Miss Goddard cited three cases to show that a conspiracy to defraud can exist without deceit, that false representations need not be made, and that the execution of the conspiracy need not involve the commission of a substantive crime. All that is required, she says, is an agreement dishonestly to cause economic loss or prejudice to another.

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In *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 380, the respondents were suspected of selling pirated video cassettes thereby infringing the appellants' copyright. Lord Wilberforce said, at p. 441, conspiracy to defraud was "an exact description" of that activity. Similarly in *Reg. v. Scott* [1975] A.C. 819, 834 the indictment charged conspiracy to defraud.

"such companies . . . as might be caused loss by the unlawful copying and distribution of films, the copyright in which and the distribution rights of which belonged to [others]."

The House of Lords ruled that deceit was not a necessary ingredient of a conspiracy to defraud; an agreement by dishonesty to injure some proprietary right of a person was sufficient.

In *Reg. v. Allsop* (1976) 64 Cr.App.R. 29, the appellant, a sub-broker for a hire purchase company, falsified the particulars on application forms to induce the company to accept applications they may otherwise have rejected. He intended no loss, believing the transactions would ultimately be satisfactory. He was held to have been rightly convicted of conspiracy to defraud, as he had put the company's economic interests in jeopardy by dishonesty even though he did not intend to cause loss.

Miss Goddard argues that in the present case, whether the conspirators intended it or not, the effect of this dishonesty abroad would have been to injure the X company's economic interest here. She says that was the real object of the fraud. It should however be noted that in the first two cases she cites the owners of the copyright were the intended and only possible victims of the fraud. In *Reg. v. Allsop* likewise the hire purchase company was the intended and only possible victim. The false representations were aimed at the company.

The real question must in each case be what was the true object of the agreement entered into by the conspirators? In our judgment, the object here was to obtain money from prospective purchasers of whisky in the Lebanon by falsely representing that it was the X company's whisky. It may well be that if the plan had been carried out, some damage could have resulted to the X company. But that would have been a side effect or incidental consequence of the conspiracy, and not its object. There may be many conspiracies aimed at particular victims which in their execution result in loss or damage to third parties. It would be contrary to principle, as well as being impracticable for the courts to attribute to defendants constructive intentions to defraud third parties based on what the defendants should have foreseen as probable or possible consequences. In each case to determine the object of the conspiracy, the court must see what the defendants actually agreed to do. Had it not been for the jurisdictional problem, we have no doubt the charge against these conspirators would have been conspiracy to defraud potential purchasers of the whisky, for that was the true object of the agreement. Accordingly we reject the first argument.

Miss Goddard's alternative approach is more bold. She asks us to lay down a different test from that propounded in *Board of Trade v. Owen* [1957] A.C. 602, which she suggests is inappropriate to the facts of this case. The new test proposed is this: If a conspiracy to defraud, although to be wholly carried out abroad, would cause injury to an individual or company within the jurisdiction, it is indictable here. Miss Goddard contends that the protection of economic interests in this country against injury by fraud here or abroad is a legitimate and proper function of the criminal law.

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A.-G.'s Reference (No. 1 of 1982) (C.A.)

A The only semblance of support for her proposal is a dictum at the end of Lord Tucker's speech in *Board of Trade v. Owen*. After stating the general test already cited, he continued, at p. 634:

B "In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."

C It is to be noted that Lord Tucker limited the point for consideration to cases where the conspiracy was made in England, and Miss Goddard adopts that limitation. But this could well involve the most technical anomalies, such as were foreshadowed by Lord Wilberforce in *Reg. v. Doot* [1973] A.C. 807. He said, at p. 818:

D "Often in conspiracy cases the implementing action is itself the only evidence of the conspiracy—this is the doctrine of overt acts. Could it be said, with any plausibility, that if the conclusion or a possible conclusion to be drawn from overt acts in England was that there was a conspiracy, entered into abroad, a charge of conspiracy would not lie? Surely not: yet, if it could, what difference should it make if the conspiracy is directly proved or is admitted to have been made abroad? The truth is that, in the normal case of conspiracy carried out, or partly carried out, in this country, the location of the formation of the agreement is irrelevant: the attack upon the laws of this country is identical wherever the conspirators happened to meet; the 'conspiracy' is a complex, formed indeed, but not separably completed, at the first meeting of the plotters. A legal principle which would enable concerting law breakers to escape a conspiracy charge by crossing the Channel before making their agreement or to bring forward arguments, which we know can be subtle enough, as to the location of agreements, or, conversely, which would encourage the prosecution into allegation or fiction of a renewed agreement in this country, all this with no compensating merit, is not one which I could endorse."

F If, on the other hand, Lord Tucker's limitation to conspiracies entered into in England were removed, the new test would be immensely wide. Whenever a fraudulent conspiracy made abroad and to be carried out abroad sent ripples back to England washing over and damaging some economic interest here, an indictment would lie.

G We can find no grounds in authority or principle for so holding. If it is necessary to enlarge the present jurisdiction, which we think it is not, then that is a matter for Parliament. Accordingly, we reject Miss Goddard's second argument. Our answer to the points of law posed for consideration in paragraphs 1 (i) and 1 (ii) of the reference is in each case "No."

Opinion accordingly.

H Solicitors: *Director of Public Prosecutions; Alistair Porter & Co.*

[1983]

[COURT OF APPEAL]

STOKE-ON-TRENT CITY COUNCIL v. B & Q (RETAIL) LTD.
 WOLVERHAMPTON BOROUGH COUNCIL v. B & Q (RETAIL) LTD.
 BARKING AND DAGENHAM LONDON BOROUGH COUNCIL
 v. HOME CHARM RETAIL LTD

[1982 S. No. 2111]
 [1982 W. No. 16293]
 [1982 B. No. 16360]

1983 March 24, 28, 29, 30;
 April 26

Lawton, Ackner and
 Oliver L.JJ.

Local Government—Powers—Action by local authority—Sunday trading in deliberate and flagrant breach of statute—Local authority claiming injunction to restrain further breaches—Whether entitled to injunctive relief—Whether proceedings properly instituted—Whether proceedings improperly instituted capable of ratification—Shops Act 1950 (14 Geo. 6, c. 28), ss. 47, 71 (1)—Local Government Act 1972 (c. 70), s. 222 (1) (a)

The defendants in three separate actions owned retail shops which they continued to open for trading on Sundays contrary to section 47 of the Shops Act 1950,¹ despite complaints and warnings from the local authorities concerned. In each case the local authority instituted civil proceedings for an injunction to restrain the defendants from trading in breach of section 47 and applied for an interim injunction, relying on section 222 (1) of the Local Government Act 1972² and, in the third case, also on section 71 (1) of the Shops Act 1950. Interim injunctions were made in the first and third actions and refused in the second action.

On appeal by the defendants in the first and third actions and by the local authority in the second action:—

Held, (1) that local authorities, in carrying out the duty to enforce the provisions of the Shops Act 1950 imposed on them by section 71 of the Act, were entitled to use their power under section 222 (1) of the Local Government Act 1972 to institute proceedings for injunctive relief where they were satisfied that such relief was the only way to stop deliberate and flagrant flouting of section 47 of the Act of 1950; and that, on the evidence, it was reasonable in all three actions to conclude that the defendants would continue deliberately and flagrantly to flout section 47 (post, pp. 92C-D, 93C, 96A-B, 99C, F, 103A-C, G—104A).

Gouriet v. Union of Post Office Workers [1978] A.C. 435, H.L.(E.) and *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, C.A. considered.

(2) Allowing the second and third appeals, that, although the proper exercise by a local authority of their discretion under section 222 (1) of the Act of 1972 involved a consideration of whether the action proposed was expedient for the promotion or protection of the inhabitants of their area, there was a rebuttable presumption that the discretion had been so exercised; and that, as no evidence had been adduced by the

¹ Shops Act 1950, s. 47: see post, p. 93G.

S. 71 (1): see post, p. 89C.

² Local Government Act 1972, s. 222: "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . ."

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defendants in the second action, those proceedings were presumed to have been, and were in fact, properly brought; but that evidence in the third action showed that the local authority gave no consideration to section 222 and that no proper authority had been given for the institution of proceedings for injunctive relief against the defendants (post, pp. 92E-G, 93D, 97F-G, 99G-H, 104A-B).

(3) Dismissing the first appeal, that although, on the evidence, the proceedings in the first action had been instituted without a proper exercise of the discretion under section 222 of the Act of 1972 by the local authority they were effectively ratified by a subsequent consideration of the limitations imposed by section 222 (post, pp. 92G-93A, 97H, 99E-F).

Warwick Rural District Council v. Miller-Mead [1962] Ch. 441, C.A. applied.

Per curiam (i) Section 71 of the Shops Act 1950 does not authorise local authorities to institute civil proceedings for injunctive relief against the commission of offences against section 47 of the Act (post, pp. 89D-E, 99G-H, 104B).

(ii) Local authorities do not have a general discretion to decide whether or not to enforce the Shops Act 1950 and could be made to enforce it by means of a judicial review (post, pp. 89H, 96H-97A, 102G).

Reg. v. Braintree District Council, Ex parte Willingham (1982) 81 L.G.R. 70, D.C. approved.

Per Ackner L.J. The general observation that, for the purposes of section 222 of the Local Government Act 1972, the inhabitants of any area have a general interest to see that the provisions of Acts in force in the area are duly observed cannot be accepted (post, p. 95E-F).

Decision of Whitford J. affirmed and decisions of Nourse J. and Falconer J. reversed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General v. Bastow [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

Attorney-General v. Chaudry [1971] 1 W.L.R. 1614; [1971] 3 All E.R. 938, C.A.

Attorney-General v. Harris [1961] 1 Q.B. 74; [1960] 3 W.L.R. 532; [1960] 3 All E.R. 207, C.A.

Attorney-General v. Shonleigh Nominees Ltd. [1971] 1 W.L.R. 1723; [1971] 3 All E.R. 473; [1974] 1 W.L.R. 305; [1974] 1 All E.R. 734, H.L.(E.).

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.).

Hampshire County Council v. Shonleigh Nominees Ltd. [1970] 1 W.L.R. 865; [1970] 2 All E.R. 144.

Kitchener v. Evening Standard Co. Ltd. [1936] 1 K.B. 576; [1936] 1 All E.R. 48.

Prestatyn Urban District Council v. Prestatyn Raceway Ltd. [1970] 1 W.L.R. 33; [1969] 3 All E.R. 1573.

Reg. v. Braintree District Council, Ex parte Willingham (1982) 81 L.G.R. 70, D.C.

Solihull Metropolitan Borough Council v. Maxfern Ltd. [1977] 1 W.L.R. 127; [1977] 2 All E.R. 177.

Stafford Borough Council v. Elkenford Ltd. (unreported), July 30, 1976, Oliver J.; [1977] 1 W.L.R. 324; [1977] 2 All E.R. 519, C.A.

Stoke-on-Trent City Council v. Saxon Scaffolding Ltd. (unreported), October 26, 1979, Goulding J.

Stoke-on-Trent Council v. B & Q Ltd. (C.A.)**[1983]**

Tottenham Urban District Council v. Williamson & Sons Ltd. [1896] 2 Q.B. 353, C.A. A

Warwick Rural District Council v. Miller-Mead [1962] Ch. 441; [1962] 2 W.L.R. 284; [1962] 1 All E.R. 212, C.A.

The following additional cases were cited in argument:

Caldwell v. Pagham Harbour Reclamation Co. (1876) 2 Ch.D. 221.

Hammersmith London Borough Council v. Magnum Automated Fore-courts Ltd. [1978] 1 W.L.R. 50; [1978] 1 All E.R. 401, C.A. B

Kent County Council v. Batchelor (No. 2) [1979] 1 W.L.R. 213; [1978] 3 All E.R. 980.

Wyre Forest District Council v. Taylor (unreported), October 22, 1981, Dillon J.

STOKE-ON-TRENT CITY COUNCIL v. B & Q LTD. (RETAIL) LTD. C**APPEAL from Whitford J.**

By writ dated May 5, 1982, the plaintiffs, Stoke-on-Trent City Council, claimed an injunction restraining the defendants, B & Q (Retail) Ltd., from using or causing or permitting to be used premises at Waterloo Road, Burslem, Stoke-on-Trent, and at Leek Road, Hanley, Stoke-on-Trent, as a retail do-it-yourself and garden centre on Sundays other than for the purposes of carrying out transactions exempted from the operation of the Shops Act 1950 by section 47 and Schedule 5 to that Act. On June 25, 1982, Whitford J., on motion by the plaintiffs, granted an injunction in the terms claimed by the writ until judgment or further order. D

By notice of appeal dated July 9, 1982, the defendants appealed on the grounds that the judge erred in law in that (1) he gave no or no sufficient weight to the fact that there was no evidence that the plaintiffs or any duly authorised committee or sub-committee of the plaintiffs had considered whether the commencement of the action was expedient for the purposes of promoting or protecting the inhabitants of the plaintiffs' locality (as required by section 222 of the Local Government Act 1972); (2) he gave no or no sufficient weight to the fact that there was no evidence that the plaintiffs or their duly authorised organs had concluded that it was expedient for such purposes that the action be commenced; (3) he gave no or no sufficient weight to the fact that there was no evidence that there was any interest of the inhabitants which would be promoted or protected by the commencement of the action; (4) he gave no or no sufficient weight to the fact that there was no evidence of any complaint by any inhabitant of the plaintiffs' area nor that the defendants' activities of which complaint was made in the action were contrary to the interests of the inhabitants of the plaintiffs' locality; (5) he gave no or no sufficient weight to the fact that there was no evidence as to the terms of any policy which the plaintiffs might have had as to the enforcement by means of civil proceedings of the provisions of the Shops Act 1950; (6) he held that it could be assumed to be in the interests of the inhabitants of the plaintiffs' locality that the provisions of the Shops Act 1950 should be enforced by means of an injunction; (7) notwithstanding (a) that the plaintiffs' standing orders contained no power authorising the delegation of the decision whether to institute legal proceedings in respect of breaches of the Shops Act 1950 to the town clerk, (b) that the plaintiffs' environmental health sub-committee on April 15, 1982, authorised the town clerk to "take out injunctions" where considered appropriate, and (c) that the plaintiffs' officers expressly E
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A disclaimed having exercised any discretion, he held that the commencement of the action was duly authorised; and (8) he held that if the action was not duly authorised by the date of the issue of the writ any want of authority was cured by resolution of the plaintiffs' policy committee on May 17, 1982, and/or by resolution of the plaintiffs' themselves on May 27, 1982, notwithstanding that those resolutions were passed after the date of issue of the writ.

B The facts are stated in the judgment of Lawton L.J.

WOLVERHAMPTON BOROUGH COUNCIL v. B & Q (RETAIL) LTD.

APPEAL from Nourse J.

C By writ dated December 13, 1982, the plaintiffs, Wolverhampton Borough Council, claimed an injunction restraining the defendants, B & Q (Retail) Ltd., from using or causing or permitting to be used their premises at Howard Street, Wolverhampton, and at Loxdale Street, Bilston, Wolverhampton, and at Bushbury Lane, Wolverhampton, as retail do-it-yourself trade or business or as garden centres on Sundays except for the purposes of carrying out transactions exempted from the operation of the Shops Act 1950 by section 47 and Schedule 5 to that Act. By notice of motion dated December 13, 1982, the plaintiffs sought an injunction in the same terms as that sought in the writ until trial or further order. On January 18, 1983, Nourse J. refused to grant an injunction on the motion.

D By notice of appeal dated February 11, 1983, the plaintiffs appealed on the grounds that (1) the judge erred in law in holding that it was for the plaintiffs (in the absence of any evidence lodged by the defendants) to show a case within section 222 of the Local Government Act 1972 so as to justify the commencement of the proceedings without the fiat of the Attorney-General; (2) the judge erred in law in holding that there were no facts or circumstances known to the plaintiffs on which they could reasonably have considered it to be expedient for the promotion or protection of the interests of the inhabitants of their area that the application for an injunction should be made; (3) the plaintiffs could reasonably have considered it to be for the promotion or protection of the interests of the inhabitants of their area that the persistent and continued flouting of the provisions of section 47 of the Shops Act 1950 by the defendants in their area be prevented by an application to the High Court for an injunction; (4) the judge erred in law in rejecting the submission in ground (3): (a) by holding that the provisions of section 222 of the Local Government Act 1972 required there to be some "special" interest in the inhabitants of the plaintiffs' area in bringing the proceedings in that the conduct of the defendants which the plaintiffs sought to restrain must be such as to cause particular prejudice to the inhabitants of the plaintiffs' area that in any event such prejudice did not exist, and (b) in giving no or no sufficient weight to the fact that by virtue of section 71 (1) of the Shops Act 1950 the plaintiffs were under a statutory duty to enforce the provisions of the Shops Act 1950; and (5) alternatively the plaintiffs were by virtue of section 71 (1) of the Shops Act 1950 duly authorised to commence the proceedings without the fiat of the Attorney-General and without the necessity for a

Stoke-on-Trent Council v. B & Q Ltd. (C.A.)**[1983]**

resolution duly passed in accordance with the provisions of the Local Government Act 1972 and that the judge erred in law in holding to the contrary. A

The facts are stated in the judgment of Lawton L.J.

**BARKING AND DAGENHAM LONDON BOROUGH COUNCIL
v. HOME CHARM RETAIL LTD.** B

APPEAL from Falconer J.

By writ dated December 15, 1982, the plaintiffs, Barking and Dagenham London Borough Council, claimed an injunction restraining the defendants, Home Charm Retail Ltd., from opening a shop or causing or permitting others to open a shop for the service of customers on a Sunday at Merrie-lands Crescent, Dagenham, or elsewhere in the district of the London Borough of Barking and Dagenham in breach of the Shops Act 1950. By notice of motion dated December 15, 1982, the plaintiffs sought an injunction in the same terms as that sought in the writ until the hearing of the action or further order. On January 11, 1983, Falconer J. granted the injunction sought on the motion. C

The defendants appealed by notice of appeal dated February 8, 1983, and amended March 3, 1983, on the grounds that (1) the judge misdirected himself in holding that the plaintiffs had authority to commence the proceedings and pursue the application for an injunction by reason of section 71 (1) of the Shops Act 1950; (1A) there was no power in a local authority to bring in its own name proceedings for an injunction restraining the defendants from committing a criminal offence; alternatively (2) the judge ought to have directed himself that the only basis on which the plaintiffs could commence proceedings was pursuant to section 222 of the Local Government Act 1972, if at all; (2A) the judge erred in treating *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324 as authority for the proposition that injunctive proceedings could be initiated by a local authority otherwise than under section 222 of the Local Government Act 1972 or by way of relator action; (2B) the judge erred in thinking it relevant to the issues before him that he was of the view that the enforcement of the law and the carrying out of the statutory duty placed on the local authority was a matter which was expedient for the promotion or protection of the interests of the inhabitants of their area, and the relevant question was whether the authority, having properly directed itself, considered it expedient for the promotion or protection of the interests of the inhabitants of their area to institute civil proceedings in their own name; (2C) there was no evidence before the judge to that effect, and the plaintiffs having contended that they were empowered to bring such civil proceedings otherwise than under section 222 of the Local Government Act 1972, the judge erred in presuming (if he did so) that the plaintiffs had taken into account the matters specified in that section; (3) the judge misdirected himself in holding that he was entitled to presume that the commencement of proceedings in the present form by the plaintiffs was expedient for the promotion or protection of the interests of the inhabitants of their area; (4) on the evidence the judge could and should have concluded that the only reason why the plaintiffs commenced the proceedings was in order to attempt to enforce the law; (5) there was no evidence before the judge that the failure or refusal of the defendants to abide by the law had given rise to any particular problem or difficulty which required action on the part of the plaintiffs in order to protect the interests of the D
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- A inhabitants of their area; (6) the judge was wrong in the absence of any supporting evidence to presume that the commencement of proceedings was expedient for the promotion or protection of the inhabitants of the plaintiffs' area; and (7) the judge erred in exercising his discretion to grant an injunction on the evidence before him: (a) he erred in equating the position of a shopkeeper who opened his shop on Sundays with the position which appertained in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, namely that of a person organising a system which encouraged the mass breaking of the law by others, (b) there was no evidence that criminal proceedings were inadequate to prevent continuing breaches and at most the evidence went to show that the level of fines imposed by the magistrates (which was less than the maximum prescribed by statute) was inadequate to prevent continuing breaches.
- C. The facts are stated in the judgment of Lawton L.J.

John Samuels Q.C. and *Nicholas Davidson* for the defendants in the first appeal.

Simon D. Brown as amicus curiae.

Robert Reid Q.C. and *Nicholas Patten* for the plaintiff councils in the first and second appeals.

- D *John Samuels Q.C.* and *L. J. West-Knights* for the defendants in the second appeal.

Konrad Schiemann Q.C. and *Keith Knight* for the defendants in the third appeal.

Julian Sandys Q.C. for the plaintiff council in the third appeal.

E

Cur. adv. vult.

April 26. The following judgments were handed down.

LAWTON L.J. These three appeals raise a common issue. Can local authorities obtain injunctions to restrain shopkeepers from anticipated unlawful Sunday trading contrary to section 47 of the Shops Act 1950? In the Wolverhampton appeal this is the sole issue. In the other two appeals queries arise on the evidence as to whether the proceedings were ever properly authorised and instituted.

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- G The common issue touches upon a matter of general interest and some public controversy. It is common knowledge that the provisions of the Shops Act 1950 about Sunday trading are widely disregarded and that many people want the statutory prohibition against the Sunday opening of shops for many kinds of retail trading repealed. But not all want this. Some local authorities do what they can within their resources to curb unlawful Sunday trading. Others do little, if anything. We were told by Mr. Schiemann, who has an extensive knowledge of local government law and administration, that for a few years now some local authorities have sought and obtained injunctive relief against anticipated unlawful Sunday trading; but not all applications have been successful. In the cases before us, the Stoke-on-Trent and Barking councils got such relief: Wolverhampton did not.

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The two companies involved in these appeals are typical defendants. They both have chains of retail shops which sell building materials and tools which are used mostly by individuals for home repairs and improvements—colloquially known as do-it-yourself goods. The sale of these kinds

of goods on Sundays is clearly convenient to customers who want to use them during their weekends away from their normal work. A

There was some evidence in the Stoke-on-Trent case, which may be typical of what is happening in many areas, that it was the policy of that local authority to proceed by injunction against the bigger retailers and by warnings against the smaller. This alleged policy was criticised as oppressive at first instance but it is, in my opinion, justifiable if it is effective, as it may be, either by warning off the smaller retailers or by making examples of the bigger ones so as to deter the others. B

At the outset of this judgment I wish to make clear what I regard as irrelevant considerations: first, that section 47 of the Shops Act 1950 is widely disregarded; secondly, that many people want it repealed; thirdly, that many people find it convenient to shop for non-exempt goods on Sundays; and fourthly, that with the resources of manpower and money which are available to local authorities many of them could not hope to stop unlawful Sunday trading save on a selective and spasmodic basis which would probably be regarded as unfair and oppressive. My judicial duty is to apply the law as laid down by Parliament, not to change it. Change is the function of Parliament, not of judges. But cases may reveal to Parliament weaknesses and anomalies in the law which call for change. Whether these appeals will have such an effect is for Parliament to decide. D

The Wolverhampton appeal

This appeal brings out clearly the main issue in all three appeals. It is uncomplicated by side issues. The defendants, B & Q (Retail) Ltd., have three retail shops in Wolverhampton. In the late spring and summer of 1982 they advertised locally that their shops would be open on Sundays; and they were. On November 3, 1982, they were convicted by the Wolverhampton magistrates of 24 offences under section 47 of the Shops Act 1950 and fined £50 in respect of each, and ordered to pay £120 costs. The offences had been committed on dates between May and July 1982. E

On October 13, 1982, the environmental health and control committee of the Wolverhampton Borough Council met. It was the appropriate one to consider breaches of section 47 of the Shops Act 1950. It had before it a report from its chief executive and town clerk which stated what B & Q (Retail) Ltd. had been doing in Wolverhampton and that they had been convicted in a number of other towns of unlawful Sunday trading. The report also dealt with the unlawful trading of other retailers. It contained the following paragraph: F

“Since fines are no deterrent, the only effective form of action which can be taken against companies trading in defiance of the Shops Act 1950 is that taken by Stoke City Council, viz.: the obtaining of an injunction. A local authority has power under section 222 of the Local Government Act 1972 to take such proceedings where they consider it expedient for the promotion or protection of the interests of the inhabitants of their area. This would entail more serious sanctions being applied against the company and its directors and management should they continue to open and I understand that since the obtaining of the injunction at Stoke-on-Trent the store of B & Q (Retail) Ltd. has remained closed.” G H

The chief executive advised that before starting proceedings the defendants should be sent a warning letter. This advice was accepted. On

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Stoke-on-Trent Council v. B & Q Ltd. (C.A.)

Lawton L.J.

A October 19, 1982, a letter was sent to them under the heading "Shops Act 1950—Sunday Trading":

B "In response to complaints received by the council, inspections by officers of the environmental health department have revealed that premises operated by you in Wolverhampton are open on Sundays and are then selling goods outside those contained in Schedule 5 to the above Act. This of course is in clear breach of the law and a report was accordingly submitted to the environmental health and control committee of the council last week. The committee resolved that if the operations in breach of the law did not cease application would be made to the court for an injunction to compel you to observe the law. I therefore inform you that should your premises in Wolverhampton be open in breach of the Shops Act 1950 next Sunday, October 24, and subsequently, application will be made to the court for an injunction without further notice."

C The defendants took no notice. They opened their shops on October 24, 1982, and again committed offences against section 47 of the Shops Act 1950.

D On November 9, 1982, the policy and resources committee resolved that the decisions on Sunday trading taken by the environmental health and control committee should be supported. The chief legal officer was authorised to start proceedings for an injunction. He did so. A writ was issued on December 13, 1982, and on the same day the Wolverhampton Borough Council served a notice of motion asking for an injunction to restrain the defendants until trial from using or causing or permitting the use of their premises otherwise than for lawful Sunday trading. The affidavit in support, sworn by an assistant solicitor in the council's employment, ended as follows:

F "6. I believe that the defendants have been warned verbally as well as by letter that they are breaking the provisions of the Shops Act 1950 and that the defendants continue to trade in breach of section 47 of the Shops Act 1950.

"7. The plaintiffs are under a duty to enforce the provisions of the Shops Act 1950 and I verily believe that contravention of the legislation will take place if an injunction is not granted."

G In my judgment the council had good grounds for thinking that the defendants would go on committing offences under section 47 unless restrained by injunction. I infer that they would not have been deterred by having had even the maximum fine of £200 imposed upon them for each offence. They would have regarded this as the price they had to pay for Sunday opening and that that price was worth paying having regard to the profits which were likely to be made.

H Nourse J. heard the motion on January 18, 1983, and dismissed it. The council have appealed. The judge gave two reasons for his decision. The council had failed to show, first, that the proceedings for an injunction were "expedient for the protection of the interests of the inhabitants of their area" as required by section 222 of the Local Government Act 1972 and, secondly, that a desire on the part of the council to stop the commission of criminal offences under section 47 of the Shops Act 1950 within their area did not justify their using their powers under section 222. The council have submitted that the judge misdirected himself on both points.

The Stoke-on-Trent appeal

In April 1982 it became clear to the Stoke-on-Trent City Council's officers that a number of retail shops selling do-it-yourself goods in their area intended to trade on Sundays. Observation was kept on them on Sunday, April 11, 1982. A number were found to be unlawfully trading, including two shops belonging to the defendants, B & Q (Retail) Ltd. A written report was put before the council's environmental health sub-committee at its meeting on April 15, 1982. It ended with two recommendations as follows:

"1. That in view of the proliferation of contraventions of the Shops Act 1950 legal proceedings be instituted and injunctions be taken out against all the offending companies. 2. That the council make a representation to the Association of District Councils in an endeavour to secure an increase in the level of fines which might more adequately serve as a deterrent to potential offenders."

The report inaccurately stated that the defendants had been convicted in 1981 of an offence under section 1 of the Shops Act 1950. The sub-committee passed the following resolution:

"That, in view of the proliferation of contraventions of the Shops Act 1950, the town clerk be authorised to institute legal proceedings and, where considered appropriate, take out injunctions against the companies concerned."

By letter dated April 19, 1982, the council warned the defendants that legal proceedings might be instituted. They opened their shops again on Sunday April 25, 1982. By letter dated April 27, 1982, the council warned them that unless they gave an undertaking within 24 hours that they would not open their shops on Sunday, May 2, 1982, an application would be made for an injunction. No undertaking was given. The council issued a writ on May 5, 1982, asking for an injunction to restrain these defendants from unlawful Sunday trading in their Stoke-on-Trent shops. They served a notice of motion next day, which came before the court on May 12 and was adjourned. The defendants agreed not to open their shops pending a full hearing. They informed the council's lawyers that they intended to question their power to start proceedings for an injunction. On May 17, 1982, the council's policy committee met and passed the following resolution:

"That this committee, acting on behalf of the local authority and exercising executive powers granted by the city council, and having read and considered the report of the director of environmental services submitted to the environmental health sub-committee on April 15, 1982, and considering that it is expedient for the promotion or protection of the interests of the inhabitants of the City of Stoke-on-Trent that the provisions of section 47 of the Shops Act 1950 should be enforced and in particular that the further breach of those provisions by the retailers named in the report of the director of environmental services should be prevented, the council hereby resolves that pursuant to section 222 of the Local Government Act 1972, the proceedings for an injunction in the High Court against B & Q (Retail) Ltd., under title No. 1982 S. 2111 Chancery Division Group A should be prosecuted and continued and hereby ratifies the same."

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A In an affidavit sworn on May 26, 1982, in answer to the motion one of the defendants' regional managers made it clear that in addition to opposition on legal grounds the defendants would contend that the proceedings had been commenced without any proper authority given by or on behalf of the council.

B The motion was heard by Whitford J. on June 25, 1982. He granted the injunction asked for by the council. He adjudged that the proceedings had been properly authorised and that the council had acted properly pursuant to section 222 of the Local Government Act 1972 because:

"it must be in the general interest of the inhabitants of any area that if there is an open, plain breach of any law all appropriate action may and should be used to ensure compliance."

C The defendants have submitted that he was wrong on both points.

The Barking and Dagenham appeal

D The appellants, Home Charm Retail Ltd., own a shop within the area of the London Borough of Barking and Dagenham. On March 11, 1982, the manager of this shop was warned by one of the council's officers not to open for unlawful Sunday trading. He took no notice. The shop was opened on three successive Sundays thereafter, March 14, 21 and 28, 1982. Informations were laid against the defendants. On July 13, 1982, they were convicted of offences against section 47 of the Shops Act 1950 and fined £50 for each offence and ordered to pay £25 costs.

E On September 15, 1982, the council's general purposes committee considered a number of cases of alleged unlawful Sunday trading, including 14 involving the defendants. They had opened their shop on all Sundays during the spring and summer. Minute 757 reads:

"Trading Standards

F "(i) Authorisation of proceedings—We have authorised the institution of legal proceedings subject to the town clerk being satisfied with the evidence in the following cases:"—There then followed particulars of offences committed by a number of traders including the defendants—"The chief trading standards officer reported that the chairman and vice-chairman had, in accordance with standing order No. 34, and as a matter of urgency, authorised the institution of legal proceedings subject to the town clerk being satisfied with the evidence in the following cases:"—There then followed further references to offences against the Shops Act 1950 committed by traders including the defendants—"The chief trading standards officer reported that, in addition, the chairman and vice-chairman had agreed to the seeking of injunctions in the High Court restraining the directors of companies referred to above . . . from further contraventions of the Shops Act 1950."

H On December 15, 1982, the council issued a writ to restrain the defendants from unlawful Sunday trading. They served a notice of motion which was heard by Falconer J. on January 11, 1983. The defendants took the same legal objection as was taken by the defendants in the other two cases and in addition submitted that the proceedings for an injunction had never been authorised. This point turned not on the delegated powers of the council's general purposes committee or of its chairman and vice-chairman but on the lack of any reference in the minutes to the exercise

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of powers under section 222 of the Local Government Act 1972 and indications in the evidence that the council thought that they were empowered to start proceedings for injunctive relief by section 71 (1) of the Shops Act 1950. The judge granted the council an injunction. He adjudged that section 71 (1) gave them an enabling power to claim injunctive relief in their own name and that on the evidence the council had brought themselves within section 222 of the Act of 1972. The defendants have appealed against these specific findings as well as on the issue common to all three cases.

The law relating to Sunday trading

According to the legal research undertaken by Mr. Reid on behalf of Stoke-on-Trent City Council and Wolverhampton Borough Council English law started to prohibit Sunday trading in the reign of King Athelstan. For about two centuries after the Norman Conquest Sunday trading was legal but, according to *Pease and Chitty's Law of Markets and Fairs*, 2nd ed. (1958), p. 41, in the 13th century the view began to prevail that Sunday marketing was wrong. The Sunday Fairs Act 1448, which was not repealed until 1969, made Sunday trading unlawful. There was, however, an exemption in favour of "necessary victual" which was the origin of the list of goods which may be sold on Sundays set out in Schedule 5 to the Shops Act 1950. The Sunday Observance Act 1676, which remained on the Statute Book until 1960, by section 1 provided:

"no person . . . shall publicly cry, shew forth or expose to sale, any wares, merchandises, fruit, herbs, goods or chattels whatsoever, upon the Lord's day, or any part thereof . . ."

Section 3 provided that the Act did not extend

"to selling of meat in inns, cookshops or victualling houses, for such as otherwise cannot be provided nor to the crying or selling of milk before nine of the clock in the morning or after four of the clock in the afternoon."

This Act was widely disregarded in parts of London, mostly in the street markets of the East End. Parliament made special provisions in both the Shops (Sunday Trading Restrictions) Act 1936 and the Shops Act 1950 (section 54) to legalise such trading. At the end of the 19th century Parliament started to pass Acts regulating the conditions under which shop assistants worked. These Acts provided for closing hours and conditions of employment. The Shops Act 1950 was intended to consolidate the Shops Acts 1912 to 1938 and other enactments relating to shops. It is pertinent to remember that when Parliament passed the Act of 1950 both the Sunday Fairs Act 1448 and the Sunday Observance Act 1676 were still in force. As recently as 1936 in *Kitchener v. Evening Standard Co. Ltd.* [1936] 1 K.B. 576 Atkinson J. had given judgment in favour of a common informer suing for penalties pursuant to the Sunday Observance Act 1780. As the Act of 1950 allowed the sale of some goods on Sundays (see sections 48 to 56 and Schedules 5, 6 and 7), provision had to be made to ensure that such sales were not unlawful under the old Acts. This was done by section 59 (2). In 1950 Parliament presumably had regard for what was thought to be the public's attitude towards trading activities on Sundays. Section 47 left no doubt that shops should be closed on Sundays save for serving customers with the goods specified in Schedule 5. Local authorities were given limited

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A dispensing powers to deal with special situations: see sections 48, 49, 51, 52, 53 and 54. Section 59 made any contravention of the provisions of the Act relating to Sunday trading a criminal offence punishable in the case of a first offence to a fine of £5 and in the case of a second or subsequent offence of £20. These penalties were later increased to £50 and £200; but were not revised again when Parliament increased the maxima for fines for many offences by the Criminal Law Act 1977 and the Criminal Justice Act 1982.

The duty of enforcement

Parliament thought it prudent to make a special provision for the enforcement of the Act of 1950. Section 71 (1) provided:

C “It shall be the duty of every local authority to enforce within their district the provisions of this Act and of the orders made under those provisions, and for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions and such orders as aforesaid as may be necessary to secure observance thereof.”

D By section 71 (2) it was the duty of local authorities “for the purpose of their duties under the foregoing subsection” to appoint inspectors and to authorise them to institute and carry on any proceedings under the Act on their behalf. In the Barking case it was submitted by the council and accepted by Falconer J. that the word “proceedings” which is to be found in section 71 (1), (2) and (4) includes civil proceedings. Before us it was accepted by all counsel, including Mr. Sandys who appeared for Barking and Dagenham London Borough Council, that this word had to be construed in its context as being limited to criminal proceedings and that section 71 did not authorise local authorities to institute and carry on civil proceedings for injunctive relief against anticipated commissions of offences against section 47. What section 71 does make clear, however, is that Parliament intended the prohibition against unlawful Sunday trading to be observed and charged local authorities with the duty of ensuring it was. It seems likely, too, that in 1950 Parliament thought that taking traders before magistrates’ courts and fining them would be an adequate deterrent. The facts of these cases and the social and economic changes which have occurred since 1950 show that convictions and the present scale of fines are no deterrent.

G Local authorities have to grapple with administrative problems when seeking to perform their duties under section 71. Getting evidence of contraventions of section 47 necessitates their inspectors or other employees keeping observation on shops suspected of unlawful Sunday opening. If contraventions are widespread, as in many parts of England and Wales they are, this means an extensive use of expensive manpower; and if that use is ineffective in securing observance of the Act of 1950 time and rate-payers’ money are wasted. Further, failure to secure observance of the Act tends to generate complaints of unlawful and unfair competition by traders who do comply with it. If local authorities disregard these complaints, disgruntled traders may try to make them enforce the Act by means of a judicial review. This is what happened in *Reg. v. Braintree District Council, Ex parte Willingham* (1982) 81 L.G.R. 70. The Divisional Court adjudged that the council did not have a general discretion to decide whether or not to enforce the Act of 1950, nor to decide whether it would be expensive or desirable to institute proceedings. In my judgment this case was rightly decided. What then is a local authority to do? Clearly

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some action has to be taken to stop widespread deliberate flouting of the law. The three local authorities involved in these appeals, and others not before the court, have tried to rely upon the powers given them by section 222 (1) of the Local Government Act 1972, which provides:

“Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . .”

Enforcement by injunction

Both companies involved in these appeals have submitted that these statutory powers do not enable the local authorities to do what they did. If any action needs to be taken, they submitted by their counsel, it should be by the Attorney-General and then only in exceptional circumstances. He has, they said, a wide discretion as to when and how the criminal law should and can be enforced. He alone can weigh the considerations whether attempted enforcement would be likely to make the administration of justice unpopular with a large section of the public, thereby undermining respect for the law. They submitted that these were the principles enunciated by the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435: see Lord Wilberforce at pp. 481–482; Viscount Dilhorne at pp. 489, 491 and 495; Lord Diplock at pp. 498–499; and Lord Edmund-Davies at p. 513. Counsel pointed out that before the passing of the Local Government Act 1972 local authorities had no power anyway to institute in their own names proceedings for injunctive relief to restrain anticipated breaches of the criminal law in their areas. They had to persuade the Attorney-General either to act *ex officio* or to allow them to proceed *ex relatione*: for examples, see *Attorney-General v. Bastow* [1957] 1 Q.B. 514 and *Attorney-General v. Harris* [1961] 1 Q.B. 74. Section 222 of the Act of 1972 did give them a power to sue for such relief in their own names but it was a limited power circumscribed by the words “expedient for the promotion or protection of the interests of the inhabitants of their area.” In consequence of these limiting words local authorities were not given in their areas the wide discretion which the Attorney-General had. Mr. Samuels, on behalf of B & Q (Retail) Ltd., submitted further that as a consequence of these limiting words a local authority could only use its powers under section 222 to restrain anticipated offences if the commission of them was likely to cause a public nuisance. This, he said, was how the Sunday market trading cases, such as *Stafford Borough Council v. Elkendorf Ltd.* [1977] 1 W.L.R. 324 could be justified. Sunday markets do tend to cause public nuisances by attracting large crowds with consequential traffic problems. In the *Stafford* case neither Oliver J. at first instance (unreported), July 30, 1976, nor the Court of Appeal [1977] 1 W.L.R. 324 were asked to consider the limitations on local authorities’ powers under section 222. Further, Lord Denning M.R.’s comment, at p. 329:

“When there is a plain breach of the statute I do not think that the authorities concerned, the county councils, need wait at all for finality anywhere. They can take proceedings in the High Court before any other proceedings are even started.”

must be qualified by what was said in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. Before local authorities could institute proceedings for injunctive relief they had to consider the interests of the inhabitants

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A of their areas, which meant the inhabitants generally, not some of them such as traders who did close their shops on Sundays and complained of unfair or unlawful competition. He invited our attention by way of contrast to section 137 (1) of the Act of 1972 which limited a local authority's powers to use for the benefit of "all or some of its inhabitants."

B Mr. Reid's answer on behalf of the Stoke-on-Trent and Wolverhampton councils was that the words of section 222 did not limit the exercise of power to the restraining of anticipated public nuisances. Both the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 and Bridge L.J. in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324 had envisaged that the institution of proceedings for injunctive relief to restrain anticipated offences could be used in exceptional cases: see *Gouriet's* case [1978] A.C. 435 *per* Lord Wilberforce, at p. 481; *per* C Viscount Dilhorne, at p. 491; and *per* Lord Fraser of Tullybelton, at p. 519. Exceptional cases included those in which an injunction was necessary to restrain an anticipated criminal act "where the penalties imposed for the offence have proved wholly inadequate to deter its commission": see p. 491. Mr. Reid pointed out that Bridge L.J. in the *Stafford* case, seemingly in anticipation of what the House of Lords was to decide in *Gouriet's* case [1978] A.C. 435 and of the problems which have to be D dealt with in these appeals, stated the appropriate approach in these words [1977] 1 W.L.R. 324, 330:

"We have been urged to say that the court will only exercise its discretion to restrain by injunction the commission of offences in breach of statutory prohibitions if the plaintiff authority has first shown that it has exhausted the possibility of restraining those breaches by the exercise of the statutory remedies. Ordinarily no doubt that is a very salutary E approach to the question, but it is not in my judgment an inflexible rule. The reason why it is ordinarily proper to ask whether the authority seeking the injunction has first exhausted the statutory remedies is because in the ordinary case it is only because those remedies have been invoked and have proved inadequate that one can draw the inference, which is the essential foundation for the exercise of the court's discretion to grant an injunction, that the offender is, in the language of Oliver J., 'deliberately and flagrantly flouting the law.'"

I agree with what Bridge L.J. said in this passage; but he did not have to consider, because the point was never taken in the *Stafford* case, what we have to decide in these appeals, namely, whether the instituting of proceedings for injunctive relief to restrain anticipated offences against section 47 of the Shops Act 1950 is expedient for the promotion or protection of the interests of the inhabitants of a local authority's area. I accept Mr. Samuel's proposition that before instituting such proceedings a local authority must consider the interests of the inhabitants generally, not of a particular section of them. I also accept that it is for the Attorney-General to take such steps as he deems necessary in his absolute discretion to ensure that the criminal H law is enforced in all parts of England and Wales. But Parliament in 1972 entrusted local authorities with limited powers to institute legal proceedings of *all* kinds. These powers are ancillary, as Mr. Simon Brown *amicus* pointed out, to the discharge of their statutory duty of administering their areas. They must concern themselves with the environment and the enforcement of a number of statutes creating criminal offences of a regulatory kind. They must safeguard their resources and avoid the waste of their

ratepayers' money. It is in everyone's interest, and particularly so in urban areas, that a local authority should do what it can within its powers to establish and maintain an ambience of a law-abiding community; and what should be done for this purpose is for the local authority to decide. Members of the public should be confident that the local authority will do all it can to ensure that they will not be sold unwholesome food or given false measure, that goods will not be sold with false trade descriptions, that property will not be used in breach of the planning legislation and that shops will be open on days and at hours regulated by the Shops Act 1950. In my judgment a local authority is entitled to use its powers for all these purposes. Its power under section 222 to institute proceedings for injunctive relief is not limited to restraining public nuisances. Further, as I have already commented, the employment of shop inspectors and other employees Sunday after Sunday to keep observation on shops which advertise that they will open on Sundays is a waste of manpower and money; and the cost of prosecuting offenders is not always covered by any orders for costs made by magistrates. It follows, in my judgment, that all local authorities who give thought to these factors and satisfy themselves on reasonable grounds and on adequate evidence that an injunction is the only way of stopping anticipated offences amounting deliberately and flagrantly to flouting the law may use their powers under section 222 of the Act of 1972 to apply for injunctive relief. The Wolverhampton and Barking councils had reasonable grounds for concluding that the defendant companies would continue deliberately and flagrantly to flout section 47 of the Shops Act 1950. The evidence in the Stoke-on-Trent case is less clear. I will examine it separately when dealing with that case.

The exercise of discretion

In all three cases the question arises whether before instituting proceedings for injunctive relief the councils did give thought to the limitation of their powers under section 222 of the Act of 1972. In the Wolverhampton case Nourse J. adjudged that it was for the council to show that what they did was within section 222. In so deciding, as all counsel accepted in this court, he overlooked the application to the exercise of local authorities' powers of the rebuttable presumption of *omnia praesamuntur rite esse acta*. It was for the defendant companies to show, if they could, that the three councils had not given thought to any limitation upon the exercise of their powers. In the Wolverhampton case the defendants called no evidence so the presumption that the council's appropriate committee did exercise their discretion before authorising proceedings applies. There was in fact evidence that their attention was invited to section 222. This was provided by the written report made to them by the council's chief executive to which I have already referred.

The evidence in the Stoke-on-Trent case leads me to infer that that council's environmental health sub-committee did not give thought to the limitations imposed upon their council's powers by section 222 but that the policy committee at its meeting on May 17, 1982, did. Their resolution of that date provided that the proceedings against the defendants "should be prosecuted and continued." and they purported to ratify them. They had, however, been instituted in the council's own name without thought being given to the statutory limitations on the council's powers. In my judgment the words "prosecute" and "appear" in section 222 (1) (a) are apt to describe what the policy committee did, namely, to authorise and

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A ratify what had been started without the proper exercise of discretion. Since May 17, 1982, the council have "prosecuted" the proceedings, having decided that their continuance was expedient for the statutory purposes. The resolution of May 17, 1982, was an effective ratification.

B There remains the question whether on the evidence the conduct of the defendants was such as to require restraint by injunction. When the sub-committee resolved to authorise the town clerk to institute legal proceedings the defendants had only committed one offence against section 47 of the Act of 1950 in the Stoke-on-Trent area and had not yet been prosecuted for it. But before the writ was issued on May 5, 1982, the council had more evidence of what their intentions were for the future. After having been warned by letter dated April 19, 1982, that proceedings had been authorised in respect of the unlawful openings on April 11, 1982, C the defendants unlawfully opened their shops on April 25, 1982, and made no reply to the council's request that they should give an undertaking not to do so on May 2, 1982; and they did open on that date. In my judgment the council were justified in concluding that the defendants intended deliberately and flagrantly to flout the law.

D The evidence in the Barking case raises two issues. Did the council exercise their discretion at all? If they did, were the proceedings for injunctive relief properly authorised? Minute 757 of the meeting of the general purposes committee makes no reference to the matters which had to be considered if proceedings were to be instituted under section 222. I infer that they were not considered. Even had they been there is no evidence that any authority was given for the instituting of legal proceedings for injunctive relief against the defendants Home Charm Retail Ltd. The references to "legal proceedings" against the defendants in their context E clearly refer to criminal proceedings to be taken under section 71 (1) of the Shops Act 1950. The authorisation of civil proceedings was limited to the directors of the companies referred to, not to the companies themselves. No such proceedings were ever instituted.

F I would allow the appeals of the Wolverhampton Borough Council and Home Charm Retail Ltd. and dismiss the appeal of B & Q (Retail) Ltd.

ACKNER L.J. The common question of law which these appeals raise is the extent to which it is open to a local authority to seek in its own name injunctive relief in relation to those who infringe the Shops Act 1950 in relation to Sunday trading.

G *Shops Act 1950*

Section 47 of the Act provides:

"Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in Schedule 5 to this Act."

H Schedule 5 specifies a variety of transactions for the purposes of which a shop may be open in England and Wales for the serving of customers on Sunday. They do not cover the activities of the shops concerned in these appeals, all of which were open for the sale of equipment for use in what is conveniently referred to as "do-it-yourself" activities particularly related to house decoration and maintenance.

No one suggests that the Act is obsolete. On the contrary, it has been recently under much attack and an attempt to achieve its repeal failed in

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the House of Commons this year. It is common ground that the penalties provided by section 59 are in themselves quite inadequate to restrain the large organisations, particularly those who operate a chain of shops which find it highly profitable to trade on Sundays. Recent growth, in particular, in leisure activities has made Sunday the next most popular day after Saturday for shopping for many commodities, including in particular do-it-yourself articles. The penalties provided by section 59 were originally £5 in the case of a first offence and £20 in the case of a second or subsequent offence. In 1972 the penalties were increased to £50 and £200 respectively.

In section 71 of the Act, Parliament has imposed a clear obligation upon the local authority with regard to the enforcement of the Act. The section provides:

“(1) It shall be the duty of every local authority to enforce within their district the provisions of this Act and of the orders made under those provisions, and for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions and such orders as aforesaid as may be necessary to secure observance thereof.”

This section unequivocally obliges the local authority to use the best means they can, having regard to their resources, “to secure observance” of, inter alia, section 47 of the Act. Prior to 1972, if a trader refused to heed the local authority’s warnings in regard to breaches of section 47 of the Act, then the only direct action which the local authority could take would be to institute criminal proceedings in the hope that the fines that would be imposed for the first or subsequent offences would be enough to dissuade the offender. Where, however, the trader, despite the imposition of fines, persisted in defying the Act, then all that was left to the local authority was to apply to the Attorney-General for his permission to bring relator proceedings in order to obtain an injunction. They had no power, if they thought summary proceedings afforded an inadequate remedy, to bring proceedings in their own name in the civil courts for injunctive relief: see *Tottenham Urban District Council v. Williamson & Sons Ltd.* [1896] 2 Q.B. 353. This was so despite the provisions of section 276 of the Local Government Act 1933 which provided:

“Where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings.”

(See *Prestatyn Urban District Council v. Prestatyn Raceway Ltd.* [1970] 1 W.L.R. 33 and *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865).

Section 222 of the Local Government Act 1972

This section replaced section 276 of the Local Government Act 1933. It provides, so far as is material to these appeals:

“(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . .”

Thus, there was added to the local authority’s armoury in relation to securing the observance of the provisions of section 47 of the Shops Act 1950 the right to bring proceedings in the civil court for injunctive relief.

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A *Scope of section 222 of the Local Government Act 1972*

It is common ground that the local authority is not entitled to use the civil courts generally to control criminal conduct; for instance, they would not be entitled to use section 222 to apply for injunctive relief to prevent obscenity occurring in a theatre in their area or the sale of pornography from a local newsagent's shop. The House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 made it clear that relator actions, which are the exclusive right of the Attorney-General to represent the public interest and in which the assistance of the civil courts is invoked in aid of the criminal law, is a jurisdiction which, although useful on occasions, is one of great delicacy and to be used with caution: see in particular the speech of Lord Wilberforce, at p. 481. In that case the right of a local authority to invoke the assistance of the civil courts was not in point, but Viscount Dilhorne, at p. 494, referred to section 222 as giving local authorities a "limited power" to sue on behalf of the public. Lord Edmund-Davies observed, at p. 513, that whenever public rights are in issue, the general rule is that relief may be sought only by, and granted solely at the request of, the Attorney-General subject to the statutory exception created by section 222 "which enables a local authority to institute civil proceedings for the promotion or protection of the interests of the inhabitants of their area."

The proper limitation upon the entitlement of the local authority to apply in their own name for injunctive relief is to be found in the opening words of the section, "Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area." A local authority must consider it expedient and there must be material to support the opinion that the civil proceedings may promote or protect the interests of the inhabitants of their area. With respect, I cannot accept the general observation made by Goulding J. in *Stoke-on-Trent City Council v. Saxon Scaffolding Ltd.* (unreported), October 26, 1979, when he said:

"I conceive that, for the purposes of the section, the inhabitants of any area have a general interest to see that the provisions of Acts of Parliament in force in the area are duly observed."

However, in relation to Sunday trading, there are some matters that are self-evident. The essential motivation for a trader to keep his shop open on a Sunday is because it is profitable to do so. The trader who refuses to abide by the law with regard to Sunday trading and remains undissuaded from trading on that day by repeated prosecutions is, through his criminal conduct, obtaining a wholly unfair advantage in relation to his competitors. He is not only obtaining the profit which is normally associated with his own activities, but he is obtaining an increased profit, likely to be substantial, by reason of his competitors abiding by the law and keeping their shops closed. He is thus, by his criminal conduct, obtaining part of the profit which would normally have gone to them. It is clearly in the interests of the inhabitants of the area involved that there should be fair competition amongst the local traders. If unfair trading is permitted to exist not only will the commercial interests of the trading community be prejudiced, but so ultimately will those of the inhabitants generally in the area.

Moreover, there is a further point which to my mind is equally self-evident. No one doubts that once an injunction has been obtained, unlawful Sunday trading will cease. The penalties for contempt of court are likely to dissuade any commercial activity in breach of the law from continuing.

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In an appropriate case, an injunction is a relatively speedy and inexpensive remedy to obtain. Assuming that the maximum fines that can be obtained will have no deterrent effect upon the trader intent on trading on Sunday, ratepayers' money will be wasted by the preparation for, and the institution of, criminal proceedings. It is clearly in the interests of ratepayers generally that public money is not wasted on useless litigation. A

I accordingly, with respect, reject as quite unrealistic Mr. Samuel's submission that breaches of section 47 of the Shops Act 1950 do not in themselves, unless coupled with behaviour which causes a public nuisance, prejudice the interests of the inhabitants of a particular area. I find support for the view which I have expressed in the observations of Sellers L.J. in *Attorney-General v. Harris* [1961] 1 Q.B. 74, 86, when he said: B

"It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender find it profitable to pay the fine and continue to flout the law. The matter becomes no more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it." C

The discretion of the local authority

1. I have already referred to the duty imposed on local authorities by section 71 (1) of the Shops Act 1950 to enforce the Act, including the Sunday trading provisions. The means of carrying out its duty is essentially a matter for the local authority, bearing in mind its resources, the nature of the breach and any other relevant factors. No local authority could be criticised for first issuing a warning, when it is established that a breach of the Act has occurred or is being threatened. If that warning is disregarded, then much must depend upon the particular circumstances of the case. If satisfied that a successful prosecution may well have the effect of dissuading any repetition of the offence, then, of course, summary proceedings in the local magistrates' court would seem the next appropriate step. However, if the terms in which the warning was rejected, the policy adopted by the offender in regard to Sunday trading in other districts and the likelihood of a conviction and fine for the maximum having no deterrent effect are such, the local authority may well properly decide that criminal proceedings are a waste of time and money. Further, the status in the commercial world of the offender may be such that the speed with which the local authority obtain an effective remedy may make their task of enforcing in their area the provisions of this controversial Act a great deal easier. Each case must be considered on its own merits, but there is no rigid rule which requires a local authority to institute criminal proceedings which are bound, or highly likely, to be ineffectual before moving for injunctive relief: see *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, in particular the judgment of Bridge L.J., at p. 330. D E F G

2. Having regard to the clear terms of section 71 (1) imposing the duty to take such proceedings as may be necessary to secure observance of the Shops Act 1950, the local authority are not entitled to refuse to take effective action because the Shops Act 1950 may be unpopular within their area. They are not entitled to say, we have carried out our obligations under section 71 (1) by instituting criminal proceedings on a number of occasions, although we fully recognise that such proceedings are quite useless to achieve the observance of the Act. If such were the attitude of a local authority then they would have laid themselves open to an order of mandamus H

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- A requiring them to exercise their powers under section 222 of the Act of 1972 and institute civil proceedings: see *Reg. v. Braintree District Council, Ex parte Willingham*, 81 L.G.R. 70, a decision of the Divisional Court with which I respectfully agree. I view this as an important constitutional point. If an Act has become so unpopular that it should no longer be enforced, then it is for Parliament to achieve its repeal. So long as it remains on the statute book, containing as it does a positive obligation on the local authority to enforce its provisions, it has to be treated as the still effective manifestation of the will of Parliament. Its demise is not to be achieved by attrition. If it is no longer justifiable to make it a criminal offence for shops generally to open on a Sunday, and accordingly section 47 should be repealed, this will not be achieved by the non-enforcement of its provisions. Quite the contrary. The strength of the public support for a change in the law will only be debilitated if the section is disregarded.

The institution of proceedings

- As previously stated, the local authority have under section 222 of the Act of 1972 a discretion as to whether to prosecute or institute civil proceedings in their own name. It is axiomatic that in order validly to exercise this discretion the local authority must apply their minds to whether or not they consider it expedient for the promotion or protection of the interests of the inhabitants of their area to exercise these statutory powers. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion they must have regard to those matters: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 228, *per* Lord Greene M.R. It is, of course, for those who assert that the local authority have not had regard to the matters which they ought to have considered to establish that proposition: see *Wednesbury* case, also at p. 228. This may often be difficult. However, where a local authority can be shown to have relied on some other but invalid statutory justification for bringing the proceedings and can thus be shown never to have purported to have exercised the discretion given to it by section 222, the local authority would be shown to have contravened the law.

- Where the local authority purport to act for the promotion or protection of the interests of the inhabitants of their area, then they will be presumed to have done so lawfully pursuant to section 222—the maxim *omnia praesumuntur rite esse acta* applies. Again applying the *Wednesbury* decision, it is for those who assert the unlawfulness to prove this by showing that the local authority made their decision on the basis of facts they should not have taken into account, or failed to take into account matters that they ought to have taken into account, or that no reasonable local authority could have reached the decision they reached.

Ratification

The question which next arises is, given that the proceedings under section 222 are improperly initiated because the local authority are shown not to have considered the criteria of the section, can those proceedings be subsequently ratified and validated? On the authority of *Warwick Rural District Council v. Miller-Mead* [1962] Ch. 441, the answer is in the affirmative. In that case, the statutory power relied upon by the local

authority was section 100 of the Public Health Act 1936 which placed the local authority in the privileged position of being entitled to sue in respect of a statutory nuisance without the necessity of proving special damage. The section is in the following terms:

“ If in the case of any statutory nuisance the local authority are of opinion that summary proceedings would afford an inadequate remedy, they may in their own name take proceedings in the High Court for the purpose of securing the abatement or prohibition of that nuisance, and such proceedings shall be maintainable notwithstanding that the authority have suffered no damage from the nuisance.”

The solicitors for the local authority issued a writ against the owner of a caravan site and served notice of motion to restrain him from keeping or maintaining the site in such a state as to be a statutory nuisance contrary to section 92 of the Act of 1936. However, it was only three days later that the local authority in council meeting resolved, “ being of opinion that the summary proceedings would afford an inadequate remedy ” to take proceedings in the High Court to secure the abatement of the alleged statutory notice. When subsequently Widgery J. heard the council’s motion for an injunction, the defendant raised the objection that the proceedings were a nullity since at the date of the issue of the writ the local authority had not recorded “ its opinion ” by resolution, as required by section 100 of the Act of 1936, and therefore had no capacity to sue and could not by subsequent resolution ratify the act of its servant in issuing the writ. This objection failed and in the Court of Appeal it was held (Lord Evershed M.R. and Dankwerts L.J., Willmer L.J. dissenting) that by the time the defendant challenged the validity of the council’s cause of action promulgated in the endorsement of the writ, the council had by then satisfied the terms of section 100 of the Act of 1936. Moreover, I think that Mr. Reid is correct in his submission that an analogy can properly be drawn with the power which has been accepted to exist to convert an ordinary action into a relator action: see *Hampshire County Council v. Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865, 876 where the action would have been struck out unless the Attorney-General was prepared to give his fiat, which fiat was subsequently granted: see [1971] 1 W.L.R. 1723 and [1974] 1 W.L.R. 305 in the House of Lords.

The discretion of the court to grant or refuse the injunction sought by the local authority

It is important to have firmly in mind that although the local authority may have acted entirely lawfully in seeking in the exercise of its statutory powers under section 222 of the Local Government Act 1972 injunctive relief against a trader, the court’s discretion still exists as to whether or not to grant the injunction sought. Generally speaking a court will not grant an injunction unless the defendant is deliberately and flagrantly flouting the law. Generally speaking the local authority would have to show that its complaints were unheeded and that subsequent prosecutions, resulting in convictions and fines, had failed to deter the defendant. However, as Bridge L.J. recognised in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324, 330, exceptional cases may exist where the scale of the operation which the defendant is carrying on, or plans to carry on, the extent of the profits likely to be enjoyed, are such that it

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A can be legitimately inferred that the defendant will continue in his operations or plans unless the court orders him to desist. But the court must at all times be alert to ensure that its civil jurisdiction does not oust its criminal jurisdiction as the appropriate means of controlling criminal conduct.

B *The three appeals*

I will now seek to apply the principles which I have endeavoured to set out to the three appeals before us. In so doing I gratefully accept the facts so succinctly set out by Lawton L.J. in his judgment and I shall not therefore repeat them.

C *The Wolverhampton appeal*

D (1) The local authority purported to act from the outset under section 222 of the Local Government Act 1972. (2) There was ample material to justify the local authority's concluding that the defendant company would continue deliberately and flagrantly to flout section 47 of the Shops Act 1950. (3) I cannot agree with Nourse J. that the material before the council did not point to any particular prejudice to the interests of the inhabitants of their area as distinct from the public in general. For the reasons given, it is in my judgment self-evident that effectively to prevent unlawful trading which results in unfair competition protects the interests of the inhabitants in the area where the law is being disregarded.

E I too, therefore, would allow the appeal of Wolverhampton Borough Council.

F *The Stoke-on-Trent appeal*

G (1) I agree that although the council's environmental health sub-committee did not give thought to the limitations imposed upon their council's powers by section 222 of the Local Government Act 1972, the policy committee did do so at its meeting on May 7, 1972, and thereby ratified what had been started without the proper exercise of discretion. (2) There was material which justified the local authority in concluding that the defendants intended deliberately and flagrantly to flout the law. (3) I accordingly agree with the conclusion of Whitford J. that this was a proper case for the grant of an injunction and I too would dismiss this appeal.

H *The Barking and Dagenham appeal*

(1) I agree that the proper inference is that the general purposes committee never gave any thought to section 222 of the Local Government Act 1972 and therefore never embarked upon the consideration of the requirements of the section which are necessary to the valid exercise of the discretion which the section confers. If they gave any thought to the basis of their authority to institute proceedings, they wrongly concluded that it was to be found in section 71 of the Shops Act 1950. (2) I further agree that there is no evidence that any authority was given for the institution of legal proceedings for injunctive relief. (3) I too would therefore allow the appeal of Home Charm Retail Ltd.

OLIVER L.J. Each of the three appeals with which we are concerned has individual features which require consideration, but there are two

questions which are common to all three and which are fundamental to the arguments which have been addressed to the court. Although they are, in my judgment, quite distinct questions, they tended to become confused in the course of the argument and it is, I think, important that they be considered separately. The first, which really lies at the threshold of any useful discussion of the subject matter of these appeals, is that of the extent to which it is ever proper to invoke the civil remedy of injunction as an aid to the enforcement of the criminal law in cases where the breach gives rise to no civil right of action in any individual. The second, which assumes the propriety of the invocation of a civil remedy, relates to the circumstances in which proceedings to obtain that remedy can properly be put in motion at the suit, not of the Attorney-General, but of a local authority acting under the statutory power conferred upon them by section 222 of the Local Government Act 1972.

As has been pointed out by both Mr. Samuels and Mr. Schiemann, the decision of this court in *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324 and my own decision at first instance in *Solihull Metropolitan Borough Council v. Maxfern Ltd.* [1977] 1 W.L.R. 127 both preceded the decision of the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 which now represents an authoritative statement of the circumstances in which it will be proper for the court to grant the civil remedy of injunction to restrain threatened breaches of the criminal law which do not also constitute any private wrong. The majority of their Lordships in that case concurred in expressing the view that this form of proceeding is anomalous and to be resorted to only in exceptional circumstances, Lord Wilberforce observing, at p. 481, that in practice it is restricted to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty as in *Attorney-General v. Harris* [1961] 1 Q.B. 74 or cases of emergency such as *Attorney-General v. Chaudry* [1971] 1 W.L.R. 1614.

Where such proceedings are appropriate—that is, where the circumstances are of such an exceptional nature—the proper plaintiff, and the only proper plaintiff, is the Attorney-General unless the case can be brought within one of the statutory or common law exceptions. One such exception is that provided by section 222 of the Local Government Act 1972 but, so the argument runs, that provision does not enlarge the ambit within which such proceedings may properly be brought: it merely enables a local authority, in a proper case and—and this is important—subject to satisfying the provisions of the section, to institute proceedings in their own name instead of in the name of the Attorney-General, as was necessary prior to 1972.

Thus, it is argued, a local authority suing to enforce by injunction a criminal prohibition involving no private wrong have to surmount two hurdles. They have first to show that the case is one where, prior to 1972, it would have been proper for the Attorney-General to proceed in accordance with the principles laid down in *Gouriet* [1978] A.C. 435. Secondly, they have to satisfy also the internal requirements of the section.

Mr. Samuels, indeed, goes further than this, if I understand his argument correctly. He suggests—I think by analogy with section 100 of the Public Health Act 1936—that the power of the local authority to institute proceedings is restricted to cases where some element of public nuisance is involved and that where there is no such element and no invasion of any private right, a relator action by the Attorney-General is still the

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A only appropriate proceeding. Speaking for myself, I am unable to accept this submission and I can see nothing in the history of the legislation or in the structure of the section itself which leads to the conclusion that the power conferred by it is so restricted.

B Nevertheless, I accept entirely the general proposition that the section was not intended to extend and ought not to be treated as extending the range of cases in which application can properly be made to a civil court to aid in the enforcement of the criminal law by providing a remedy which Parliament itself has not seen fit to provide. It was, as Mr. Brown has submitted, clearly designed by Parliament to confer a substantial autonomy upon local authorities within their areas to institute proceedings in cases where they would previously have needed to invoke the assistance of the Attorney-General, but the considerations by which the court should be guided in determining whether or not to grant injunctive relief remain, in my view, the same. Thus the critical question, regardless of the identity of the plaintiffs, is whether the case is an appropriate one for injunctive relief having regard to the limitations suggested by the *Gouriet* case [1978] A.C. 435.

C It then has to be considered whether, on the assumption that the case is one in which the Attorney-General could properly have invoked the relief sought, the local authority can properly assume the role of plaintiff, for section 222 does not give a general and unlimited power. It is a discretionary power to institute civil proceedings in their own name "where the local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area," and this raises two questions which have occupied the bulk of the argument on these appeals, namely (1) in what circumstances can the enforcement of the criminal law in general, and section 47 of the Shops Act 1950 in particular, by means other than those envisaged by Parliament at the time of creating the offences, be considered to be "for the promotion of the interests of the inhabitants of their area" and (2) to what extent is it incumbent upon the local authority in each case (i) actually to consider and (ii) to prove that they have considered the promotion of those interests.

F On the first of these questions several arguments have been advanced. It is not, it is submitted, sufficient to say, as has been said in some cases, simply that it is for the benefit of the inhabitants that the law of the land should be enforced. Section 222 is directed to specifically local interests and it is not, it is suggested, appropriate to use the power conferred by that section for the purpose of general law enforcement, which is for the benefit of the population of the British Isles generally. Thus, the argument runs, one has to look for some more localised interest and where, it is asked forensically, is that to be found? No doubt the closing of all shops on Sunday promotes the interests of those shopkeepers who do not wish to open on Sunday. It promotes the interests of those who have environmental or religious objections to trading on Sundays. But these groups are only sections of the local inhabitants and the section is not referring to the promotion of the interests of "persons who are inhabitants of their area" but of "*the* inhabitants of their area." I agree with Mr. Samuels's submission that this more appropriately refers to the inhabitants generally, so that what one has to look for is some general interest common to the inhabitants taken as a whole, although it may not be the interest of particular individual inhabitants or groups of inhabitants.

H There may well, it is argued, be such a general interest where what is sought to be restrained is some generally organised breach of the law which

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involves public nuisance, traffic congestion, breaches of planning law and the inducement of others to undertake an illegal activity—features which were present in the *Stafford Borough Council v. Elkenford Ltd.* [1977] 1 W.L.R. 324 and *Solihull Metropolitan Borough Council v. Maxfern Ltd.* [1977] 1 W.L.R. 127. But here, it is submitted, there are no such features. The cases in which the three appeals before the court have arisen are cases of individual traders opening their ordinary shopping premises with no element of conspiracy or public disturbance and no evidence of complaint from any member of the public. True it is that in all three cases the defendants had indicated beyond doubt their intention of flouting the law, but nevertheless, it is argued, the penalties prescribed by the Shops Act 1950 are those which Parliament has seen fit to provide and which, so it seems, have been deliberately left unaltered despite there having been subsequent opportunities to increase them. There being, therefore, here no element of public nuisance nor evidence of public complaint, the plaintiffs should, it is argued, be content with the exaction of such penalties as Parliament has prescribed, despite its being perfectly clear that those penalties have absolutely no deterrent effect and are totally ineffective to secure compliance with the statute. Now of course I appreciate the argument for restricting enforcement of the statute to the method which Parliament has prescribed and which, therefore, Parliament must presumably have considered to be adequate. But the fact is that, certainly in the Stoke and Wolverhampton cases, the statutory penalties have proved entirely inadequate. Parliament no doubt considered the penalties adequate and was confident that they would be effective. But at the same time Parliament intended the Act to be enforced and there cannot, I think, be attributed to it the intention, by restricting the statutory penalties to figures which are derisory when compared with the profitability of the prohibited activity, of turning a nation of shopkeepers into a nation of commercial recidivists. Thus the argument based on the non-alteration of the statutory penalties is one which I find less than compelling. There remains, however, the limitation in section 222 of the Act of 1972 to the promotion of the interests of the inhabitants of the area and the difficulty of establishing the criteria for determining where those interests lie. I agree that this is a difficult question but it is one which cannot, in my judgment, be segregated from the essential feature which statutorily underlies the approach of the local authority to enforcement of the Shops Act 1950 by whatever means. I do not, for my part, see how the interests of the inhabitants of the area can be treated apart from the statutory duties of the local authority in relation to the area for which they are responsible, and in this context the provisions of section 71 of the Shops Act 1950 are, in my judgment, crucial. That section has already been referred to in the judgments of Lawton and Ackner L.JJ. and, as has been pointed out, its effect has been the subject matter of a decision of the Divisional Court in *Reg. v. Braintree District Council, Ex parte Willingham*, 81 L.G.R. 70 with which I respectfully agree. No useful consideration of the interests of the inhabitants of the area can be divorced from the background that they are inhabitants of an area the local authority for which are under a specific duty to enforce and to maintain (at the ratepayers' expense) the machinery to enforce the provisions of the Act.

Parliament, for good or ill, has decreed that shops shall not be open on Sunday except for certain specified transactions and it has placed on local authorities a specific duty to enforce that prohibition in their areas. Argument about whether some or all of the inhabitants think that the existence of that duty serves their interests is irrelevant. The duty exists and has to

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A be carried out and it follows that the local authority best serves the interests of the inhabitants by doing that which it is statutorily obliged to do in the way which it considers most effective and most economical. To put it in a negative way it cannot be in the interests of the inhabitants that an offender should be regularly and repeatedly brought before the court for the exaction of a statutory penalty which obviously has no deterrent effect whatever, for there ultimately comes a point where so barren a process not only brings the law into disrepute but exposes the prosecuting authority itself to public ridicule. Nevertheless, it still has to carry out its duty and it has to continue to expend public funds on maintaining the machinery of enforcement and on repetitive but ineffective proceedings. If this situation arises—or in the exceptional case if it is clear that such a situation is inevitably going to arise—then enforcement of the prohibition by proceedings for an injunction not only could properly be considered to promote the interests of the inhabitants but would also do so as a matter of fact, for the local inhabitants have to recognise that one of the facts of life with which they have to live is that their local authority are under this inescapable statutory duty.

D Turning to the evidential problem, I entirely accept Mr. Samuels's and Mr. Schiemann's submissions that the power under section 222 of the Act of 1972 is exercisable only in the circumstances envisaged in the section and that this involves a consideration of whether the action proposed is one which is expedient for the promotion of the interests of the inhabitants. What is less clear to me is how far this involves the consideration of anything beyond the proposition that the action envisaged is the most effective way of carrying out the local authority's statutory duty under section 71 of the Act of 1950. If that is the opinion of the authority—and that it is is self-evident from the very resolution to institute the proceedings—then that, as it seems to me, subsumes the expediency for the promotion of the interests of the inhabitants, for the reasons given above, and it does not seem to me that it becomes necessary to look for some further and different interest of the inhabitants beyond that of having their local authority carry out its statutory duties as expeditiously, effectively and economically as it considers possible. In any event, I agree respectfully with what has fallen from Lawton L.J. as regards the application of the maxim, *omnia prae-sumuntur rite esse acta*.

G Turning to the facts of the individual cases, the questions which arise in each case are (a) were the proceedings properly authorised and (b), if they were, are they, in any event, proceedings of that exceptional nature envisaged in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 which justifies the exercise of the court's discretion in granting injunctive relief to restrain the commission of further offences? As regards the former, the facts have been fully set out in the judgment of Lawton L.J. and I respectfully concur with his conclusions. As regards the latter, the Wolverhampton case is beyond argument a case in which, in the absence of an injunction, the defendants openly state that they intend to go on breaking the law, and Mr. Samuels has frankly accepted—indeed averred—this on their behalf. That seems to me to be a case plainly within the *Gouriet* principles. As regards Stoke, it is true that when the proceedings commenced there had not been a course of conduct which could be said to amount to persistent breach of the law. Nevertheless, again, it is entirely clear that, unless the injunction granted by Whitford J. is continued, the defendants propose to embark on the same course in Stoke as that upon

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which they have already embarked in Wolverhampton. I can see no useful purpose which would be served by refusing an injunction now merely to enable offences to be committed in the future until they reach the point at which the conduct can be said to be persistent. A

Accordingly, I agree that the appeal of the Wolverhampton Borough Council should be allowed and that of the defendants in the Stoke case dismissed. I also agree that the appeal in the Barking and Dagenham case should be allowed for the reason given by Lawton L.J. There simply was, in that case, no proper authority given by the plaintiff council for the institution of the proceedings and it is, I think, entirely clear that section 71 of the Act of 1950 itself does not confer on the local authority any power to institute proceedings of this nature in its own name. B

First appeal dismissed with costs. C
Leave to appeal refused.

Second appeal allowed with costs
Leave to appeal refused.

Third appeal allowed with costs.

Solicitors: *Hepherd, Winstanley & Pugh, Southampton; Treasury Solicitor; Sharpe, Pritchard & Co. for Town Clerk & Chief Executive, Stoke-on-Trent City Council, and Solicitor, Wolverhampton Borough Council; Hepherd, Winstanley & Pugh, Southampton; Laytons; Town Clerk, Barking and Dagenham London Borough Council.* D

C. N. E

F

G

H

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[QUEEN'S BENCH DIVISION]

DEPARTMENT OF TRANSPORT v. NORTH WEST
WATER AUTHORITY1982 Nov. 15, 16;
Dec. 3

Webster J.

Highway—Public utilities—Nuisance—Burst water main—Escape of water constituting nuisance—Damage to street—Water authority not negligent—Whether liable to street authority for cost of repair—Public Utilities Street Works Act 1950 (14 & 15 Geo. 6, c. 39), s. 18 (2) (b)

Section 18 (2) of the Public Utilities Street Works Act 1950 provides:

“If any nuisance is caused—(a) by the execution of code-regulated works, or (b) by explosion, ignition or discharge of, or any other event occurring to, gas, electricity, water or any other thing required for the purposes of a supply or service afforded by any undertakers which at the time of or immediately before the event in question was in apparatus of those undertakers the placing or maintenance of which was or is a code-regulated work . . . nothing in the enactment which confers the relevant power to which section 1 of this Act applies . . . shall exonerate the undertakers from any action or other proceeding at the suit . . . (i) of the street authority . . .”

At all material times the plaintiffs were a street authority responsible for a street for the purposes of the Public Utilities Street Works Act 1950 and the defendants were the water authority responsible for a water main running beneath the street. The defendants were under a duty by virtue of section 11 of the Water Act 1973 to supply water within their area and at all material times were acting in pursuance of that Act. The water main burst and water escaped damaging the street, causing an appreciable obstruction and constituting a nuisance which was not attributable to any negligence on the part of the defendants or anyone for whom the defendants were liable. The water discharged from the broken main was water required for the purposes of a supply or service afforded by the defendants which at the time of, or immediately before, the discharge was in apparatus of the defendants, the placing or maintenance of which was a code-regulated work within the meaning of section 18 (2) (b) of the Public Utilities Street Works Act 1950. Work was carried out by the plaintiffs to repair the damage at a cost of £1,014·87. The defendants agreed to reimburse the plaintiffs for the sum representing the cost of obtaining access through the street to repair the broken water main, but they disputed any liability in respect of the cost of repairing the damage to the street due to the escape of water.

On the plaintiffs' claim for damages in reliance on the provisions of section 18 (2) (b) of the Act of 1950:—

Held, giving judgment for the plaintiffs, that a statutory body was liable for a nuisance committed by it, whether resulting from its negligence or not, subject to the common law rules governing the exoneration from liability for nuisance arising out of the exercise, without negligence, of a statutory duty or power; that it was the existence of the enactment imposing the relevant statutory duty or conferring the relevant statutory power which afforded such exoneration from liability; that on its true construction the effect of section 18 (2) (b)

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of the Act of 1950, having regard to the provisions of the Act generally and, in particular, to the provisions of sections 18 (1) and 19 (1), was to remove such exoneration and to render the body liable as if the nuisance had not been attributable to the exercise of a statutory duty or power; and that, accordingly, the defendants could not rely on the fact that the nuisance was attributable to the exercise, without negligence, of a statutory duty or power under the Water Act 1973, and, in the absence of any other defence, they were liable for the nuisance complained of and the damage to the street resulting therefrom (post, pp. 112D–F, 113A–B, H).

The following cases are referred to in the judgment:

Abel v. Lee (1871) L.R. 6 C.P. 365.

Allen v. Gulf Oil Refining Ltd. [1981] A.C. 1001; [1981] 2 W.L.R. 188; [1981] 1 All E.R. 353, H.L.(E.).

Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 K.B. 772, C.A.

Dunne v. North Western Gas Board [1964] 2 Q.B. 806; [1964] 2 W.L.R. 164; [1963] 3 All E.R. 916, C.A.

Green v. Chelsea Waterworks Co., (1894) 70 L.T. 547, C.A.

Hammond v. Vestry of St. Pancras (1874) L.R. 9 C.P. 316.

Longhurst v. Metropolitan Water Board [1948] 2 All E.R. 834, H.L.(E.).

Midwood & Co. Ltd. v. Manchester Corporation [1905] 2 K.B. 597, C.A.

Rylands v. Fletcher (1868) L.R. 3 H.L. 330, H.L.(E.).

Smeaton v. Ilford Corporation [1954] Ch. 450; [1954] 2 W.L.R. 668; [1954] 1 All E.R. 923.

Stretton's Derby Brewery Co. v. Mayor of Derby [1894] 1 Ch. 431.

The following additional case was cited in argument:

Post Office v. Hampshire County Council [1980] Q.B. 124; [1978] 2 W.L.R. 907; [1979] 2 All E.R. 818, C.A.

ACTION

The plaintiffs, the Department of Transport, and the defendants, the North West Water Authority, agreed the following statement of facts. (1) The plaintiffs were at all material times the highway authority for the A57 trunk road and in particular the stretch of that road outside No. 746 Warrington Road, Rainhill. At the time of the action the section was no longer a trunk road. (2) The defendants were, and at all material times had been, the authority responsible for the four-inch water main running approximately two feet six inches underneath the stretch of road. (3) On or about September 7, 1978, the water main burst, as a result of which damage was caused to the stretch of road. (4) The main was laid under the Rainhill Gas and Water Act 1870. The water supply was administered by the Rainhill Gas and Water Co. under that Act. (5) An agreement of December 10, 1926 transferred the water undertaking to Whiston Rural District Council, the transfer date being November 1, 1927. (6) Under section 119 (2) of the Liverpool Corporation Act 1927 the undertaking so transferred formed part of the waterworks undertaking of the Liverpool Corporation. Section 53 of the Liverpool Corporation Act 1921 empowered Liverpool Corporation to supply water and section 54 of the Act of 1921 defined limits to sell and supply water, which was extended to include Rainhill under the Act of 1927. (7) It was agreed for the purpose of the action: (a) that the defendants were a water authority and at all material times acted in pursuance of the Water Act 1973; (b) that the water main was a necessary part of the

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- A distribution of water to the occupiers of houses in Warrington Road, Rainhill; (c) that there was no negligence on the part of the defendants or their servants or agents or the defendants predecessors, for whom the defendants were liable, or their servants or agents, in respect of the laying or maintenance (including discovery and repair) of the main which burst; and that the defendants used all reasonable diligence to prevent the main becoming a nuisance; (d) that on September 7, 1978, there was a discharge
- B from the main of water required for the purposes of a supply or service afforded by the defendants, which at the time of, or immediately before, the discharge was in apparatus of the defendants the placing or maintenance of which was a code-regulated work within the meaning of section 18 (2) (b) of the Public Utilities Street Works Act 1950; (e) that the damage to the road was an appreciable obstruction of the public right of
- C highway. (8) The total cost to the plaintiffs of the work carried out in making good the damage to the plaintiffs' highway following the burst of the water main was £1,014.87. Of the total, the sum of £459.66 was accepted by the defendants to represent the cost which would have been incurred in any event in obtaining access through the highway to repair the broken water main. The defendants, on September 17, 1981, acknowledged and discharged liability in that sum but at all times disputed any
- D liability in respect of the remainder of the total cost, namely that part representing the cost of repairing the damage due to the escape of water from the broken water main.

E By particulars of claim dated September 27, 1979, issued in the Warrington County Court (plaint no. 79.03224), the plaintiffs claimed damages limited to £1,100 against the defendants in respect of the damage caused to the street resulting from the nuisance caused by the defendants, namely the escape of water. The defendants denied liability. In a reply dated December 10, 1979, the plaintiffs stated their intention of contending that section 18 (2) (b) of the Public Utilities Street Works Act 1950 imposed upon the defendants liability at common law in claims of nuisance in respect of the damage caused.

F With the consent of the parties the action was heard in the Queen's Bench Division of the High Court.

John Davies Q.C. and *Simon D. Brown* for the plaintiffs.

John Roch Q.C. and *Giles Wingate-Saul* for the defendants.

Cur. adv. vult.

G December 3. WEBSTER J. read the following judgment. All the facts which give rise to this action are agreed and I recite them in the terms in which they are agreed (but not in the same order as that in which they are set out in the agreed statement of facts), without distinguishing between agreed facts and facts agreed "for the purpose of this action" and without omitting any matter notwithstanding that nothing seems to have turned

H upon it at the trial.

The plaintiffs were at all material times the highway authority for the A57 trunk road and in particular the stretch of this road outside no. 746, Warrington Road, Rainhill. That section is no longer a trunk road. The plaintiffs are a "street authority," and that stretch of road is a "street," within the meaning assigned to those expressions by section 39 (1) of the Public Utilities Street Works Act 1950. Since, later in this judgment, I shall have to make references both to highway authorities and to street

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authorities, I add (in an attempt to avert confusion) that section 39 (1) defines "street authority" as having the meaning assigned to it by section 2, and that by section 2 (4) "street authority" means, where the street is a maintainable highway, the highway authority. A

The defendants are a water authority and are, and at all material times have been, the authority responsible for the four inch water main running approximately two feet six inches underneath that stretch of trunk road. At all material times they have acted in pursuance of the Water Act 1973. The main was laid under the Rainhill Gas and Water Act 1870. The water supply was administered by the Rainhill Gas and Water Co. under that Act. An agreement of December 10, 1926, transferred the water undertaking to Whiston Rural District Council, the transfer date being November 1, 1927. Under section 119 (2) of the Liverpool Corporation Act 1927, the undertaking so transferred formed part of the Water Works undertaking of the Liverpool Corporation. Section 53 of the Liverpool Corporation Act 1921, empowered the Liverpool Corporation to supply water; and section 54 of that Act defined the limits within which that power might be exercised, which were extended to include Rainhill under the Act of 1927. (I was not referred at the trial of this action to the Gas and Water Act 1870, the Liverpool Corporation Act 1921, or the Liverpool Corporation Act 1927.) B
C
D

On or about September 7, 1978, the water main burst, as a result of which damage was caused to the stretch of the trunk road. There was no negligence on the part of the defendants or their servants or agents or on the part of the defendants' predecessors, for whom the defendants are liable, or their servants or agents, in respect of the laying or maintenance (including discovery and repair of the burst) of the main which burst; and the defendants used all reasonable diligence to prevent the main becoming a nuisance. The water which was discharged from the main when it burst on or about September 7, 1978, was water required for the purposes of a supply or service afforded by the defendants, which at the time of, or immediately before, the discharge was in apparatus of the defendants the placing or maintenance of which was a code regulated work within the meaning of section 18 (2) (b) of the Act of 1950. The damage to the road was an appreciable obstruction of the public right of highway. E
F

The total cost to the plaintiffs of the work carried out in making good the damage to their highway was £1,014.87. Of that total, the sum of £459.66 is accepted by the defendants to represent the cost which would have been incurred in any event in obtaining access through the highway to repair the broken water main. The defendants on September 17, 1981, acknowledged, and have since discharged, liability in this sum but they have at all times disputed any liability in respect of the remainder of the total cost, namely, that part representing the cost of repairing the damage due to the escape of water from the broken water main. Expressed shortly, therefore, the issue between the parties is whether or not the defendants are liable to pay damages to the plaintiffs to compensate them for the cost of repairing the damage to the highway caused by the escape of water from the main; and that issue in turn depends upon the construction of section 18 (2) of the Act of 1950 which, so far as material, provides: G
H

"If any nuisance is caused—(a) by the execution of code-regulated works, or (b) by explosion, ignition or discharge of, or any other event occurring to, gas, electricity, water or any other thing required for the purposes of a supply or service afforded by any undertakers which at the time of or immediately before the event in question was in apparatus

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A of those undertakers the placing or maintenance of which was or is a code-regulated work . . . nothing in the enactment which confers the relevant power to which section 1 of this Act applies . . . shall exonerate the undertakers from any action or other proceedings at the suit . . . (i) of the street authority . . .”

B Powers to which section 1 of the Act applies are: “any statutory power to execute undertakers’ works in a street . . .” It was also accepted at the trial, by counsel on behalf of the defendants, that the escape of water constituted a nuisance at common law actionable at the suit of the plaintiffs; and it was accepted by counsel on behalf of the plaintiffs that he could not seek to establish liability for the escape, on the part of the defendants, without relying upon section 18 (2).

C In order to consider the issue as I have expressed it, it is necessary, as both counsel agreed, to set that issue against the background of the common law rules which govern the liability for nuisance of bodies exercising statutory authority. In my view, it is not necessary to analyse those rules in any detail: it is sufficient for this purpose to express them in the following broad terms. 1. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed upon it by statute: see *Hammond v. Vestry of St. Pancras* (1874) L.R. 9 C.P. 316. 2. It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance: see *Stretton’s Derby Brewery Co. v. Mayor of Derby* [1894] 1 Ch. 431, and *Smeaton v. Ilford Corporation* [1954] Ch. 450. 3. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance: see *Midwood & Co. Ltd. v. Manchester Corporation* [1905] 2 K.B. 597; *Longhurst v. Metropolitan Water Board* [1948] 2 All E.R. 834; and *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806. 4. A body is liable for a nuisance attributable by it to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not exempted from liability, for nuisance: see *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914] 3 K.B. 772.

E In these rules, references to absence of negligence are references to:
 “the qualification, or condition, that the statutory powers are exercised without ‘negligence’—that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons: . . .”: see *Allen v. Gulf Oil Refining Ltd.* [1981] A.C. 1001, 1011, *per* Lord Wilberforce.

References to nuisance are to be taken as references either to liability in nuisance simpliciter, or to liability under the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330.

H The agreed fact that there was no negligence on the part of the defendants or their servants or agents, or on the part of the defendants’ predecessors, in respect of the laying or maintenance of the main (including discovery and repair of the burst), and, in particular, that the defendants used all reasonable diligence to prevent the main becoming a nuisance, constitutes an agreement that the exercise of statutory duty to which the burst was attributable was a duty exercised without “negligence” within

the meaning of that word given to it by Lord Wilberforce in *Allen v. Gulf Oil Refining Ltd.* [1981] A.C. 1001. A

Before considering the rival contentions of the parties as to the proper construction of section 18 (2), there is one other matter which it may be necessary for me to decide, namely, whether the escape of water was attributable to the exercise by the defendants of a statutory duty or whether it was attributable to the exercise of a statutory power. Counsel on behalf of the plaintiffs submitted that, whereas the defendants may have been under a duty to make water supplies available under section 11 of the Water Act 1973, nonetheless neither they nor their predecessors were under any duty to lay the water pipe in the highway: they had no more than a power to do that, so that the escape of water from the main was attributable not to the exercise of a statutory duty but of a statutory power. But in my view the burst and the consequent nuisance occurred not because of the laying of the main but because of the pressure of water in the main; and, in my judgment, if the question be material, the burst and escape of water was attributable to the exercise by the defendants of a statutory duty, not of a statutory power. B C

I turn now to the rival contentions as to the meaning and effect of section 18 (2). In short, counsel on behalf of the plaintiffs contends that that subsection creates either an absolute or a strict liability, such that the defendants are liable for the nuisance attributable to the exercise by them of their statutory duty notwithstanding that they were not negligent. Counsel on behalf of the defendants contends that the effect of the subsection is to do no more than to deprive them of the right to rely upon any statutory provision which would otherwise relieve them of liability, and that since the nuisance was attributable to the exercise by the defendants of a statutory duty, they could not be made liable for this nuisance in accordance with the rules I have stated even if some statute had expressly imposed liability on them for nuisance, and a fortiori where, as here, the effect of the subsection is merely to deprive them of any right which they might have to rely upon a statutory immunity. D E

The detailed submissions made by counsel on behalf of the plaintiffs in support of his contention refer to, and rely upon much of the scheme of, the Act of 1950 as a whole; and it is in any event necessary to have regard to that Act as a whole, and to certain of its provisions, in order to place section 18 (2) in its context, which must be done in order to construe it properly. Accordingly, I will set out the terms, or the substance, of various provisions of the Act which appear to me to be relevant to the construction of section 18 (2). F

The long title, so far as is material, is in the following terms: G

“An Act to enact uniform provisions for regulating relations as to apparatus in streets between authorities, bodies and persons having statutory powers to place and deal with apparatus therein, and those having the control or management of streets and others concerned in the exercise of such powers; . . . and for purposes connected with the matters aforesaid.” H

Section 1 provides, so far as material:

“1 (1) Sections 3 to 14 of this Act and Schedules 1, 2 and 3 thereto (in this Act referred to as ‘the street works code’) shall have effect in relation to powers to which this section applies, that is to say, any statutory power to execute undertakers’ works in a street . . . with a view to—(a) providing a uniform set of provisions for

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A the protection of authorities, bodies and persons concerned in the mode of exercise of such powers as having the control or management of streets . . . (2) In this Act the expression 'undertakers' works' means works . . . for any purposes other than road purposes, being works of any of the following kinds, that is to say—(a) Placing apparatus. Inspecting, maintaining, adjusting repairing, altering or renewing apparatus. Changing the position of apparatus or removing it.

B (b) Breaking up or opening a street . . . for the purposes of works mentioned in paragraph (a) of this subsection . . . (5) In this Act the expression 'code-regulated works' means undertakers' works executed or proposed to be executed—(a) in exercise of a power to which this section applies, being a power in relation to which the street works code has effect . . ."

C Sections 3 to 14 make various provisions for the submission of plans and sections of proposed street works, for the settlement by arbitration of any dispute as to the place where or the mode in which the works are to be carried out, as to the re-instatement of streets after the execution of works, and as to other related matters.

D Section 17 has the effect of enabling an undertaker to execute code-regulated works in a highway without the consent of the highway authority. Its provisions, so far as material, are:

E “(1) Undertakers may, without obtaining any consent to which this subsection applies, execute in a maintainable highway any code-regulated works which they would be entitled to execute therein with that consent . . . This subsection applies to any consent of any of the following authorities, bodies and persons which apart from this subsection they or he would have been entitled in the following capacity to require the undertakers to obtain, that is to say any consent—(i) of the highway authority as such, or (ii) of any transport authority . . . (2) All enactments passed or made before the passing of this Act which require the obtaining of consents which the preceding subsection renders not requisite, whether being public general enactments or special enactments shall cease to have effect in so far as they so require, and no enactment passed after the passing of this Act shall be construed as requiring the obtaining of any such consent unless the contrary intention appears therein . . .”

F

G So much for the wider context of section 18 (2). Its narrower context consists of the other subsections of section 18, and section 19, which so far as material, are:

H “18 (1) If by the execution of lawfully of code-regulated works in a street damage is caused to property of the street authority . . . the undertakers shall pay compensation to the street authority . . . equal to the expense reasonably incurred by them of making good the damage to that property . . . Provided that undertakers shall not be liable by virtue of this subsection in respect of any damage if it would not have been sustained but for misconduct or negligence on the part of the authority or managers or their contractors or any person in the employ of the authority or managers or their contractors.”

I have already set out the relevant provisions of subsections (2). Subsections (3) and (4) provide:

“(3) The preceding provisions of this section shall not confer any rights on a transport authority . . . (4) . . . the preceding provisions

of this section shall not exonerate undertakers from any liability to which they are subject apart from the preceding provisions of this section, whether to a street authority . . . or to any other person.” A

Section 19, so far as material, provides:

“(1) If either—(a) by the execution of code-regulated works in a street which is carried by or goes under a bridge vested in a transport authority or which crosses or is crossed by other property held or used for the purposes of a transport undertaking, or (b) . . . damage is caused to the bridge or other property, or flooding or other obstruction thereof is caused, the undertakers shall indemnify the transport authority against expense reasonably incurred by them of making good the damage or removing the obstruction, and against any loss sustained by them in respect of interference with traffic resulting directly from the damage or obstruction: Provided that undertakers shall not be liable by virtue of this subsection in respect of any damage or obstruction if it would not have been sustained or have occurred but for misconduct or negligence on the part of the authority or their contractors or any person in the employ of the authority or their contractors.” B C

The expression “transport authority” is defined by section 39 (1), but the definition is of no relevance to the argument. I now turn to the detailed submissions as to the construction and effect of section 18 (2). D

Counsel on behalf of the plaintiffs submits, in effect, that a nuisance can be committed without negligence (using the word in its ordinary sense); that ordinarily a statutory undertaker which commits a nuisance is liable for it, whether or not the nuisance is attributable to its negligence (in whatever sense that word is used); that it is only exonerated from that liability, according to the rules which I have set out above, where the nuisance is attributable to the exercise of a statutory power or duty; that it is therefore the enactment which confers the power or imposes the duty that “exonerates” it from liability; and that the clear effect of the words of subsection (2) following the end of paragraph (b) is to remove that exoneration so that, once again, the undertaker is liable for the nuisance as it would otherwise be had the nuisance not been attributable to the exercise of a statutory power or duty. His principal submission, in argument, was that the construction for which he contends is consistent with the scheme of the Act as a whole, and in particular that part of it which regulates and unifies the relationship between the four main public utilities on the one hand and street and transport authorities on the other; and that that construction would have the sensible effect of providing an expeditious apportionment of damage, as between two public bodies (a street authority and a public utility) where damage is caused which is in one way or another attributable to code-regulated works, without the necessity of investigating the many other questions which otherwise might arise, such as whether the damage was attributable to the exercise of a statutory power or duty, whether there had been any negligence in the execution of the original works or in their subsequent maintenance and what, precisely, caused the damage in question. He submits that the use of the word “power” rather than “duty” in the subsection is of no relevance since every statutory duty subsumes a relevant power. E F G H

The effect of the construction for which he contends is that the subsection, while depriving the undertaker of the defence that the nuisance

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A or event was not attributable to his "negligence," does not deprive him of any other defences which might be available, such as that the nuisance was caused by the act of the plaintiff, or by act of God, or by the act of an independent third party. He submits that the application of his construction to the facts of this case has the result that the escape of water following the burst did constitute a nuisance caused by an event such as is defined by paragraph (b), that the defendants are unable, because of
 B the effect of the subsection, to rely upon the fact that the explosion was attributable to the exercise of a statutory power or duty without negligence and that, since they seek to rely upon no other defence, they are therefore liable for the nuisance.

The arguments of counsel on behalf of the defendants, if I have correctly summarised them, are: that if a statutory provision is to have
 C the effect of imposing a strict or absolute liability, it must use words which clearly have that effect; that the words of the subsection do not have that clear effect, and are to be contrasted with other statutory provisions which do have that effect; that if the subsection is to have the effect for which the plaintiffs contend, then it is necessary to add words to it in order to give it that effect, which should not lightly be done; and
 D that even if, contrary to his contention, the subsection creates an absolute or strict liability where otherwise there would be no such liability, it does so only where the nuisance is attributable to the exercise by the undertaker of a statutory power.

The other statutory provisions to which counsel on behalf of the defendants refers, and which he seeks to contrast with section 18 (2), are
 E section 8 of the Telegraph Act 1878, section 14 of the Gas Act 1965, section 6 of the Water Act 1981, and sections 18 (1) and 19 (1) of the Act of 1950 itself. But in my view none of those provisions assists him. Those of the Telegraph Act 1878, the Gas Act 1965 and the Water Act 1981 are all concerned with the liability of the undertaker in question to the public generally rather than with liability to a particular authority and for that reason alone are not strictly comparable; section 8 of the
 F Telegraph Act 1878 and section 6 of the Water Act 1981 deal with damage rather than nuisance and are, therefore, the equivalent of section 18 (1) and section 19 (1) of the Act of 1950 rather than with section 18 (2); and section 14 (1) of the Gas Act 1965 imposes an absolute liability, again for damage rather than for nuisance, in respect of what is obviously a potentially highly dangerous activity. The differences between the
 G wording of sections 18 (1) and 19 (1) of the Act of 1950 on the one hand and section 18 (2) on the other are, in my view, attributable to the fact that the first two of those subsections impose an absolute or a strict liability for damage whereas, in my view and for reasons which will appear, the third makes strict a liability for nuisance which would otherwise not be so.

For reasons which I am about to express, I conclude that the sub-
 H section has the effect for which the plaintiffs contend. It cannot, in my view, be said clearly to have that effect if regard is had only to the words of the subsection itself, since the words "nothing in the enactment . . . shall exonerate the undertakers" would, if literally construed, only affect an undertaker whose enabling Act contains a provision to the effect that the undertaker is not to be liable for a nuisance. If, therefore, the subsection were clearly to have the effect for which the plaintiffs contend, it would, in my view, be necessary to add after the word "power" where

it secondly appears words such as “nor the fact that the nuisance is attributable to the exercise of such a power.” But in my judgment it is to be given that effect, as a matter of construction, if regard is had not merely to the words of the subsection itself but to the other sections of the Act to which I have referred, and particularly to the provisions of sections 18 (1) and 19 (1). For it seems to me that to give to section 18 (2) its literal construction would be to give it a construction inconsistent with the effect of those provisions, whereas to give it the construction for which the plaintiffs contend would be to give it a construction consistent with those provisions. For in my view the effect of sections 18 (1) and 19 (1) is, as it were in consideration for the power given to undertakers to carry out code-regulated works without the consent of the highway or transport authority, to impose upon those undertakers liability to those authorities for damage caused by code-regulated works whether or not that damage is caused by negligence; and, as it seems to me, subsection (2) appears as a separate provision because it is possible that a wrong, properly described as a nuisance, could be caused by the execution of code-regulated works or a specified event without necessarily causing damage to property of the street authority in question and because the street authority may have an interest in preventing or recovering damages for a nuisance even though no damage has been caused to its property. The construction of subsection (2) as being one which creates a liability rather than as being one which deprives an undertaker of a defence is, though perhaps not to any great extent, confirmed by the terms of subsection (3) (“The preceding provisions of this section shall not confer any rights . . .”).

In order to justify any construction of sections 18 and 19 as a whole, that construction must, or at least should, be consistent with a reasonable explanation for the fact that sections 18 (1) and 19 (1) each contain a proviso in identical terms, whereas section 18 (2) contains no such proviso. In my view, that explanation, given the construction which I put upon section 18 (2), is that the proviso is a necessary proviso to sections 18 (1) and 19 (1) but is not needed in section 18 (2) because, whereas it is clearly appropriate to provide the defence of contributory negligence on the part of the plaintiff where the cause of action is one of strict liability for damage caused, no such provision is necessary in section 18 (2) because the act of the plaintiff would be a defence to an action brought in reliance upon that subsection in any event. Conversely, it can be seen to be necessary to add to subsection (2) words which have the effect that the undertaker is to be liable even where the nuisance is not attributable to its negligence because, at common law, that defence would be available to it in an action for nuisance; whereas the very wording of section 18 (1) and section 19 (1) is sufficient to create strict liability without negligence.

In support of his submission that words should not lightly be added to the subsection, counsel on behalf of the defendants relied on the dictum of Willes J. in *Abel v. Lee* (1871) L.R. 6 C.P. 365, where he said, at p. 371:

“No doubt the general rule is that the language of an Act . . . is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy, or injustice. . . . But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act . . . in order to bring it in accordance with his views as to what is right or reasonable.”

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A I do not take the view, however, that I have notionally added the words, to which I have already referred, in order to bring the subsection into accordance with my views of what is right or reasonable; I have notionally added them so as to give to the subsection the construction which, in my view, in its context, is properly to be given to it.

B There is another reason which I would add for construing section 18 (2) as I do. Counsel on behalf of the defendants submits that the only effect of the subsection is to remove an immunity from action or other process where a plaintiff authority has established that a nuisance has been caused by one of the prescribed matters. He referred me to no particular provision of any particular enactment which would have that effect, if that be the true effect of the subsection, so that I have not been provided with any illustration, in any particular instance, of the way in which that effect is achieved. On the contrary, each of the authorities C (which I have already cited) to which he referred when making submissions about the ordinary rules, save three, retained the liability of the undertakers in question for nuisance; those three are *Green v. Chelsea Waterworks Co.* (1894) 70 L.T. 547, *Longhurst v. Metropolitan Water Board* [1948] 2 All E.R. 834, and *Allen v. Gulf Oil Refining Ltd.* [1981] A.C. 1001. Moreover, it seems inherently improbable that any D enactment conferring a relevant power would exonerate the undertaker entirely from any action or other proceeding at the suit of a relevant authority; it seems much more likely that, if such an enactment were to contain some such provision, it would be a provision which exonerated the undertaker from liability for nuisance in the absence of negligence, so as to conform with the general law which I have already described. E Were that to be the only practical effect of the subsection, if it is to be given the meaning for which the defendants contend, it would be precisely the same as its effect if it is given the meaning for which the plaintiffs contend. It seems to me, therefore, if the subsection were to have the effect for which the defendants contend rather than that for which the plaintiffs contend, either that it would have no practical effect or that at best its practical effect would be uncertain. I would, if necessary, justify F the addition of the words to which I have already referred for the purpose of avoiding that uncertainty.

As to the final argument of counsel on behalf of the defendants, that if the subsection, contrary to his contention, creates a strict liability where otherwise there would not be one, it only does so in relation to a nuisance attributable to the exercise of a statutory duty and does not do so in relation G to a nuisance attributable to the exercise of a statutory power, it seems to me that, with respect, he misreads the significance of the word "power" in the subsection. In my view, it does not have any effect so as to qualify the nature of the nuisance caused. Its grammatical effect upon the literal wording of the subsection is merely to identify the enactment referred to; but its substantive effect on the subsection, given the meaning of that subsection which I have ascribed to it, is in my view that the subsection only H creates a strict liability for nuisance caused by (paragraph (a)), or in a defined connection with (paragraph (b)), the execution of code-regulated works where those works have been executed by the undertaker in question pursuant to statutory powers. It may be said that this effect is unnecessary and tautologous, because by virtue of section 1 (1), as it seems, no code-regulated works can be executed other than pursuant to a statutory power; but as the draftsman has not in any event adopted wording which has the precise effect of achieving the meaning which in my view the subsection

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bears when properly construed, it is perhaps not surprising that its wording A should contain such a tautology.

For all these reasons in my judgment the plaintiffs are entitled to judgment against the defendants in the sum of £555·21, the balance of the total cost to the plaintiffs of making good the damage, namely, £1,014·87, after giving credit to the defendants for £459·66 already paid by them.

*Judgment for plaintiffs with costs.
Certificate under section 12 of the
Administration of Justice Act 1969
for leave to apply direct to House of
Lords for leave to appeal.* B

Solicitors: Treasury Solicitor; Keogh Ritson & Co., Bolton. C

[Reported by ISOBEL COLLINS, Barrister-at-Law]

January 26, 1983. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Templeman), in accordance with section 13 of the Administration of Justice Act 1969, allowed a petition by the defendants for leave to appeal. D

[PRIVY COUNCIL]

WILLIAM DAVID WISEMAN APPELLANT E
AND
CANTERBURY BYE-PRODUCTS CO. LTD. RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1983 March 9; Lord Diplock, Lord Wilberforce, F
April 12 Lord Keith of Kinkel, Lord Templeman
and Sir John Megaw

New Zealand—Statutory power—Delegation of power—City council as controlling authority of abattoir—Council delegating statutory powers to company—Whether company's rules surviving expiry of delegation deed—Meat Act 1939 (Statutes of New Zealand 1908–1957, 1960 reprint, vol. 9) s. 16 G

Section 16 of the Meat Act 1939¹ empowered a local authority to delegate its duty to establish and maintain an abattoir within its district to a fit person. The controlling authority of an abattoir was expressed to be the local authority or its delegate for the time being having control of the abattoir. Section 22 of the Act gave the controlling authority power to make rules prescribing, inter alia, the fees, known as hanging fees, to be paid by a person selling meat in the local authority's district from stock which had been slaughtered elsewhere. Rules so made by a delegate were to be approved by the local authority and both rules and delegation deed were subject to the approval of the Minister. In October 1950 a city council as local authority executed a deed delegating its duty to maintain an abattoir to a company for 10 years. The company H

¹ Meat Act 1939, s. 16: see post, p. 118B–H.

3 W.L.R. Wiseman v. Canterbury Bye-Products Co. Ltd. (P.C.)

A made rules prescribing hanging fees which were duly approved by the council. The Minister approved both the delegation and the rules. That first deed of delegation expired in October 1960 and in October 1961 the council executed a second deed of delegation to the company which was approved by the Minister in November 1961. The second deed expired in 1970. In May 1973 the council executed a third deed of delegation to the company for 10 years expressed to come into force in June 1973. That was approved by the Minister in January 1974. Shortly afterwards the defendant sold meat within the council's district which had been slaughtered outside it. He refused to pay hanging fees to the company. The company applied to the High Court for a declaration that he was liable to pay the fees as prescribed by the rules. Cook J. held that the rules had terminated with the expiry of the second delegation deed and refused the declaration. The Court of Appeal allowed the company's appeal.

C On the defendant's appeal to the Judicial Committee: —
 D Held, dismissing the appeal, that it was a general rule of public law that subordinate legislation properly made by a statutory authority continued in force notwithstanding any change in the person or body constituting the authority unless the enabling statute otherwise provided; that, therefore, since it was clear from section 16 (4) of the Meat Act 1939 that in 1960 and in 1970 when the first and second delegation deeds expired the council had replaced the company as the controlling authority of the abattoir for the period until the council executed the succeeding delegation deed and the Meat Act did not provide that rules made by a delegate under section 22 were to lapse when a delegation deed expired, the rules which had been validly made by the company in 1950 had not lapsed on the expiry of the first or the second delegation deed; and that, accordingly, the rules were in force when the defendant sold his meat and hanging fees were due from him to the company in accordance with them (post, pp. 121B–E, G–H, 122D–E).

E Decision of the Court of Appeal of New Zealand [1980] 2 N.Z.L.R. 458 affirmed.

No cases are referred to in the judgment.

F The following case was cited in argument:
Kruse v. Johnson [1898] 2 Q.B. 91, D.C.

APPEAL (No. 8 of 1982) by William David Wiseman, the defendant, from a judgment (December 19, 1980) of the Court of Appeal of New Zealand (Richmond P., McMullin and Quilliam JJ.) whereby that court
 G allowed an appeal by the plaintiff company, Canterbury Bye-Products Co. Ltd., against a judgment delivered on April 22, 1980, by Cook J. in favour of the defendant in the company's action in the High Court against the defendant claiming a declaration that the defendant was liable to pay to the company the prescribed fees for stock killed outside the company's district but sold or traded within it by the defendant.

H The facts are stated in the judgment of their Lordships.

A. A. P. Willy (of the New Zealand Bar) for the defendant.
J. G. Fogarty (of the New Zealand Bar) for the company.

Cur. adv. vult.

April 12. The judgment of their Lordships was delivered by LORD DIPLOCK.

This appeal raises a question of construction of certain provisions of the Meat Act 1939 and the corresponding provisions of the Meat Act 1964 which replaced them without any relevant alteration in their wording. As it was the provisions of the Act of 1939 that were referred to and cited in the Court of Appeal, their Lordships will follow a similar course.

With the preliminary observation that the City of Christchurch (the council) was in 1950, and all times thereafter that are relevant to this appeal, a local authority which was required by section 7 of the Meat Act 1939 to establish and maintain an abattoir for the purposes of its district, it is convenient to set out straightaway the particular provisions of that Act upon the construction of which the present appeal depends:

“2. *Interpretation*—(1) In this Act, unless the context otherwise requires,— . . . ‘Controlling authority,’ in relation to an abattoir, means the local authority for the time being having control of the abattoir, and includes any person to whom a local authority has delegated its power to establish or to maintain the abattoir: . . .

“16. *Local authority may delegate power to establish abattoir*—(1) Any local authority that by this Act is required to establish or to maintain an abattoir, or any local authority that, in accordance with section nine hereof, has made a special order for the establishment of an abattoir, may, with the approval of the Minister, delegate to any fit person or persons (including a company) its power to establish or to maintain the abattoir. (2) Every instrument of delegation by a local authority under this section shall be by deed under the seal of the corporation, and shall be signed by or on behalf of the person or persons to whom the delegation is made. Where the delegation is to a company, the seal of the company shall be affixed to the instrument of delegation. (3) Every such instrument of delegation shall contain only such terms, conditions, and provisions as the Minister may approve, and shall operate as an agreement between the local authority and the person or persons to whom the delegation is made. (4) The person or persons to whom any delegation is made as aforesaid shall, while the instrument of delegation continues in force, be deemed to be the controlling authority of the abattoir, and in relation to the abattoir shall, subject to the provisions of this Act and of the instrument of delegation, have all the rights, powers, duties, and functions which the local authority would have had if the instrument of delegation had not been executed. (5) Every instrument of delegation under this section shall contain provisions for the termination of the delegation if the person or persons to whom the delegation is made fail to establish the abattoir, or to maintain its efficiency (having regard to the requirements of the district) or for any other sufficient reason. In the event of the termination of the delegation, the obligation of the local authority to establish an abattoir, or to maintain an abattoir, as the case may be, shall be immediately revived.

“22. *Controlling authority may make bylaws or rules relating to use of abattoir, and other matters*—(1) The controlling authority of an abattoir (including any person to whom a local authority has delegated its powers and functions in respect of the abattoir in accordance with section 16 hereof) may from time to time make bylaws (where the controlling authority is a local authority) or rules (in any other case), not inconsistent with this Act or with any

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Wiseman v. Canterbury Bye-Products Co. Ltd. (P.C.)

- A regulations thereunder—(a) Regulating the working and management of the abattoir: (b) Prescribing rates of charges to be payable to the controlling authority in accordance with the next succeeding subsection by persons on whose account any stock is slaughtered in the abattoir: (c) Prescribing rates of fees to be paid to the controlling authority in accordance with subsection three thereof in respect of meat sold for consumption within the abattoir district and derived from stock slaughtered in another abattoir or in any meat export slaughterhouse: . . . (d) Prescribing particulars of returns to be furnished to the controlling authority in respect of meat sold for consumption in the abattoir district and derived from stock slaughtered elsewhere than in the abattoir, and prescribing the person or persons required to furnish any such return . . . (3) The fees to be paid to the controlling authority pursuant to bylaws or rules made under paragraph (c) of subsection one hereof shall, in the case of meat derived from stock slaughtered in an abattoir, be payable by the person by whom the meat was sold or deemed to have been sold for consumption in the abattoir district, or, in the case of any such meat in respect of which there has been more than one sale, such fees shall be payable by the person by whom that meat was first sold or deemed to have been sold for consumption in the abattoir district. In the case of meat derived from stock slaughtered in a meat export slaughterhouse, such fees shall be payable by the licensee of that slaughterhouse. Such fees shall be fixed separately for different classes of stock, and shall be fixed at a rate per head of each such class. The rate shall be the same as the rate of the charge made for the use of the abattoir in respect of stock of the same class slaughtered therein . . . (6) All charges and fees payable to the controlling authority pursuant to any bylaws or rules made under this section shall be recoverable by the controlling authority by action in any court of competent jurisdiction or by distress and sale of any stock, meat, carcasses, or hides for the time being in the abattoir on account of any person by whom such charges or fees are payable. (7) Notwithstanding anything in the foregoing provisions of this section, no bylaws or rules made thereunder shall come into force unless and until they have been approved by the Minister. The Minister may at any time disallow, in whole or in part, any bylaw or rule theretofore approved by him, by giving to the controlling authority not less than three months' notice in writing of his intention so to do . . . (9) Bylaws made by any local authority for the purposes of this section shall be made in the same manner as other bylaws are required to be made by that local authority."

The facts which have given rise to the question of construction of these provisions the answer to which is determinative of this appeal can be stated shortly.

- H On October 1, 1950, the council by duly executed deed ("the first delegation deed") delegated to the plaintiff (the company) the council's power to maintain the abattoir that prior to such delegation the council was itself maintaining in its district. The first delegation deed, which was duly approved by the Minister on October 2, 1950, was for a period of 10 years, expiring on October 1, 1960. It contained a provision that any rules made by the company should be submitted to the council for its approval and should not be submitted to the Minister for his approval

unless the council's approval had been first obtained. On September 25, 1950, the company had made rules relating to the use of the abattoir which, among other things, prescribed the rates of fee to be paid to the company in respect of meat sold for consumption within the abattoir district and derived from stock slaughtered in another abattoir or in a meat export slaughterhouse. Such fees are commonly called "hanging fees." These rules were approved by the council and the Minister on October 2, 1950. A B

Although shortly before the expiry of the 10 year period of the first delegation deed, the council had agreed to renew the delegation for a further period of 10 years from October 1, 1960, the deed to give effect to this resolution ("the second delegation deed") was not executed until October 16, 1961, and approval to it was given by the Minister on November 8, 1961. The deed contained an option to the company to obtain the extension of the delegation for a further term of 10 years from October 1, 1970, upon giving at least 12 months' notice of its intention to exercise the option. C

The company did not exercise the option, so the second delegation deed expired on September 30, 1970. Thereafter negotiations took place between the company, the council and the Department of Agriculture, about the modernisation of the abattoir, and it was not until May 23, 1973, that the third delegation deed was executed by the council. It was expressed to come into force on June 1, 1973, and to expire on October 1, 1980, subject, however, to extension for a further period of 10 years at the company's option. This delegation did not receive the approval of the Minister until January 15, 1974. D

The defendant, Wiseman, during a period after January 15, 1974, sold for consumption within the Christchurch abattoir district meat derived from stock slaughtered in another abattoir, but failed to pay to the company in respect of such sales the hanging fees prescribed by the rules as from time to time amended after January 15, 1974, by the company with the approval of the council and the Minister. In the action which is the subject of the present appeal, the company claimed a declaration that the defendant was liable to pay to it the prescribed hanging fees, an account of the amount due in respect thereof and judgment for the sum awarded on the taking of the account. E F

In substance, although it has been sought to be put in a variety of ways, the defendant's defence is that the rules made by the company in 1950 lapsed either (1) on the expiring of the first delegation deed when there was a gap from September 30, 1960, to October 16, 1961, between it and the second delegation deed; or (2) if that gap had been filled retroactively by the provision in the second delegation deed that it should operate as an extension from October 1, 1960, of the period of delegation, the rules nevertheless lapsed on the expiry of the second delegation deed when there was a gap from September 30, 1970, to either June 1, 1973, when the third delegation deed was expressed to come into force, or until January 15, 1974 when the Minister approved it. As respects this second gap, which was that upon which counsel for the defendant principally relied, no question of possible retroactive filling is involved. G H

This argument commended itself to Cook J. in the High Court. He dismissed the company's action. His ratio decidendi is expressed succinctly in the last two sentences of an extract from his judgment that

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A was cited by Richmond P. in the Court of Appeal [1980] 2 N.Z.L.R. 458, 465:

“in the case of a delegate, the power to make rules lies not in the statute alone but in the statute coupled with an instrument of delegation. If the former were repealed, with no saving provision in respect of rules made under it, they would cease to have effect and, if the latter terminates, so surely must the rules.”

B

The Court of Appeal (Richmond P., McMullin and Quilliam JJ.) unanimously reversed Cook J.'s judgment. In brief, Richmond P. and McMullin J. held that the crucial last nine words in the passage cited from the judgment of Cook J. were a non sequitur and that in view of the provisions of the Meat Act 1939 and of sections 20 (d) and 25 (h) of the Acts Interpretation Act 1924 the non sequitur was erroneous in law.

C

Their Lordships agree with the Court of Appeal. Section 16 (4) of the Meat Act 1939 leaves no room for ambiguity. So long as a delegation deed in its favour was in force the company was deemed to be the controlling authority pro tempore and, as such, had all the rights, powers, duties and functions which the council itself would have had as controlling authority if the delegation deed had not been executed, subject only to any relevant limitation of such rights, powers, duties or functions as might be contained in the delegation deed. The powers so vested in the company as controlling authority under the first delegation deed, included the power under section 22 (1) (c) of making rules prescribing hanging fees, which under section 22 (6) were recoverable by the controlling authority by civil action in a court of law. The company's power to make rules under the first delegation was subject to the limitation that any rules made by the company should not be submitted to the Minister for his approval under section 22 (7) unless they had first been approved by the council itself. This limitation was complied with as respect the rules made by the company and approved by the Minister on October 2, 1950.

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The only legal source of the company's power to make rules for the payment of hanging fees that were binding upon third parties, such as Wiseman, who made no use of the abattoir and entered into no contractual relationship with the company, was section 22 of the Meat Act 1939. The Act required that in relation to an abattoir in a district where the maintenance of an abattoir was compulsory there should at all times be a controlling authority capable of exercising the power under section 22 to make rules binding upon third parties. The controlling authority of an abattoir, it was contemplated by the statute, might change from time to time. So long as a delegation deed executed by the council was in force, the other party to the deed was the controlling authority, but the delegation might be (as in the instant case) for a fixed period and on the expiry of that period the council would again become the controlling authority, as section 16 (5) provides, and would continue to be so unless and until it executed a fresh delegation deed in favour of the other party to the former deed (as in the instant case) or in favour of some other person. Their Lordships see no ground in law or common sense why rules validly made under section 22 by a controlling authority of an abattoir, at a time when it was empowered by statute to act in that capacity, should ipso facto become void merely because the person by whom the powers of the controlling authority of that abattoir had hitherto

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been exercised is succeeded by another person invested with the like rule-making powers, including (by virtue of section 25 (h) of the Acts Interpretation Act 1924) the power to revoke and vary any rules made by his predecessor.

The general principle of public law, unless the empowering statute otherwise provides, is that subordinate legislation validly made by a statutory authority (in casu the controlling authority of an abattoir) continues in force notwithstanding any change in the person or persons who constitute the statutory authority. The Meat Act 1939 does not otherwise provide. On the contrary, to treat the general principle as inapplicable would lead to practical consequences so inconvenient that Parliament cannot be supposed to have so intended. It would mean, for instance, that if a local authority terminated a delegation for misconduct under the provision which section 16 (5) requires it to include in a delegation deed, or if a company to which a delegation had been made went into compulsory liquidation, there would be an interregnum until the bylaw-making procedures of local authority were complete and the approval of the Minister to the new bylaws obtained; during the interregnum, although the local authority would be under an obligation to maintain the abattoir, there would be no enforceable rules as to its management or use and no power to charge any fees for the use of it.

Their Lordships accordingly agree with the Court of Appeal that the rules made by the company in 1950 (as varied from time to time by the company with the approval of the council and the Minister during the continuance in force of any of the three delegation deeds) were valid and were in force during the period in respect of which the company seeks to recover hanging fees from the defendant. Throughout that period the rates of hanging fees payable were fixed by successive variations of the relevant rate. All of these variations were made in due form after the third delegation deed had been approved by the Minister. Their Lordships thus are not, in the instant case, concerned with variations made to the rules during either of the two gaps already referred to, during the second of which, at any rate, there was no delegation deed in force. They have heard no argument and must not be taken as expressing any opinion on this topic.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

Solicitors: *Macfarlanes; Wedlake Bell.*

T. J. M.

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[HOUSE OF LORDS]

REGINA RESPONDENT
AND
SULLIVAN APPELLANT

1983 April 20, 21; Lord Diplock, Lord Scarman, Lord Lowry,
June 23 Lord Bridge of Harwich and Lord
Brandon of Oakbrook

*Crime—Insanity—Automatism—Injury to victim caused during
epileptic fit—Defence of automatism—Whether verdict of not
guilty by reason of insanity required in law*

The appellant kicked a man violently on the head and body while suffering a seizure due to psychomotor epilepsy. At his trial he pleaded not guilty to causing grievous bodily harm with intent and inflicting grievous bodily harm. He gave evidence, which was not disputed, that he had no recollection of the incident, and two medical experts, whose evidence was also uncontested, testified that it was strongly probable that the attack took place during the third, or post-ictal, stage of the seizure, when the appellant would make automatic movements of which he was not conscious. At the close of the evidence, the judge ruled, in the absence of the jury, that they should be directed that if they accepted the evidence it would not be open to them to bring in a verdict of not guilty but that they would be bound to return a special verdict of not guilty by reason of insanity. The appellant thereupon changed his plea to guilty of assault occasioning actual bodily harm, and was convicted accordingly. On appeal against conviction on the ground that the judge should have left the defence of non-insane automatism to the jury, the Court of Appeal dismissed the appeal.

On appeal by the appellant:—

Held, dismissing the appeal, that a disorder which so impaired the appellant's mental faculties of reason, memory and understanding, that at the time of the commission of the act he did not know what he was doing or, if he did know, that he did not know that it was wrong, was a "disease of the mind" causing a "defect of reason" within the M'Naghten Rules, whether the aetiology of the impairment was organic or functional and whether it was permanent or transient and intermittent; that, accordingly, despite a reluctance to attach the label of insanity to a sufferer from psychomotor epilepsy, the proper verdict on the evidence was the special verdict of not guilty by reason of insanity (post, pp. 128A–C, F–G, 129H–130B).

M'Naghten's Case (1843) 10 Cl. & Fin. 200 applied.

Reg. v. Kemp [1957] 1 Q.B. 399 and *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, H.L.(N.I.) considered.

Per curiam. The possibility exists of non-insane automatism (for which the proper verdict would be a verdict of not guilty) in cases where temporary impairment (not being self-induced by consuming drink or drugs) results from some external physical factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes (post, p. 129A–B).

Decision of the Court of Appeal (Criminal Division) [1983] 2 W.L.R. 392; [1983] 1 All E.R. 577 affirmed.

The following cases are referred to in the opinion of Lord Diplock:

Bratty v. Attorney-General for Northern Ireland [1963] A.C. 386; [1961] 3 W.L.R. 965; [1961] 3 All E.R. 523, H.L.(N.I.).

M'Naghten's Case (1843) 10 Cl. & Fin. 200.

Reg. v. Kemp [1957] 1 Q.B. 399; [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249.

Reg. v. Quick [1973] Q.B. 910; [1973] 3 W.L.R. 26; [1973] 3 All E.R. 347; 57 Cr.App.R. 722, C.A.

The following additional cases were cited in argument:

Arnold's Case (1724) 16 St.Tr. 695.

Fain v. Commonwealth (1879) 39 Am.Rep. 213.

Hadfield's Case (1800) 27 St.Tr. 1281.

Hill v. Baxter [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, D.C.

Reg. v. Charlson [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859; 39 Cr.App.R. 37.

Reg. v. Clarke [1972] 1 All E.R. 219; 56 Cr.App.R. 225, C.A.

Reg. v. Holmes [1960] W.A.R. 122.

Reg. v. Isitt [1978] R.T.R. 211; 67 Cr.App.R. 44, C.A.

Reg. v. Joyce [1970] S.A.S.R. 184.

Rex v. Holt (1920) 15 Cr.App.R. 10, C.C.A.

Rex v. Offord (1831) 5 C. & P. 168.

Rex v. True (1922) 16 Cr.App.R. 164, C.C.A.

Williams v. Williams [1964] A.C. 698; [1963] 3 W.L.R. 215; [1963] 2 All E.R. 994, H.L.(E.).

APPEAL from the Court of Appeal.

This was an appeal by Patrick Joseph Sullivan from a decision dated December 9, 1982, of the Court of Appeal (Lawton L.J. and Michael Davies and Bush J.J.) dismissing the appellant's appeal against his conviction at the Central Criminal Court on January 15, 1982 (Judge Lymbery Q.C. and a jury) of assault occasioning actual bodily harm. The Court of Appeal refused leave to appeal, but certified under the Criminal Appeal Act 1968 that the following point of law of general public importance was involved in the decision:

"Whether a person who is proved to have occasioned, contrary to section 47 of the Offences Against the Person Act 1861, actual bodily harm to another, whilst recovering from a seizure due to psychomotor epilepsy and who did not know what he was doing when he caused such harm and has no memory of what he did should be found not guilty by reason of insanity."

On February 10, 1983, the Appeal Committee of the House of Lords (Lord Diplock, Lord Keith of Kinkel and Lord Brandon of Oakbrook) allowed a petition by the appellant for leave to appeal.

The facts are stated in the opinion of Lord Diplock.

Lionel Swift Q.C. and *Bruce Speller* for the appellant.
S. G. Mitchell and *V. B. A. Temple* for the Crown.

Their Lordships took time for consideration.

June 23. LORD DIPLOCK. My Lords, the appellant, Mr. Sullivan, a man of blameless reputation, has the misfortune to have been a lifelong sufferer from epilepsy. There was a period when he was subject to major

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Lord Diplock

A seizures known as grand mal; but, as a result of treatment which he was receiving as an out patient of the Maudsley Hospital from 1976 onwards, these major seizures had, by the use of drugs, been reduced by 1979 to seizures of less severity known as petit mal, or psychomotor epilepsy, though they continued to occur at a frequency of one or two per week.

B One such seizure occurred on May 8, 1981, when Mr. Sullivan, then aged 51 was visiting a neighbour, Mrs. Killick, an old lady aged 86 for whom he was accustomed to perform regular acts of kindness. He was chatting there to a fellow visitor and friend of his, a Mr. Payne aged 80, when the epileptic fit came on. It appears likely from the expert medical evidence about the way in which epileptics behave at the various stages of a petit mal seizure that Mr. Payne got up from the chair to help Mr. Sullivan. The only evidence of an eyewitness was that of Mrs. Killick, who did not see what had happened before she saw Mr. Payne lying on the floor and Mr. Sullivan kicking him about the head and body, in consequence of which Mr. Payne suffered injuries severe enough to require hospital treatment.

D As a result of this occurrence Mr. Sullivan was indicted upon two counts: the first was of causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861; the second of causing grievous bodily harm contrary to section 20 of that Act. At his trial, which took place at the Central Criminal Court before Judge Lymbery and a jury, Mr. Sullivan pleaded not guilty to both counts. Mrs. Killick's evidence that he had kicked Mr. Payne violently about the head and body was undisputed and Mr. Sullivan himself gave evidence of his history of epilepsy and his absence of all recollection of what had occurred at Mrs. E Killick's flat between the time that he was chatting peacefully to Mr. Payne there and his returning to the flat from somewhere else to find that Mr. Payne was injured and that an ambulance had been sent for. The prosecution accepted his evidence as true. There was no cross-examination.

F Counsel for Mr. Sullivan wanted to rely upon the defence of automatism or, as Viscount Kilmuir L.C. had put it in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 405, "non-insane" automatism; that is to say, that he had acted unconsciously and involuntarily in kicking Mr. Payne, but that when doing so he was not "insane" in the sense in which that expression is used as a term of art in English law, and in particular in section 2 of the Trial of Lunatics Act 1883, as amended by section 1 of the Criminal Procedure (Insanity) Act 1964. As was decided unanimously by this House in *Bratty*, before a defence of non-insane automatism may properly be left to the jury, some evidential foundation for it must first be laid. G The evidential foundation that counsel laid before the jury in the instant case consisted of the testimony of two distinguished specialists from the neuro-psychiatry epilepsy unit at the Maudsley Hospital, Dr. Fenwick and Dr. Taylor, as to the pathology of the various stages of a seizure due to psychomotor epilepsy. Their expert evidence, which was not disputed by the prosecution, was that Mr. Sullivan's acts in kicking Mr. Payne had all H the characteristics of epileptic automatism at the third or post-ictal stage of petit mal; and that in view of his history of psychomotor epilepsy and hospital records of his behaviour during previous seizures, the strong probability was that Mr. Sullivan's acts of violence towards Mr. Payne took place while he was going through that stage.

The evidence as to the pathology of a seizure due to psychomotor epilepsy can be sufficiently stated for the purposes of this appeal by saying that after the first stage, the prodrom, which precedes the fit itself, there

is a second stage, the ictus, lasting a few seconds, during which there are electrical discharges into the temporal lobes of the brain of the sufferer. The effect of these discharges is to cause him in the post-ictal stage to make movements which he is not conscious that he is making, including, and this was a characteristic of previous seizures which Mr. Sullivan had suffered, automatic movements of resistance to anyone trying to come to his aid. These movements of resistance might, though in practice they very rarely would, involve violence. A B

At the conclusion of the evidence, the judge, in the absence of the jury, was asked to rule whether the jury should be directed that if they accepted this evidence it would not be open to them to bring in a verdict of "not guilty," but they would be bound in law to return a special verdict of "not guilty by reason of insanity." The judge ruled that the jury should be so directed. C

After this ruling, Mr. Sullivan, on the advice of his counsel and with the consent of the prosecution and the judge, changed his plea to guilty of assault occasioning actual bodily harm. The jury, on the direction of the judge, brought in a verdict of guilty of that offence, for which the judge sentenced him to three years' probation subject to the condition that during that period he submitted to treatment under the direction of Dr. Fenwick at the Maudsley Hospital. D

My Lords, neither the legality nor the propriety of the procedure adopted after the judge's ruling has been canvassed in this House; nor was it canvassed in the Court of Appeal to which an appeal was brought upon the ground that the judge ought to have left to the jury the defence of non-insane automatism which, if accepted by them, would have entitled Mr. Sullivan to a verdict of "not guilty." In these circumstances the present case does not appear to be one in which it would be appropriate for this House to enter into a consideration of the procedure followed in the Central Criminal Court after the judge's ruling; more particularly, as it raises some questions that will shortly come before your Lordships for argument in another appeal. E

The Court of Appeal [1983] 2 W.L.R. 392 held that Judge Lymbery's ruling had been correct. It dismissed the appeal and certified that a point of law of general public importance was involved in the decision, namely: F

"Whether a person who is proved to have occasioned, contrary to section 47 of the Offences against the Person Act 1861, actual bodily harm to another, whilst recovering from a seizure due to psychomotor epilepsy and who did not know what he was doing when he caused such harm and has no memory of what he did should be found not guilty by reason of insanity." G

My Lords, for centuries up to 1843, the common law relating to the concept of mental disorder as negating responsibility for crimes was in the course of evolution, but I do not think it necessary for your Lordships to embark upon an examination of the pre-1843 position. In that year, following upon the acquittal of one, Daniel M'Naghten, for shooting Sir Robert Peel's secretary, in what today would probably be termed a state of paranoia, the question of insanity and criminal responsibility was the subject of debate in the legislative chamber of the House of Lords, the relevant statute then in force being the Criminal Lunatics Act 1800 (39 & 40 Geo. 3, c. 94) "for the safe custody of insane persons charged with offences," which referred to persons who were "insane" at the time of the commission of the offence, but contained no definition of insanity. The H

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A House invited the judges of the courts of common law to answer five abstract questions on the subject of insanity as a defence to criminal charges. The answer to the second and third of these questions combined was given by Tindal C.J. on behalf of all the judges, except Maule J., and constituted what became known as the M'Naghten Rules. The judge's answer is in the following well known terms (see *M'Naghten's Case* (1843) 10 Cl. & Fin. 200, 210):

B "the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

C Although the questions put to the judges by the House of Lords referred to insane delusions of various kinds, the answer to the second and third questions (the M'Naghten Rules) is perfectly general in its terms. It is stated to be applicable "in all cases" in which it is sought "to establish a defence on the ground of insanity." This answer was intended to provide a comprehensive definition of the various matters which had to be proved (on balance of probabilities, as it has since been held) in order to establish that the accused was insane within the meaning of the statute of 1800 which, like its successors of 1883 and 1964, make it incumbent upon a jury, if they find the accused to have been "insane" at the time that he committed the acts with which he is charged, to bring in a verdict neither of "guilty" nor of "not guilty" but a special verdict the terms of which have varied under the three successive statutes, but are currently "not guilty by reason of insanity."

The M'Naghten Rules have been used as a comprehensive definition for this purpose by the courts for the last 140 years. Most importantly, they were so used by this House in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386. That case was in some respects the converse of the instant case. Bratty was charged with murdering a girl by strangulation. He claimed to have been unconscious of what he was doing at the time he strangled the girl and he sought to run as alternative defences non-insane automatism and insanity. The only evidential foundation that he laid for either of these pleas was medical evidence that he might have been suffering from psychomotor epilepsy which, if he were, would account for his having been unconscious of what he was doing. No other pathological explanation of his actions having been carried out in a state of automatism was supported by evidence. The trial judge first put the defence of insanity to the jury. The jury rejected it; they declined to bring in the special verdict. Thereupon, the judge refused to put to the jury the alternative defence of automatism. His refusal was upheld by the Court of Criminal Appeal of Northern Ireland and subsequently by this House.

The question before this House was whether, the jury having rejected the plea of insanity, there was any evidence of non-insane automatism fit to be left to the jury. The ratio decidendi of its dismissal of the appeal was that the jury having negatived the explanation that Bratty might have been acting unconsciously in the course of an attack of psychomotor

epilepsy, there was no evidential foundation for the suggestion that he was acting unconsciously from any other cause. A

In the instant case, as in *Bratty*, the only evidential foundation that was laid for any finding by the jury that Mr. Sullivan was acting unconsciously and involuntarily when he was kicking Mr. Payne, was that when he did so he was in the post-ictal stage of a seizure of psychomotor epilepsy. The evidential foundation in the case of *Bratty*, that he was suffering from psychomotor epilepsy at the time he did the act with which he was charged, was very weak and was rejected by the jury; the evidence in Mr. Sullivan's case, that he was so suffering when he was kicking Mr. Payne, was very strong and would almost inevitably be accepted by a properly directed jury. It would be the duty of the judge to direct the jury that if they did accept that evidence the law required them to bring in a special verdict and none other. The governing statutory provision is to be found in section 2 of the Trial of Lunatics Act 1883. This says "the jury shall return a special verdict . . ." B C

My Lords, I can deal briefly with the various grounds on which it has been submitted that the instant case can be distinguished from what constituted the ratio decidendi in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, and that it falls outside the ambit of the M'Naghten Rules. D

First, it is submitted the medical evidence in the instant case shows that psychomotor epilepsy is not a disease of the mind, whereas in *Bratty* it was accepted by all the doctors that it was. The only evidential basis for this submission is that Dr. Fenwick said that in medical terms to constitute a "disease of the mind" or "mental illness," which he appeared to regard as interchangeable descriptions, a disorder of brain functions (which undoubtedly occurs during a seizure in psychomotor epilepsy) must be prolonged for a period of time usually more than a day; while Dr. Taylor would have it that the disorder must continue for a minimum of a month to qualify for the description "a disease of the mind." E

The nomenclature adopted by the medical profession may change from time to time; *Bratty* was tried in 1961. But the meaning of the expression "disease of the mind" as the cause of "a defect of reason" remains unchanged for the purposes of the application of the M'Naghten Rules. I agree with what was said by Devlin J. in *Reg. v. Kemp* [1957] 1 Q.B. 399, 407, that "mind" in the M'Naghten Rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act. The purpose of the legislation relating to the defence of insanity, ever since its origin in 1800, has been to protect society against recurrence of the dangerous conduct. The duration of a temporary suspension of the mental faculties of reason, memory and understanding, particularly if, as in Mr. Sullivan's case, it is recurrent, cannot on any rational ground be relevant to the application by the courts of the M'Naghten Rules, though it may be relevant to the course adopted by the Secretary of State, to whom the responsibility for how the defendant is to be dealt with passes after the return of the special verdict of "not guilty by reason of insanity." F G H

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Lord Diplock

A To avoid misunderstanding I ought perhaps to add that in expressing my agreement with what was said by Devlin J. in *Kemp*, where the disease that caused the temporary and intermittent impairment of the mental faculties was arteriosclerosis, I do not regard that learned judge as excluding the possibility of non-insane automatism (for which the proper verdict would be a verdict of “not guilty”) in cases where temporary impairment (not being self-induced by consuming drink or drugs) results from some

B external physical factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes. I mention this because in *Reg. v. Quick* [1973] Q.B. 910, Lawton L.J. appears to have regarded the ruling in *Kemp* as going as far as this. If it had done, it would have been inconsistent with the speeches in this House in *Bratty*, [1963] A.C. 386, where *Kemp* was alluded to without disapproval by

C Viscount Kilmuir L.C., at p. 403, and received the express approval of Lord Denning, at p. 411. The instant case, however, does not in my view afford an appropriate occasion for exploring possible causes of non-insane automatism.

The only other submission in support of Mr. Sullivan’s appeal which I think it necessary to mention is that, because the expert evidence was to the effect that Mr. Sullivan’s acts in kicking Mr. Payne were unconscious and thus “involuntary” in the legal sense of that term, his state of mind was not one dealt with by the M’Naghten Rules at all, since it was not covered by the phrase “as not to know the nature and quality of the act he was doing.” Quite apart from being contrary to all three speeches in this House in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, this submission appears to me, with all respect to counsel, to be

E quite unarguable. Dr. Fenwick himself accepted it as an accurate description of Mr. Sullivan’s mental state in the post-ictal stage of a seizure. The audience to whom the phrase in the M’Naghten Rules was addressed consisted of peers of the realm in the 1840’s when a certain orotundity of diction had not yet fallen out of fashion. Addressed to an audience of jurors in the 1980’s it might more aptly be expressed as “He did not know what he was doing.”

F My Lords, it is natural to feel reluctant to attach the label of insanity to a sufferer from psychomotor epilepsy of the kind to which Mr. Sullivan was subject, even though the expression in the context of a special verdict of “not guilty by reason of insanity” is a technical one which includes a purely temporary and intermittent suspension of the mental faculties of reason, memory and understanding resulting from the occurrence of an epileptic

G fit. But the label is contained in the current statute, it has appeared in this statute’s predecessors ever since 1800. It does not lie within the power of the courts to alter it. Only Parliament can do that. It has done so twice; it could do so once again.

Sympathise though I do with Mr. Sullivan, I see no other course open to your Lordships than to dismiss this appeal.

H LORD SCARMAN. My Lords, I agree with the speech delivered by my noble and learned friend, Lord Diplock. I would dismiss the appeal.

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with his conclusions and, for the reasons which he gives, I would dismiss the appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Diplock, with which I fully agree, I too would dismiss this appeal. A

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it, and for the reasons which he gives I would dismiss the appeal. B

Appeal dismissed.

Solicitors: *Armstrong & Co.; Solicitor, Metropolitan Police.*

M. I. H. C

[HOUSE OF LORDS]

ASTRO EXITO NAVEGACION S.A. RESPONDENTS D
AND
CHASE MANHATTAN BANK N.A. APPELLANTS

[On appeal from ASTRO EXITO NAVEGACION S.A. v. SOUTHLAND ENTERPRISE CO. LTD. AND ANOTHER (NO. 2) (CHASE MANHATTAN BANK N.A. INTERVENING)]

1983 May 3, 4; Lord Diplock, Lord Keith of Kinkel, Lord Scarman, E
June 23 Lord Roskill and Lord Bridge of Harwich

Injunction — Interlocutory — Jurisdiction to grant — Interlocutory order requiring buyers to fulfil contractual obligation by signing document—Master of Supreme Court to sign if buyers default—Document affecting third party—Whether jurisdiction to grant interlocutory injunction in mandatory terms—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c. 49), s. 47¹ F

An agreement made between sellers and buyers, through agents, provided for the delivery of a vessel at Kaohsiung harbour, Taiwan, and for payment by letter of credit. The letter of credit was opened with a Taiwan bank and subsequently confirmed by a bank in London. The buyers later inserted an additional obligation to the letter of credit. The amendment, not provided for in the agreement and accepted under protest by the sellers, stipulated that the notice of readiness must be accepted and signed by the buyers' agents. When the buyers refused to accept the notice of readiness, the sellers brought proceedings against them for specific performance. On the buyer's application, the proceedings were stayed pending arbitration. The judge, however, with regard to the sellers' application for interlocutory relief, made certain mandatory orders to secure the release of the purchase price before the letter of credit expired on October 30, 1980. He ordered, *inter alia*, the buyers, through their agents, to sign the notice of readiness by 12 noon on October 28, 1980, failing which a master of the Supreme Court would be appointed to sign it, the resulting document to stand as a valid and duly G
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¹ Supreme Court of Judicature (Consolidation) Act 1925, s. 47: see post, p. 141D-E).

3 W.L.R. Astro Exito S.A. v. Southland Enterprise Co. Ltd. (H.L.(E.))

A executed document, and to instruct the Taiwan bank to authorise the London bank to release the purchase price, which was then to be placed in an account in the joint names of the parties' solicitors and not to be released until further order. The notice of readiness, signed by a master on the buyers' agents' failure to do so, was tendered with all the other documents necessary to operate the letter of credit and rejected by the London bank. On November 10, 1980, the buyers issued a notice of appeal against the judge's order. Two days later the sellers brought separate proceedings against the London bank in relation to the letter of credit. Meanwhile, the sellers also commenced arbitration proceedings against the buyers for damages, which culminated in an award in the sellers' favour. The buyers, no longer interested in the appeal, applied to withdraw, and the London bank, wishing to challenge the validity of the judge's order, made an application under R.S.C., Ord. 5, r. 6 (2) (b) to be joined as third defendant to that action to enable it to pursue the appeal. The Court of Appeal allowed the London bank's application to intervene but dismissed its appeal.

On appeal by the London bank by leave of the House of Lords:—

D *Held*, dismissing the appeal, that there was no limitation on the class of document in relation to which the powers accorded by section 47 of the Supreme Court of Judicature (Consolidation) Act 1925 might be invoked, nor on the purpose for which a document executed in accordance with those powers might be used; and that the judge had had jurisdiction to make the order for "alternative" signature of the notice of readiness by the master notwithstanding that the purpose of the execution of the notice had been to fulfil the requirement of a contract other than that between the parties immediately before the court and, as the case had been a strong one for ordering specific performance in favour of the sellers, had been entitled in his discretion to make the order (post, pp. 132A–C, 141F–142A, 142F–G).

Quaere. Whether the bank's application to be joined as defendant to the action should have been granted (post, pp. 132A–C, 142E–F, F–G).

F Decision of the Court of Appeal [1982] Q.B. 1248; [1982] 3 W.L.R. 296; [1982] 3 All E.R. 335 affirmed.

The following case is referred to in the opinion of Lord Roskill:

United City Merchants (Investments) Ltd. v. Royal Bank of Canada [1983] A.C. 168; [1982] 2 W.L.R. 1039; [1982] 2 All E.R. 720, H.L.(E.).

The following additional cases were cited in argument:

G *Astro Exito Navegacion S.A. v. Southland Enterprise Co. Ltd.* [1981] 2 Lloyd's Rep. 595, C.A.
Gebr Van Weelde Scheepvaart Kantoor B.V. v. Homeric Marine Services Ltd. [1979] 2 Lloyd's Rep. 117.

APPEAL from the Court of Appeal.

H This was an appeal by the third defendants, Chase Manhattan Bank N.A., by leave of the House of Lords from the decision of the Court of Appeal (Stephenson, Ackner and O'Connor L.J.J.) on April 5, 1982, affirming a decision of Parker J. in chambers on October 24, 1980, in favour of the plaintiff sellers, Astro Exito Navegacion S.A. The Court of Appeal refused the bank leave to appeal, but the Appeal Committee of the House of Lords on July 29, 1982 [1982] 1 W.L.R. 1137, allowed a petition by the bank for leave.

The facts are set out in the opinion of Lord Roskill.

Leonard Hoffmann Q.C. and Michael Tugendhat for the bank. A
Nicholas Phillips Q.C. and Steven Gee for the sellers.

Their Lordships took time for consideration.

June 23. LORD DIPLOCK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Roskill. I agree with it, and for the reasons he gives I would dismiss the appeal. B

LORD KEITH OF KINKEL. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Roskill, which I have had the benefit of reading in draft and with which I agree, I too would dismiss the appeal.

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Roskill. I agree with it, and for the reasons which he gives I would dismiss the appeal with costs. C

LORD ROSKILL. My Lords, the history of the dispute which gives rise to this appeal to your Lordships' House by the Chase Manhattan Bank N.A. ("the bank") is long and complex and must, I fear, be related in some detail in order that the matters for decision can be properly understood though those matters themselves are not, as I understand all your Lordships to agree, difficult of decision. The appeal arises out of an action ("the action") between the respondents Astro Exito Navegacion S.A., a Panamanian company, and Southland Enterprise Co. Ltd., a Taiwanese company. In the action the respondents (I shall call them "the sellers") were plaintiffs and the Taiwan company (I shall call them "the buyers") were the first defendants. I can ignore the existence of the second defendants in the action. The bank, though now the appellants to your Lordships' House, were not initially parties to the action; indeed it is of great importance to observe at the outset that they were not parties to the contract out of the clear and indeed deliberate breaches of which by the buyers the action arose. The bank applied for and were granted leave to be added as defendants in the action by the Court of Appeal, (Stephenson, Ackner and O'Connor L.J.J.) [1982] Q.B. 1248 on March 4, 1982, after the action itself as between the sellers and the buyers had been stayed by Parker J. on October 24, 1980. The purpose of that application by the bank was to enable the bank to appeal against other parts of that order which Parker J. had then made, an order in which the bank claimed to be interested in circumstances still to be related. After that leave had been given and by the time the bank's appeal was thereafter heard, the buyers, who had themselves on November 10, 1980, initially given notice of appeal against that order, withdrew from the proceedings so that unless the bank were allowed to be joined and to prosecute the appeal, no appeal would have been pursued against the learned judge's order. Subsequently on April 5, 1982, the Court of Appeal dismissed the bank's appeal, the judgment of the court being given by Ackner L.J., at pp. 1264-1271. Leave to appeal was refused but such leave was later given by your Lordships' House. D
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My Lords, with that brief introduction to explain how this appeal arises, I turn to consider the history of the dispute. The sellers owned a Greek motor vessel named *Messiniaki Tolmi*. She was of some 51,400 gross

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A registered tons, and was built in Norway in 1965. By a written agreement ("the sale agreement") dated July 2, 1980, but not signed until July 23, 1980, the sellers agreed to sell and the buyers agreed to buy the vessel for breaking up at Taiwan at the price of U.S.\$4,241,575 which your Lordships were told represented a price of U.S.\$212.50 per light-weight ton. The sale agreement included the following provisions which it is necessary to set out in full:

B " (1) The vessel is now trading and is to be delivered to the purchasers inside Kaohsiung harbour under her own power 'as is' safely afloat and substantially intact expected during September 1-30, 1980, with September 30, 1980, cancelling (after discharge of inward cargo, if any) with all her outfit, materials, tackle, apparel and spare gear as on board but with the exception of private effects of captain, officers and crew and hired equipment, if any. Should the vessel not be ready for delivery within September 30, 1980, cancelling for any reason other than mentioned in clause 3 hereof, the purchasers have the option of maintaining or cancelling this agreement, such option to be declared within 48 hours and in the event of cancellation or the purchasers' failure to exercise such option, the deposit and letter of credit shall be immediately released to the purchasers in full and this agreement shall be considered null and void.

D " (2) The purchasers shall deposit with the vendors' agents, Felicity Navigation Corporation, a new Taiwan dollar cheque for the equivalent of 10 per cent. of the purchase price, such deposit to be lodged on signing this agreement and to be returned to the purchasers on opening the confirmed irrevocable letter of credit as detailed hereunder. The whole of the purchase price amounting to U.S.\$4,241,575 shall be paid by a confirmed irrevocable letter of credit in terms acceptable to the vendors and valid until October 30, 1980, established by a full detailed cable or telex within 15 working days from signing this agreement, such confirmed irrevocable letter of credit to be in favour of the vendors for the account of Oceanic Finance Corporation Ltd. (for and on behalf of Astro Exito Navegacion S.A.) with the Royal Bank of Canada, 6, Lothbury Street, London, E.C.2, England, either established direct with the said bank or through another first-class London bank (hereinafter called the 'negotiating bank'). Immediately upon receipt of the foregoing letter of credit and upon acceptance of its terms the vendors shall forthwith deposit the undermentioned documents with the negotiating bank as stakeholders of the documents. (Unless the 10 per cent. deposit of this purchase price and the irrevocable letter of credit are confirmed established and within times herein stipulated, then cancelling time stipulated in clause 1 to be extended accordingly at vendors' option. If letter of credit is not established within memorandum of agreement limits, sellers' option to cancel.)

G " 1. Legal bill of sale, duly attested by a notary public specifying free from encumbrances, all debts, claims and maritime liens.

H " 2. Signed commercial invoice in quadruplicate, setting out the vessel's particulars.

" 3. The vendors' written undertaking to cable the master or their representatives in Taiwan instructing them to physically deliver the vessel to the purchasers immediately the purchase-money has been received in full.

" 4. Certificate of deletion of the vessel from the Greek register or

the vendors' written undertaking stating that deletion of registration will be effected as soon as possible but not later than two weeks after the vessel has been fully paid for. A

"5. Signed suppliers' certificate. Within three business days of the vendors or their agents in Taiwan giving notice to the purchasers by letter or telegram of the vessel's readiness for delivery in accordance with this agreement and presenting the gas-free certificate as per clause 17, the negotiating bank shall be instructed by the purchasers to release the full letter of credit amount to the vendors forthwith. Such notice of readiness must be countersigned by the Kaohsiung harbour-master or Lloyd's agents in Taiwan, confirming safe arrival of the vessel. This document and gas-free certificate as per clause 17 with documents 1 to 5 as mentioned above shall be sufficient evidence to permit the negotiating bank to release the letter of credit in full to the vendors. When the full purchase price has been released the aforementioned documents shall be released to the purchasers. In the event that the confirmed irrevocable letter of credit is not established as aforesaid, the 10 per cent. deposit shall immediately be forfeited to the sole use of the vendors. Any Taiwan legal consular or import fees or taxes or bank charges to be for the purchasers' account. All bank charges in London in connection with the letter of credit, except bank confirmation and opening charges, are for the account of the vendors. B C D

"(3) Should the vessel be unable to enter Kaohsiung harbour on arrival for any reason other than on account of the weather or for any reason under the vendors' control the purchasers are to pay to the vendors demurrage at U.S.\$6,000.00 per day or pro rata commencing 48 hours after the vessel's arrival off Kaohsiung. The purchasers guarantee the availability of a suitable berth immediately upon arrival of the vessel at Kaohsiung outer anchorage, in order that the vendors can complete necessary pre-hand-over formalities. If purchasers' breaking-up berth is either not free or not accessible, then the vessel is to be delivered 'as is where is' as near as she can reasonably get to purchasers' breaking-up berth in master's discretion, and the purchasers shall arrange a berth, anchorage or buoy, able to accommodate the vessel and same to be available upon vessel's arrival. Should the vessel still be unable to enter Kaohsiung harbour within seven business days after arrival then the vendors shall have the right to cancel this agreement and in such case the deposit referred to in clause 2 hereof shall be forfeited to the sole use of the vendors together with payment of the accrued demurrage or at their option the vendors have the right to deliver the vessel at Kaohsiung anchorage safely afloat and in this case the full amount of the letter of credit will be released to the vendors as per clause 4 (subject to the logical amendment in the notice of readiness) and vendors' crew will be released immediately for repatriation (at vendors' cost). In addition purchasers undertake if expired, to extend the validity of the letter of credit in order to cover the above period of time. E F G H

"(4) It shall be a special instruction of the confirmed irrevocable letter of credit as referred to in clause 2 hereof, that in the event that the purchasers or the purchasers' opening bank in Taiwan fails to despatch a cable or telex to the negotiating bank releasing the full letter of credit amount to the vendors within three business days of the vendors or their agents in Taiwan giving the counter-signed notice of readiness aforesaid and the gas-free certificate as per clause 17, to the

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A purchasers (or their agents or otherwise as may be stipulated in the letter of credit), then the vendors have the right to negotiate the confirmed irrevocable letter of credit by presenting to the negotiating bank a copy of the aforesaid counter-signed notice of readiness, together with the documents 1, 2, 3, 4 and 5 as specified in clause 2 hereof and presentation of such documents alone shall constitute sufficient evidence to permit the negotiating bank to release the letter of credit amount in full to the vendors.

B “(5) The vessel is sold for the purpose of breaking up only and the purchasers hereby covenant that they will neither trade the vessel for their own account nor sell the vessel to a third party for any purpose other than breaking up. The purchasers undertake to complete breaking up within nine months from time of delivery to be proved by production of certificate issued by the appropriate local authority . . .

C “(14) Any dispute or difference arising under this agreement shall be settled by arbitration in London each party choosing one arbitrator who shall if necessary appoint an umpire whose decision shall be accepted as final and may be made a rule of court. Arbitrators and umpire are to be commercial men and not lawyers. Such arbitration to be in accordance with the provisions of the Arbitration Act 1950 or any statutory modification thereof.

D “(15) This agreement is to be construed and take effect as a contract made in England and in accordance with the laws of England and shall not only in England but in other countries be interpreted and enforceable in all respects in accordance with the said laws . . .

E “(17) The vessel will be delivered to the purchasers with a valid gas-free certificate for hot work, which certificate to be approved by the Taiwan authorities. However, if the said gas-free certificate is not approved by the Taiwan authorities, gas clearance shall be carried out again by the vendors or their agents at vendors’ expense[;] unless the vendors are able to deliver the vessel with the gas-free certificate accepted by the Taiwan authorities the purchasers will not accept and sign the notice of readiness.”

F It was common ground that the last date for establishing and confirming the letter of credit was August 13, 1980, but when on that date a letter of credit was established by an issuing bank in Taiwan, it neither complied with the terms of the sale agreement nor was it confirmed by a London bank. However, amendments were made and on September 3, 1980, the Bank duly confirmed the letter of credit. The important respect in which the letter of credit did not comply with the sale agreement was in regard to the notice of readiness.

The letter of credit provided thus:

H “A copy of the valid gas-free certificate for hot work, which certificate to be approved by the Taiwan authorities, together with a copy of the notice of readiness countersigned by the Kaohsiung harbour-master or Lloyd’s agents in Taiwan (Jardine, Matheson & Co. Ltd., Taipei) confirming safe arrival of the vessel inside Kaohsiung harbour and accepted and signed by the purchasers (Nan Jong Iron and Steel Co. Ltd., Tainan, Taiwan on behalf of Southland Enterprise Co. Ltd., Tainan, Taiwan).”

This provision contrasted sharply with the provision of the last paragraph of clause (2) of the sale agreement.

The ensuing events will be found detailed with care and clarity in the reasons annexed to an award dated November 30, 1981, by Mr. Kazantzis and Mr. Selwyn, the two commercial arbitrators respectively appointed in the arbitration between the sellers and the buyers which followed the stay of the action granted by Parker J. on October 24, 1980. I gratefully refer to their narrative in order to avoid unnecessarily lengthening this speech. Suffice it to say that the vessel arrived at Kaohsiung at 0900 hours on September 22, 1980. Notice of her arrival was telexed to the buyers. A formal notice of readiness was issued by the master at 1530 hours on September 22, 1980, and indorsed by Lloyd's agents on September 25, 1980. On that day the buyers rejected the notice on the ground that the gas-free certificate presented with the notice of readiness had not been approved by the Taiwan authorities; it followed that the requirement in the letter of credit to which I have just referred that the notice of readiness should be accepted and signed by the buyers was not complied with.

My Lords, the explanation of the buyers' strenuous endeavours to find some excuse for avoiding their contractual obligations to the sellers is to be found in paragraphs 18 to 20 of the arbitrators' reasons. By the end of September the market price of scrap had fallen to around U.S.\$190 per light-weight ton. As the autumn progressed so did the market fall until by December 1980 the market price was U.S.\$150 per light-weight ton at which price the sellers ultimately resold the vessel to Hong Kong.

Meanwhile events had moved to London. On October 9, 1980, the sellers, doubtless appreciating that the buyers were determined not to fulfil their obligations if they could possibly find some excuse for avoiding them and anticipating the approach of the expiry date of the letter of credit, issued a specially indorsed writ against the buyers in the Commercial Court claiming specific performance of the sale agreement. The prayer in the statement of claim sought (inter alia) a mandatory order on the buyers requiring them to sign the notice of readiness and to cause the deletion of the condition in the letter of credit regarding signature of the notice of readiness to which I have already referred.

On October 10, 1980, the sellers issued a summons in the Commercial Court designed to secure this relief. This summons was heard by Parker J. on October 24, 1980. At the same time, no doubt by consent, the learned judge heard a cross-summons (formally this still had to be issued) by the buyers seeking a stay of the action by reason of the presence of the arbitration clause in the sale agreement. By reason of section 1 of the Arbitration Act 1975 the learned judge was bound to grant this stay. But he granted the buyers the mandatory relief sought in relation to the notice of readiness and ordered that notice duly signed by the buyers in accordance with his order to be returned to the sellers' solicitors in London by noon of October 28, 1980. Failing compliance with this order, the learned judge appointed a master of the Supreme Court—by amendment made on October 28, 1980, the master was named as Master Bickford Smith—to sign that notice on behalf of the buyers. He further ordered the buyers to instruct the issuing bank in Taiwan to instruct the bank to release the full amount of the letter of credit, that instruction to be given not later than the same date and time.

Paragraphs 4 and 5 of the learned judge's order read thus:

"4. The plaintiffs do direct the full amount received under the said letter of credit to be placed in an interest bearing account in the joint names of the plaintiffs' and defendants' solicitors with Lloyds Bank at 72, Fenchurch Street, London. No sums whatsoever are to be paid

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- A out of the said account other than pursuant to an agreement in writing between the plaintiffs and the defendants or pursuant to a further order of this court. 5. The first and second defendants whether by themselves their servants or agents or otherwise howsoever be restrained and an injunction is hereby granted restraining them from making use of or dealing with howsoever any of the documents presented by the
- B plaintiffs under the said letter of credit, except with the prior written permission of the plaintiffs' solicitors and in accordance with the terms of such permission until further order of the court."

- C Your Lordships have a brief note taken by counsel of the learned judge's oral judgment. It is clear from that note and indeed from the terms of the order itself that the learned judge, having stayed the action, thought (in my view entirely correctly) that the sellers had a strong case for specific performance of the sale agreement and therefore for obtaining the benefit of the letter of credit but that any defence which the buyers might ultimately prove to have could be adequately safeguarded by the provisions of paragraphs 4 and 5 of his order which I have just set out, the proceeds of the letter of credit being meanwhile put into a joint account unless otherwise agreed between the sellers and the buyers or ordered by the court. To this
- D end the learned judge exacted an undertaking from the sellers that the vessel should not be moved from her then anchorage save with the leave of the court. There is no doubt that in making this part of his order the learned judge, as indeed he stated, was using the powers given to the High Court by section 12 (6) of the Arbitration Act 1950 and in particular by sub-paragraphs (f) and (h) of that subsection in support of the sellers' claim
- E in the intended arbitration for specific performance. There is also no doubt that in ordering the notice of readiness to be executed by the buyers or in default by Master Bickford Smith, the learned judge was purporting to exercise the powers given by sections 45 and 47 of the Supreme Court of Judicature (Consolidation) Act 1925.

- F The buyers did not comply with the learned judge's orders as regards either the notice of readiness or the letter of credit. Accordingly, in furtherance of paragraph 2 of the learned judge's order, Master Bickford Smith executed the notice of readiness on behalf of the buyers. On October 29, 1980, the sellers presented all the documents to the bank including the notice of readiness as altered and signed by Master Bickford Smith, those being the documents said to be necessary to operate the letter of credit in favour of the sellers. The bank rejected the documents. On
- G October 30, 1980, after an ex parte application to the Court of Appeal by the sellers to authorise a minor alteration by Master Bickford Smith to what he had previously written, the documents, including the re-amended notice of readiness, were re-presented to the bank and were again rejected. On October 30, the bank had in fact sought authority to pay from the issuing bank in Taiwan but were instructed not to do so: see the judgment of Ackner L.J. [1982] Q.B. 1248, 1254. Thus the proceeds of the letter of
- H credit were never paid into the joint account envisaged by Parker J. in paragraph 4 of his order. On October 30, 1980, the validity of the letter of credit expired, the bank having by then twice rejected the documents tendered to them. Any hope of the sellers thereafter securing specific performance of the sale agreement vanished with the expiry of the letter of credit. Unless the buyers could justify their conduct, as they subsequently sought to do in the arbitration to which I have referred, the sellers were left with a clear claim for damages against them.

Clearly there was no future in the vessel remaining in Taiwan. Accordingly, on October 31, 1980, the sellers sought and obtained from Mocatta J. release from the undertaking exacted by Parker J. from the sellers on October 24, 1980, that the vessel should not move from her then anchorage. Thereafter the sellers became free to treat the buyers' conduct as a repudiation of the sale agreement and to claim damages on that basis and also to sail the vessel away from Taiwan. A

On November 12, 1980, the sellers issued a writ against the bank claiming inter alia U.S.\$4,241,575, being a sum equal to the purchase price of the vessel under the sale agreement, either as due under the letter of credit or as damages for the wrongful rejection by the bank of the documents. Pleadings in their original form were later exchanged but those pleadings were subsequently extensively amended and re-amended. I shall call this action against the bank "the bank action." Subsequently the issuing bank in Taiwan were joined as second defendants in the bank action the pleadings in which presently extend to almost 50 pages although it would seem that the issues in that action are comparatively simple. B
C

As already stated the buyers on November 10, 1980, gave notice of appeal to the Court of Appeal against the order of Parker J. made on October 24, 1980. On January 16, 1981, the sellers moved the Court of Appeal for an order for security on the grounds that the buyers were in contempt of the order of Parker J. by their disobedience to it and further contending that for that reason the buyers' appeal ought not to be heard. This matter for some reason did not come before the Court of Appeal (Lawton L.J. and Brandon and Templeman L.J.J.) [1981] 2 Lloyd's Rep. 595 until September 17, 1981. That court in reserved judgments delivered on September 24, 1981, dismissed the sellers' appeal and refused the sellers leave to appeal to this House. D
E

On September 28, 1981, four days after the sellers' appeal had thus been dismissed, the arbitration proceedings between the sellers and the buyers began, and they continued until October 7, 1981. The sellers claimed U.S.\$1,501,424.29 as damages for the buyers' wrongful refusal to accept delivery of the vessel and a further U.S.\$397,125.00 as demurrage under the sale agreement from September 24 until November 29, 1980. This last date was the date upon which the vessel ultimately left Taiwan for Hong Kong. The buyers, one might have thought somewhat optimistically in the circumstances, counterclaimed U.S.\$483,912.40 as damages for the sellers' alleged breach of the sale agreement in failing to deliver the vessel to the buyers. By their award dated November 30, 1981, the two arbitrators held the buyers to be in breach and dismissed their counterclaim. Questions of quantum were stood over in the hope of agreement being reached but, as no such agreement was reached, the two arbitrators by a further award dated March 23, 1982, awarded not only the two sums above mentioned to the sellers but also a further U.S.\$35,240 in respect of overheads and expenses. The total award was for U.S.\$1,933,899.99 together with interest at 16 per cent. from December 1, 1980, to March 31, 1982, and costs. F
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Between the dates of these two awards the bank on January 12, 1982, moved the Court of Appeal to be joined as defendants in the action, adopting the buyers' notice of appeal to which I have already referred and adding some grounds of their own which included the contention that Parker J. had no jurisdiction under section 47 of the Act of 1925 to make the order which he made on October 24, 1980, or alternatively that he exercised his discretion wrongly in making that order. It is to be observed

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A that those grounds do not assert any special interest of the bank as distinct from the interest of the buyers in seeking to be joined as parties to the appeal against Parker J.'s order.

B The buyers having thus dropped out of the proceedings, the sellers not unnaturally resisted the bank's attempt to come in in effect in their own supposed right. But the bank relied on R.S.C., Ord. 15, r. 6 (2) and sought to meet the sellers' contention that the right place to advance a challenge to the learned judge's order was in the bank action and not in the present proceedings by saying that while they could advance the want of jurisdiction argument in the bank action they could not in the bank action advance the contention that if the learned judge contrary to their contention had jurisdiction he had exercised his discretion wrongly. It was, it seems, this last contention which persuaded the Court of Appeal to allow the bank to be joined: see the judgment of Ackner L.J. [1982] Q.B. 1248, 1259. The Court of Appeal subsequently heard the bank's appeal and dismissed it for the reasons given in a reserved judgment delivered by Ackner L.J. In substance the reasons were first that the learned judge had jurisdiction under section 47 to make the order and secondly that, for the reasons given by the learned Lord Justice, at p. 1269, he had exercised his discretion correctly especially in view of the remarkable fact, to quote the learned Lord Justice's words, that "the operation of the letter of credit could depend upon the will of the buyer."

E My Lords, at the outset of his submissions to your Lordships' House Mr. Hoffmann Q.C. accepted that so long as the sellers were seeking specific performance of the sale agreement, as they were at least until October 30, 1980, the learned judge had jurisdiction under section 12 (6) (h) of the Act of 1950 and possibly also under subparagraph (f) of that subsection to make an order in aid of the sellers' claim for specific performance in the arbitration. But he contended that once, as was inevitable after October 30, 1980, the sellers were restricted to a claim against the buyers for unliquidated damages, the learned judge's order could not stand in order to support such a claim for, save only in a case appropriate for the issue of a *Mareva* injunction, a defendant or a respondent in arbitration could not be required to secure a plaintiff's or a claimant's claim for unliquidated damages. The learned judge had jurisdiction to make this order under the Act of 1950 in support of the sellers' primary right to claim specific performance but not in support of their secondary right to claim damages. The order was only proper so long as the letter of credit was extant, that is down to October 30, 1980, for the letter of credit was the means whereby the sellers would receive payment when the mutual obligations of the sellers of delivery and of the buyers of acceptance of the vessel were performed but was not the means whereby the sellers could enforce any claim for unliquidated damages for non-performance by the buyers of their obligations. Further, Mr. Hoffmann contended that the order was defective because it made no alternative provision for the possibility that the sellers' claim might subsequently become one for unliquidated damages only. In any event, he argued, the Court of Appeal were wrong to have affirmed the learned judge's order because by the time of their decision the arbitration had been held and the award of damages made.

So far as the order empowering Master Bickford Smith to sign the notice of readiness was concerned, Mr. Hoffmann contended that this part of the order was in any event wrong, because section 47 on its true construction did not entitle the learned judge to order a "substitute"

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signature of a document of this kind affecting the relationship between third parties, that is to say between the bank and the issuing bank and between the bank and the sellers. Any jurisdiction was limited to ordering a "substitute" signature of a document effective only as between the parties to the proceedings before the court in which the order was made. It was not right, he contended, to order the "substitute" signature of a document needed to satisfy the requirements of another contract. Alternatively, Mr. Hoffmann contended that if there were jurisdiction under section 47 to order such a "substitute" signature, the learned judge exercised his discretion wrongly because that section was being used to alter the nature of the obligations assumed both by the bank and by the issuing bank since absolute compliance with the documentary requirements of the credits was essential. A "just as good" document would not suffice. It must, he contended, be inherently wrong to use powers accorded by a United Kingdom statute in circumstances in which international letters of credit by no means universally governed by English law would or might be affected.

My Lords, at the outset of his reply to these submissions Mr. Nicholas Phillips Q.C. for the sellers forcefully pointed out that the inability of the sellers to claim specific performance of the sale agreement arose directly from the bank's refusal to accept the documents twice tendered to them so that the letter of credit expired without payment having been made. It was the bank alone who by their action obliged the sellers to seek damages rather than specific performance. Had the bank paid against documents the proceeds would under clause 4 of the order of Parker J. have been paid into the joint account, title to the vessel would, conditionally at least, have passed to the buyers on transfer of the bill of sale, the issuing bank would have got their security for what it was worth and the bank would have been free of any further obligations to the sellers. If by any chance the proceeds in the joint account became repayable to the bank rather than to the buyers, any necessary application to that end could have been made to Parker J. by the bank. But instead of looking only to their obligations under the letter of credit, the bank had of their own motion involved themselves in a dispute under a contract the performance of which as between the sellers and the buyers was no concern of the bank. Mr. Phillips reminded your Lordships of the recent restatement of the position by my noble and learned friend Lord Diplock in *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] A.C. 168, 183. I venture to quote the whole passage:

"Again, it is trite law that . . . the seller and the confirming bank, 'deal in documents and not in goods' . . . If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade

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A is to give to the seller an assured right to be paid before he parts with the control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.”

Mr. Phillips submitted that it was this basic principle of commercial law which the bank's actions and indeed their present submissions infringed.

B The bank, he contended, had no legitimate interest in challenging the order of Parker J. which was made in proceedings between the sellers and the buyers under the sale agreement. They had no legitimate interest in the question whether an order of the specific performance should be made. But having first rejected the documents and then sought to intervene in a dispute to which they were not parties, the bank took the risk of their rejection of the documents being wrong and were not entitled to seek to pre-empt the decision in the bank action by intervening in the action to disturb an order made some 2½ years ago in proceedings to which they were strangers.

C My Lords, before considering these several submissions I will deal briefly with Mr. Hoffmann's submission upon section 47 of the Act of 1925 upon which your Lordships did not find it necessary to hear Mr. Phillips.

D Section 47 reads thus:

“Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

F Mr. Hoffmann sought to argue that on the true construction of this section there was no power to order the execution of a document such as the notice of readiness in order to fulfil the requirement of a contract other than the contract between the parties immediately before the court. The signing of the notice of readiness by Master Bickford Smith was not, he argued, the “execution” of a document of the character referred to in the section. My Lords, with all respect this submission is untenable and

G I can see no justification for cutting down the plain and wide language of the section in the manner for which Mr. Hoffmann contended. There is no limitation upon the class of document in relation to which the powers accorded by section 47 may be invoked. Nor is there any limitation upon the purpose for which a document executed in accordance with the powers so accorded may be used. The letter of credit was a contract governed by

H English law. So, I apprehend, was the contract between the bank and the issuing bank. The English courts had jurisdiction at least over the letter of credit which the bank confirmed and that jurisdiction included power to make an order under section 47. I am of the clear opinion that Parker J. had jurisdiction to make this order and, in as much as this was, as he rightly thought, a strong case for ordering specific performance in favour of the sellers, I think in his discretion he was entitled to make the order he did.

Lord Roskill *Astro Exito S.A. v. Southland Enterprise Co. Ltd. (H.L.(E.))* [1983]

I have earlier used the phrase “substituted” signature, a phrase I have borrowed from Mr. Hoffmann. But I do not intend by my use of that phrase to imply that the document possesses any different characteristics from those it would have possessed had the buyers signed the notice of readiness as directed by Parker J. “Alternative” signature might perhaps be a better phrase. Whether such a document so “alternatively” signed was a good tender or whether the bank have any other defence in the bank action is not a matter upon which it is necessary for your Lordships’ House to pronounce in this appeal.

My Lords, I am unable to see how the exercise by Parker J. of the jurisdiction accorded by section 47 in any way altered the obligations which had been assumed by the bank or by the issuing bank, as Mr. Hoffmann sought to contend. The order which the learned judge made did not itself order the bank to do anything. Mr. Hoffmann accepted that had the buyers complied with the learned judge’s order no problems would have arisen for the bank. The requisite documents would have been presented in the ordinary course of events and the terms of the letter of credit complied with so as to enable the sellers to receive, subject to the terms of the order, the payment of the purchase price which the award of the arbitrators subsequently made plain that the buyers should have procured to be paid to the sellers. That being so, I have found some difficulty in seeing why the bank should be concerned to disturb this order at all, let alone at this very late stage. I am afraid I am unable to see why the buyers’ non-compliance with the order entitles the bank, not parties to the contract in relation to which the order was made, now to complain of its effect. Having adopted the stance they did on October 29 and 30 it is for them to show in their defence in the bank action, if they are able to do so, that their two-fold rejection of the documents was justified.

My Lords, it follows that I have no doubt not only that the order of Parker J. was correct but that the Court of Appeal was also correct in dismissing the bank’s appeal. Though I readily understand why the Court of Appeal allowed the bank to be joined as defendants in the action, I cannot but wonder whether if they had had the benefit of the full argument to which your Lordships have listened they would have granted the bank’s application to be joined. I would dismiss this appeal with costs.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Roskill, with which I agree, I too would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Allen & Overy; Holman Fenwick & Willan.*

M. G.

H

3 W.L.R.

A

[HOUSE OF LORDS]

GARDEN COTTAGE FOODS LTD. RESPONDENTS

AND

B

MILK MARKETING BOARD APPELLANTS

1983 April 12, 13;
June 23Lord Diplock, Lord Wilberforce,
Lord Keith of Kinkel, Lord Bridge of Harwich
and Lord Brandon of Oakbrook

C

European Economic Community—Free competition—Abuse of dominant position—Claim that national butter supplier abusing dominant position—Interlocutory injunction refused by judge but granted by Court of Appeal—Whether cause of action giving rise to remedy of damages—Whether Court of Appeal justified in granting injunction—E.E.C. Treaty (Cmd. 5179-II), art. 86¹

D

The defendants produced most of the bulk butter in England and Wales that was sold to distributors in this country for resale within the common market of the European Economic Community. In 1980 and 1981 the plaintiffs bought substantial quantities of bulk butter from the defendants which they resold overseas, but no more butter was supplied to them after August 1981. In March 1982 the defendants told the plaintiffs that with effect from April 1982 they would be supplying bulk butter only to four named distributors, not including the plaintiffs who would have to contact one or more of the four named distributors if they wanted bulk butter supplied by the defendants for export. The plaintiffs brought an action claiming *inter alia* an injunction restraining the defendants from withholding supplies of butter from the plaintiffs or otherwise refusing to maintain normal business relations with them, contrary to article 86 of the E.E.C. Treaty. They applied for an interlocutory injunction in the same terms. Parker J. held that there was a serious question to be tried on whether the defendants had a dominant position in a substantial part of the common market which they were abusing, but refused the application on the ground, *inter alia*, that the plaintiffs would be adequately compensated by damages if they succeeded in the action. On appeal by the plaintiffs, the Court of Appeal expressed doubts whether damages would be recoverable by the plaintiffs in the event of their success, and allowed the appeal, granting an interlocutory injunction.

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On appeal by the defendants:—

Held, allowing the appeal (Lord Wilberforce dissenting), that if, which was clearly arguable, an infringement of article 86 of the E.E.C. Treaty would give rise in English law to a cause of action at the suit of an individual citizen who suffered pecuniary loss by reason of the infringement, a remedy in damages would be available to compensate for such loss; that, since the judge was entitled to conclude on the evidence that damages would provide the plaintiffs with an adequate remedy, there were no grounds to justify an appellate court in interfering with the judge's exercise of his discretion in refusing the interlocutory injunction (post, pp. 152D–F, 153G–H, 155D–E, 163A–C).

H

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, H.L.(E.) and dicta of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] A.C. 191, 220, H.L.(E.) applied.

¹ E.E.C. Treaty, art. 86: see post, p. 149D–F.

Garden Cottage Ltd. v. Milk Board (H.L.(E.))**[1983]**

Belgische Radio en Televisie v. S.V. S.A.B.A.M. (Case 127/73) [1974] 1 E.C.R. 51, E.C.J. considered. A

Application des Gaz S.A. v. Falks Veritas Ltd. [1974] Ch. 381, C.A. and dictum of Roskill L.J. in *Valor International Ltd. v. Application des Gaz S.A.* [1978] 3 C.M.L.R. 87, 100, C.A. explained.

Per curiam. It was the procedural history of the case that induced an Appeal Committee of the House to depart from its usual practice and to grant leave to appeal in an interlocutory matter the decision of which will not be conclusive of the action (post, p. 147c). B

Per Lord Diplock. The relevant status quo which it was said in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 it is a counsel of prudence to preserve when other factors are evenly balanced, is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo (post, p. 148F-H). C

Decision of the Court of Appeal [1982] Q.B. 1114; [1982] 3 W.L.R. 514; [1982] 3 All E.R. 292 reversed. D

The following cases are referred to in the opinions of their Lordships:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).

Amministrazione delle Finanze dello Stato v. M.I.R.E.C.O. (Case 826/79) [1980] 3 E.C.R. 2559, E.C.J. E

Application des Gaz S.A. v. Falks Veritas Ltd. [1974] Ch. 381; [1974] 3 W.L.R. 235; [1974] 3 All E.R. 51, C.A.

Belgische Radio en Televisie v. S.V. S.A.B.A.M. (Case 127/73) [1974] 1 E.C.R. 51, E.C.J.

Camera Care Ltd. v. Commission of the European Communities (Case 792/79R) [1980] 1 E.C.R. 119, E.C.J. F

Europemballage Corporation and Continental Can Co. Inc. v. Commission of the European Communities (Case 6/72) [1973] 1 E.C.R. 215, E.C.J.

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1981] 3 W.L.R. 139; [1981] I.C.R. 690; [1981] 2 All E.R. 724, C.A.; [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] I.C.R. 114; [1982] 1 All E.R. 1042, H.L.(E.).

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.). G

Lyons (J.) & Sons v. Wilkins [1896] 1 Ch. 811, C.A.

Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland (Case 33/76) [1976] 3 E.C.R. 1989, E.C.J.

Texaco Ltd. v. Mulberry Filling Station Ltd. [1972] 1 W.L.R. 814; [1972] 1 All E.R. 513.

United Brands Co. v. Commission of the European Communities (Case 27/76) [1978] 1 E.C.R. 207, E.C.J. H

Valor International Ltd. v. Application des Gaz S.A. [1978] 3 C.M.L.R. 87, C.A.

The following additional cases were cited in argument:

Attorney-General v. Staffordshire County Council [1905] 1 Ch. 336.

Blakemore v. Glamorganshire Canal Navigation (1832) 1 My. & K. 154.

3 W.L.R. Garden Cottage Ltd. v. Milk Board (H.L.(E.))

- A** *Brekkes Ltd. v. Cattel* [1972] Ch. 105; E.R. 7 R.P. 150; [1971] 2 W.L.R. 647; [1971] 1 All E.R. 1031.
- Chelmkarm Motors Ltd. v. Esso Petroleum Co. Ltd.* [1979] 1 C.M.L.R. 73.
- Collins v. Wayne Iron Works* (1910) 76 Atl. 24.
- Daily Mirror Newspapers Ltd. v. Gardner* [1968] 2 Q.B. 762; [1968] 2 W.L.R. 1239; [1968] 2 All E.R. 163, C.A.
- B** *Morris v. Redland Bricks Ltd.* [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969] 2 All E.R. 576, H.L.(E.).
- Office Overload Ltd. v. Gunn* [1977] F.S.R. 39, C.A.

INTERLOCUTORY APPEAL from the Court of Appeal.

- C** This was an appeal by the Milk Marketing Board from a decision of the Court of Appeal (Lord Denning M.R., May L.J. and Sir Sebag Shaw) on May 18, 1982, allowing an appeal by the respondents, Garden Cottage Foods Ltd., from Parker J. who on April 21, 1982, refused the respondents' application for an interlocutory injunction restraining the appellants from withholding supplies of butter from the respondents and from otherwise refusing to maintain normal business relations with the respondents. The Court of Appeal refused leave to appeal but on July 29, 1982, the Appeal
- D** Committee of the House of Lords (Lord Diplock, Lord Keith of Kinkel and Lord Bridge of Harwich) allowed a petition for leave.

The facts are stated in the opinions.

John Swift Q.C., Derrick Turriff and Christopher Vajda for the appellants.

- E** *David Vaughan Q.C. and Peter Langdon-Davies* for the respondents.

Their Lordships took time for consideration.

- F** June 23. LORD DIPLOCK. My Lords, although the action in which this interlocutory appeal is brought may, if it is proceeded with, raise interesting and complex questions of European Community law and the remedies available in English law for contravention of the Community's rules on competition, the only issue which falls for determination by your Lordships at the present stage is whether the Court of Appeal (Lord Denning M.R., May L.J. and Sir Sebag Shaw) were justified in interfering with the refusal by the commercial judge, Parker J., in the exercise of his discretion, to grant to the plaintiff in the action ("the company") an interlocutory injunction against the Milk Marketing Board ("M.M.B.") in either of the
- G** alternative terms in which an injunction was sought.

- The learned judge in his judgment (of which only an agreed note which is not a transcript is available) had expressed the view that damages would be an adequate remedy for any loss sustained by the company during the period before the action could be brought to trial, if the company were then to obtain judgment in its favour. It was stated unanimously by this
- H** House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 408, that where this was the case and the defendant would be in a financial position to pay the damages, no interlocutory injunction should, normally, be granted. Parker J., however, also took into consideration the fact that the injunction applied for would disrupt the business of M.M.B. and the businesses of four distributors that it had recently appointed on profit-sharing terms. He also took into account the imprecision and unsuitability of the wording of each of the alternative forms of injunctions asked for.

In an expedited appeal by the company against the judge's refusal to grant an interlocutory injunction, the Court of Appeal [1982] Q.B. 1114 delivered an extempore judgment on May 18, 1982, shortly after the publication in the Weekly Law Reports [1982] 2 W.L.R. 322 of the decision of this House in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, in which this House took occasion, at p. 220, to point out that on an appeal from the judge's grant or refusal of an interlocutory injunction an appellate court, including your Lordships, must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

My Lords, I have ventured to repeat much of the ipsissima verba of the relevant passage of my speech in *Hadmor Productions Ltd. v. Hamilton* [1983] A.C. 191, 220, which had the considered approval of all the other members of the House, since, from the list of cases reported as having been referred to in the argument at the hearing of the instant case, it would appear the attention of the Court of Appeal was not drawn to it. Certainly there is no hint in any of the judgments that the members of that court considered that they were doing anything other than exercising an independent discretion of their own. Although there was some additional evidence before the Court of Appeal that was not before the judge, no member of the court relied upon it or even referred to it; there is no suggestion that the judge misunderstood the evidence before him; and, so far as I can see, the only suggestion that he may have misunderstood the law is that he ought not to have taken it for granted that if the company had a cause of action at all in English law for contravention of article 86 of the Treaty of Rome (the E.E.C. Treaty) it was one in which a remedy in damages would be available to it. To this suggestion I shall have to revert when I have outlined the facts and referred to the relevant Community and United Kingdom legislation.

To complete the procedural history of the instant case, the Court of Appeal allowed the company's appeal. They granted the company an interlocutory injunction, not in either of the alternative forms sought by the company in its notice of appeal but in terms suggested by Sir Sebag

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- A** Shaw in his judgment [1982] Q.B. 1114, 1126-1127. These are so unclear as to what conduct by M.M.B. would constitute a contempt of court under them, that counsel for the company has not attempted to defend them before your Lordships. Instead he has invited this House to substitute for the injunction set out in the order of the Court of Appeal an injunction in terms not hitherto suggested in either of the courts below and which on examination showed similar defects of clarity and precision. That at least
- B** five unsuccessful attempts have been made to draft an interlocutory injunction that would make it clear what M.M.B. could do and could not do without committing a contempt of court, goes far to vindicate the judge's view, which influenced his exercise of his discretion, that upon the present state of the evidence, to the paucity of which I shall be referring shortly, it is not possible to devise an appropriate wording for an interlocutory
- C** injunction which would enable M.M.B. to know precisely what it is required to do or to abstain from doing.

My Lords, it was this procedural history that induced an Appeal Committee of this House to depart from its usual practice and to grant leave to appeal in an interlocutory matter the decision of which will not be conclusive of the action.

- D** I turn now to such sketchy facts about the nature of the company's business as can be gathered from the available evidence. These are relevant both to the cause of action in English law to which it claims to be entitled against M.M.B. and also to the question whether the view taken by Parker J. that, in the event of the company's succeeding at the trial in establishing its claim, damages would be an adequate remedy for any loss it had sustained while the trial was pending, was so untenable that an
- E** appellate court would be entitled to disregard it.

- The company, which started business in May 1980, operates from the residence of Mr. Bunch at Crowborough in East Sussex. Mr. Bunch and his wife are its only employees. In effect, it is Mr. and Mrs. Bunch with limited liability. The only part of its business that is dealt with in the evidence is its purchase and resale of bulk butter. Between May 1980 and the commencement of the action in April 1982 this accounted for 80 per
- F** cent. of the company's turnover. Of its purchases during that period 90 per cent. were from the M.M.B., and of its resales 95 per cent. were for export to a single purchaser in the Netherlands, J. Wijffels B.V. ("J.W.B.V."). Save that the company purchased bulk butter from M.M.B. ex-creamery or ex-coldstore, there is no evidence as to the terms on which it was sold on to J.W.B.V. or whether the company or J.W.B.V. itself was responsible
- G** for making arrangements for the transport of consignments from creamery or coldstore to the Netherlands. Your Lordships may take judicial notice that under the Common Agricultural Policy ("C.A.P.") mountainous surpluses of butter are produced in the E.E.C. for which there is no market for human consumption as such within the member states of the Community. Some of this surplus, it would appear goes into the "bulk butter" market where it is dealt in by private traders as distinct from being purchased by
- H** the intervention agency at intervention prices under the C.A.P.; but as to how this bulk butter market operates and whether it bears any resemblance to other international commodity markets, your Lordships can find no inkling in the evidence.

M.M.B. is a statutory authority established by the Milk Marketing Scheme 1933 (S.R. & O. 1933 No. 789) as subsequently amended. The scheme is made under legislation that is now contained in the Agricultural Marketing Act 1958. M.M.B. is also subject to Council Regulation (E.E.C.)

No. 804/68 (Official Journal (1968) No. L148, p. 13) on the common A
 organisation of the market in milk and milk products and to a further
 Council Regulation (E.E.C.) No. 1422/78 (Official Journal (1978) No. L171,
 p. 14) which authorises the grant to the M.M.B., and to other milk market-
 ing boards in Scotland and Northern Ireland, of exclusive rights to purchase
 milk in those three parts of the United Kingdom respectively, and contains
 other provisions which on the face of them appear to permit the imposition
 of restrictions on free competition in milk products. At this stage of the
 proceedings in the instant case, however, your Lordships are not concerned
 with any of the detailed E.E.C. Regulations relating to the organisation of
 the market in milk products under the C.A.P. as they affect the operations
 of M.M.B. It is sufficient to draw attention to the fact that the market
 is subject to a special regime and the application of the Community's rules
 on competition to this regime may well give rise to questions of Community
 law of considerable complexity. Factually, the evidence does disclose that
 M.M.B. produces some 75 per cent. of the butter produced in England and
 Wales (not the United Kingdom) and it is reasonable to infer that it is the
 largest and, maybe, by far the largest, producer of bulk butter exported
 from the United Kingdom for trading in the bulk butter market. M.M.B.
 started to accept tenders from the company for the purchase of bulk
 butter in August 1980. It continued to do so roughly once or twice a
 month until May 1981, after which there was a gap until it made a tender
 that was accepted in August 1981. Thereafter no further tenders were
 accepted although delivery was continued under earlier forward contracts
 until the end of 1981. There was, however, no express refusal by M.M.B.
 to do further business in bulk butter with the company until, by letter dated
 March 24, 1982, it informed Mr. Bunch that it had decided to revise its
 sales and marketing strategy and to appoint four independent distributors
 (whose names and addresses were given) to handle the sales of its bulk
 butter for export, with effect from April 1, 1982. Mr. Bunch was advised
 that he should contact those distributors to discuss availability of supplies
 if the company should require M.M.B. bulk butter for export. B

This letter was followed by a meeting between Mr. Bunch and a repre-
 sentative of M.M.B. at which the latter said that M.M.B. was not prepared
 to reconsider its decision. This refusal triggered off the present action. C

The history of the trading relations between the company and M.M.B.,
 as I have outlined them, make it difficult to identify what was the relevant
 status quo which it was said in *American Cyanamid Co. v. Ethicon Ltd.*
 [1975] A.C. 396 it is a counsel of prudence to preserve *when other factors*
are evenly balanced. The status quo is the existing state of affairs; but
 since states of affairs do not remain static this raises the query: existing
 when? In my opinion, the relevant status quo to which reference was made
 in *American Cyanamid* is the state of affairs existing during the period
 immediately preceding the issue of the writ claiming the permanent injunc-
 tion or, if there be unreasonable delay between the issue of the writ and
 the motion for an interlocutory injunction, the period immediately preceding
 the motion. The duration of that period since the state of affairs last
 changed must be more than minimal, having regard to the total length of the
 relationship between the parties in respect of which the injunction is
 granted; otherwise the state of affairs before the last change would be the
 relevant status quo. D

In *Texaco Ltd. v. Mulberry Filling Station Ltd.* [1972] 1 W.L.R. 814,
 831, Ungood-Thomas J. took as the relevant period for ascertaining what
 constituted the status quo the period preceding the commencement of the
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A conduct on the part of the defendant in respect of which the action was brought—in that case breaches of covenant. But that decision was before *American Cyanamid* and was based on the assumption that a “strong prima facie” case that the plaintiff would succeed at the trial in obtaining a final injunction had to be made out before an interlocutory injunction would be granted—a requirement which he held to have been satisfied on the evidence that was before him. Now that the necessity for the court to

B determine that the plaintiff has made out a strong prima facie case for a permanent injunction before granting him an interlocutory injunction has been removed by the decision of this House in *American Cyanamid*, this also flaws the reasoning by which Ungood-Thomas J. reached the conclusion that he did as to what constituted the relevant period for determining what is the status quo. In the instant case, however, for reasons that

C will appear hereafter, I do not think that one ever reaches the stage at which the desirability of maintaining the status quo is brought into the balance of convenience.

The cause of action alleged by the company in its writ issued on April 14, 1982, was: contravention by M.M.B. of article 86 of the E.E.C. Treaty, by withholding supplies of butter from the company or otherwise refusing to maintain normal business relations with it.

D Article 86 is in the following terms:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

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This article of the Treaty of Rome (the E.E.C. Treaty) was held by the European Court of Justice in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51, 62, to produce direct effects in relations between individuals and to create direct rights in respect of the individuals concerned which the national courts must protect. This decision

G of the European Court of Justice as to the effect of article 86 is one which section 3 (1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2 (1) of the Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly.

H A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.

If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on

the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts. Of the many statutory duties imposed upon employers under successive Factories Acts and regulations made thereunder, which have provided far and away the commonest cases of this kind of action, some take the form of prohibitions, others positive obligations to do something: yet it has never been suggested that it makes any difference to the cause of action whether the breach relied on was a failure to perform a positive duty or the doing of a prohibited act.

My Lords, when faced with the company's application for an interlocutory injunction, the first task of the judge was to make up his mind whether there was a serious question to be tried. Plainly a number of difficult and doubtful questions would be involved in any trial of the action. The jurisprudence of the European Court of Justice, which in this field of law is well settled, indicates that there are three matters that must be proved to constitute a contravention of article 86. First, the contravenor must be in a dominant position in a substantial part of the common market; and this involves as a preliminary question the identification of the "relevant market"—not necessarily an easy task as *Europemballage Corporation and Continental Can Co. Inc. v. Commission of the European Communities* (Case 6/72) [1973] 1 E.C.R. 215 shows. Secondly, there must be shown an "abuse" of that dominant position. The particular examples in paragraphs (b) and (c) of article 86 upon which the company principally relies may constitute an abuse but do not necessarily do so, and in this connection it may be necessary to take into account the interaction between the Community rules on competition and the C.A.P. Thirdly, it must be shown that the abuse affects trade between member states.

My Lords, I express no view as to what is likely to be the answer to any of those questions, save to observe that it would be quite impossible at this stage and, probably, at any stage until after a reference under article 177 of the Treaty to the European Court of Justice, to say on the one hand that M.M.B.'s behaviour that forms the subject matter of the action is clearly not capable of having any appreciable effect on competition or on trade between member states, or, on the other hand, that there is no doubt of the incompatibility of that behaviour with article 86. I mention this because, your Lordships having been informed that the company, since the judgment of the Court of Appeal, has also made a complaint to the Commission under article 3 of Council Regulation (E.E.C.) No. 17/62 (Official Journal, English Special Edition 1959-62, p. 87), the judgment of the European Court in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51 indicates that it may have some relevance to the future progress of the present action in the High Court.

My Lords, Parker J. having rightly, indeed inevitably, decided that there were serious questions to be tried, next turned, as directed by *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, to consider whether if the company were to succeed at the trial in establishing its right to a permanent injunction (if a permanent injunction in some appropriate form could be devised) it would be adequately compensated by an award of damages for the loss it would have sustained as a result of

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A M.M.B.'s continuing to do what was sought to be enjoined between the time of the application for the interim injunction and the time of the trial.

B Parker J. was of opinion that an award of damages would provide adequate compensation for any such loss if M.M.B.'s refusal to accept direct tenders from it for bulk butter should be held to be a contravention of article 86. So far as the business of the company, conducted as it was entirely by Mr. and Mrs. Bunch from their own home, consisted of dealing in bulk butter it appears to have involved no more than acting as a middleman who transferred to traders in the bulk market immediately upon delivery by the M.M.B. ex-creamery or ex-coldstore consignments of butter that the company had itself bought on seven-day credit terms, and taking its own "cut" out of the price at which it passed on the consignment to the trader. If it were compelled to buy bulk butter from one or other of four distributors referred to in the letter of March 24, 1982, instead of directly from M.M.B. this would be likely to reduce the amount of the company's cut; or even to eliminate the possibility of retaining one, so that the sensible course would be to suspend until trial of the action this part of the company's business. But if that were the course adopted, all that the company would lose by such suspension of business would be the opportunity of obtaining the sums of money represented by that cut. There could hardly be a clearer case of damages being an adequate remedy unless insuperable difficulties of estimation could be foreseen; but any difficulties of estimation would be greatly reduced by the fact that the company had only one substantial customer, J.W.B.V., with whom 95 per cent. of the company's business in bulk butter was transacted, and that one customer, as appears from an affidavit of Mr. J. Wijffels that was before the Court of Appeal, during the period that the company was obtaining butter from M.M.B., purchased from the company about one-third of its requirements for bulk butter originating in the United Kingdom.

E Difficulties of estimation, however, were not the ground on which the Court of Appeal overruled the judge's opinion that damages would be an adequate remedy. Neither Lord Denning M.R. nor Sir Sebag Shaw made any mention of this topic; nor does a passing reference by May L.J. at p. 1126 to possible difficulties of assessment of the proper measure of damages "in cases such as this," without any reference to the special characteristics of the company's business to which I have just drawn attention, appear to play a significant role in his ratio decidendi. It was for an entirely different reason that the Court of Appeal rejected the view of the learned judge that damages would provide an adequate remedy.

G To that reason I must shortly come; but, before doing so, I should refer to another aspect of the difficulty of estimating damages, which the judge also took into account in exercising his discretion in favour of refusing to grant an interlocutory injunction. That was: the damage that would be caused to the business of M.M.B. and the business of the four distributors to whom it had already made commitments. For that disturbance, in the event of the company failing in the action, M.M.B.'s only remedy would be the recovery of damages from the company under the cross-undertaking which it would be required to give. This is a matter which, it was said by this House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, a judge ought to take into consideration in deciding how to exercise his discretion. No consideration appears to have been given to it by the Court of Appeal, save that it evoked the procrustean comment from the

Master of the Rolls [1982] Q.B. 1114, 1125H; "I am afraid that that is a bed of their own making and they must deal with it as best they can." A

The only reason why the Court of Appeal held that the judge was wrong in his view that damages would provide an adequate remedy to the company for any interference with its bulk butter business pending the trial of the action, appears to have been that each member of the court felt doubt, in varying degrees, as to whether the company's cause of action sounded in damages at all. Sir Sebag Shaw, at p. 1126G, expressed considerable misgivings as to whether a remedy in damages lies for a contravention of article 86 of the Treaty. Lord Denning M.R., at p. 1125A, thought there was a good deal to be said for there being a remedy in damages, but that it was not altogether certain. May L.J., though less doubtful than the Master of the Rolls as to the availability of a remedy in damages, considered that the contrary was certainly arguable: p. 1126B-D. C

My Lords, in the light (a) of the uniform jurisprudence of the European Court of Justice, of which it is sufficient to mention *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51 (which I have already cited) and the subsequent case of *Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] 3 E.C.R. 1989, which was to the same effect as respects the duty of national courts to protect rights conferred on individual citizens by directly applicable provisions of the Treaty; and (b) of sections 2 (1) and 3 (1) of the European Communities Act 1972, I, for my own part, find it difficult to see how it can ultimately be successfully argued, as M.M.B. will seek to do, that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached. What, with great respect to those who think otherwise, I *do* regard as quite unarguable is the proposition, advanced by the Court of Appeal itself but disclaimed by both parties to the action: that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused. A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act passed to the High Court. I leave aside as irrelevant for present purposes injunctions granted in matrimonial causes or wardship proceedings which may have no connection with pecuniary loss. I likewise leave out of account injunctions obtainable as remedies in public law whether upon application for judicial review or in an action brought by the Attorney-General ex officio or ex relatione some private individual. It is private law, not public law, to which the company has had recourse. In its action it claims damages as well as an injunction. No reasons are to be found in any of the judgments of the Court of Appeal and none has been advanced at the hearing before your Lordships, why in law, in logic or in justice, if contravention of article 86 of the Treaty of Rome is capable of giving rise to a cause of action in English private law at all, there is any need to invent a cause of action with characteristics that are wholly novel H

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A as respects the remedies that it attracts, in order to deal with breaches of articles of the Treaty of Rome which have in the United Kingdom the same effect as statutes.

B The notion that it is seriously arguable that a contravention of article 86 may give rise to a cause of action possessing such unique characteristics appears to have been based upon a misunderstanding by the Court of Appeal of a cautionary obiter dictum of my noble and learned friend, Lord Roskill (then Roskill L.J.) in *Valor International Ltd. v. Application des Gaz S.A.* [1978] 3 C.M.L.R. 87. In a previous decision of the Court of Appeal, *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396, Lord Denning M.R. had stated that "articles 85 and 86 are part of our law. They create new torts or wrongs." The issue in that case, however, which was one for breach of copyright in a drawing of a tin for holding liquid gas, was whether a defendant could plead breaches by the plaintiff of article 85 or 86 as a defence to the plaintiff's claim. The court was unanimous in holding that the defendant could so plead but only the Master of the Rolls expressed any view as to whether those articles created new torts or wrongs in English law. It was unnecessary for the purposes of that case to do more than to decide that it was arguable that those articles could be used as a shield, whether or not they could also be used as a sword; and in the *Valor International* case [1978] 3 C.M.L.R. 87, Roskill L.J., who had been a member of the court in the *Falks Veritas* case, pointed this out and said, at p. 100, that there were "many questions which will have to be argued in this court or elsewhere in this country or at Luxembourg, before it can be stated categorically . . . that articles 85 and 86 create new torts or wrongs . . ."

E The concept of conduct by a plaintiff in legal proceedings that may be relied upon by the defendant as a defence to the plaintiff's claim although it *does not* give rise to a cause of action on the part of the defendant against the plaintiff, is one with which English law is familiar. Examples of the application of this concept are provided by estoppel and, what my noble and learned friend may have had in mind as presenting the closest analogy to a contravention of article 85 or 86, the application of the maxim *ex turpi causa non oritur actio*. There is nothing whatever in his observations to suggest that it had ever crossed his mind that if article 86 *did* give rise to a cause of action in English private law on the part of an individual citizen who suffered pecuniary loss as a result of another individual's contravention of that article, the resulting cause of action might have the unique and heterodox characteristics that it gave a remedy by injunction to prevent future pecuniary loss but none in damages for loss that had already been sustained.

G To summarise, the Court of Appeal was in my view wrong in suggesting that if it were established at the trial (a) that M.M.B. had contravened article 86, and (b) that such contravention had (i) caused the company pecuniary loss and (ii) thereby given rise to a cause of action in English law on the part of the company against M.M.B., it was a seriously arguable proposition that such cause of action did not entitle the company to a remedy in damages although it did entitle the company to a remedy by injunction. Parker J. did not misunderstand the law in this respect. He was entitled to take the view that a remedy in damages would be available and, for the reasons I have stated earlier, that such remedy would be adequate.

I next turn briefly to the difficulty of formulating the terms of any inter-

locutory injunction to which Parker J. referred as an additional ground for not granting one. The injunction granted by the Court of Appeal was in the following terms:

“there be an injunction herein and an injunction is hereby granted restraining the defendants whether by themselves or by their servants agents or otherwise from: (i) confining its sales of bulk butter to any particular person or persons or body of persons or any particular organisation or corporate body; (ii) from imposing significantly different terms in relation to the supply of butter to buyers in the bulk butter market whether as regards price, quantity, credit terms or otherwise, otherwise than pursuant to ordinary mercantile and commercial practice until the trial of this action or further order.”

It is sufficient to say of this that counsel for the company conceded that an injunction in these terms was indefensible. He submitted to your Lordships an alternative form in which paragraphs (i) and (ii) were replaced by:

“(i) from refusing to supply the plaintiffs with bulk butter, and (ii) in supplying such bulk butter from applying to such supply dissimilar conditions, whether as to price, quantity or credit terms or otherwise from those applied to equivalent transactions with other traders to whom the defendants supply bulk butter.”

This draft, unlike the injunction granted by the Court of Appeal, is at least restricted to restraining the conduct of M.M.B. towards the company, but it still suffers from a similar lack of precision as to what the M.M.B. may and may not do without infringing it.

My Lords, I would accept that if this action were to proceed to trial before any positive step had been taken by the Commission of the E.E.C. under Council Regulation (E.E.C.) No. 17/62 and the company were to succeed in establishing a continuing contravention by M.M.B. of article 86, the High Court would have to do its best to devise a suitable form of words for a permanent injunction; but the court by then would have a great deal more evidence of the operation of the bulk butter market in the E.E.C. and its task, which in the present dearth of detailed evidence I regard as being impossible, would at least be thereby facilitated. As already mentioned, however, your Lordships have been informed that the company has made a complaint to the Commission under Regulation No. 17, which will entitle the Commission to investigate the behaviour of M.M.B. that is complained of and either make an order under article 3 of the Regulation requiring M.M.B. to bring such behaviour to an end if the Commission finds that it constitutes an infringement of article 86, or grant negative clearance under article 2 if the Commission finds that there is no infringement. Continuance of the behaviour after an order to cease and desist under article 3 may be visited with penalties imposed by the Commission under article 15 (2) (b). From decisions of the Commission under Regulation No. 17 there lies an appeal to the European Court of Justice.

As was held by the European Court of Justice in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51 the initiation of proceedings by the Commission under article 17 does not deprive the national court of jurisdiction to continue with an action brought by an individual citizen based on the same behaviour that is concurrently the subject of investigation by the Commission, and, in continuing that action, to refer a request for a preliminary ruling by the European Court

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A of Justice under article 177 of the Treaty; but it may be worth while quoting two paragraphs of the judgment in *S.A.B.A.M.*, at p. 63, couched in the tactful language in which the European Court of Justice habitually refers to the exercise of their functions by national courts:

B “20. The fact that the expression ‘authorities of the member states’ appearing in article 9 (3) of Regulation No. 17 covers such courts cannot exempt a court before which the direct effect of article 86 is pleaded from giving judgment.

“21. Nevertheless, if the Commission initiates a procedure in application of article 3 of Regulation No. 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission’s action.

C “22. On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between member states, or that there is no doubt of the incompatibility of that behaviour with article 86.”

D So it may be that, as the company is now pursuing also a remedy under Regulation No. 17, the High Court will be spared the problem of devising a suitable form of words for a permanent injunction if the company is ultimately successful in this action.

E For the cumulative reasons given earlier in this speech, I am of opinion that the judgments in the Court of Appeal disclose no ground which would justify an appellate court in interfering with the way in which Parker J. had exercised his discretion by refusing to grant an interlocutory injunction in this case; and that the only ground upon which the Court of Appeal appears to have relied for doing so is bad in law.

I would accordingly allow this appeal and discharge the order of the Court of Appeal.

F LORD WILBERFORCE. My Lords, these proceedings are brought by Garden Cottage Foods Ltd. against the Milk Marketing Board (“M.M.B.”) for the following relief:

“(1) An injunction restraining the defendants whether by themselves or by their servants agents or otherwise from withholding supplies of butter from the plaintiffs or otherwise refusing to maintain normal business relations with the plaintiffs contrary to article 86 of the [E.E.C. Treaty]. (2) Damages.”

G Article 86 is as follows:

H “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Garden Cottage Foods Ltd. is a company owned and managed by Mr. Christopher Bunch and his wife, and its primary business is the purchase and resale of butter in bulk. Mr. Bunch was previously employed for six years by another company in the dairy business and has had two years' experience with the plaintiff company. He claims great expertise in the butter trade. The principal customer of the plaintiff company is a Dutch company, J. Wijffels B.V., whose director, Mr. J. B. A. Wijffels, testifies that the plaintiff company is a very efficient and capable organisation and that the services of Mr. C. R. Bunch are of the utmost value to the Dutch company. There is no doubt that the plaintiff company has a genuine and profitable business but also a precarious one, operating as it does in a highly competitive field with powerful rivals in the United Kingdom and outside. A B

Since commencing business the plaintiff company has bought considerable quantities of bulk butter from the M.M.B.: August 1980—November 1980: £2,170,257·00; January 1981—August 1981: £20,126,854·69. Its profits arise from a small margin of sale price over purchase price, and from the maintenance of low overheads. The greater part of its purchases—in fact over 90 per cent.—is sold to J. Wijffels B.V. which specialises in the sale of British butter. About 90 per cent. of the plaintiff company's supplies of bulk butter come from the M.M.B. C D

The M.M.B. has a statutory monopoly in England and Wales for the purchase and resale of milk. When it has a milk surplus it makes butter. Up to August 1981 it sold butter to the plaintiff company as the latter required it but after a period during which no butter was offered to the plaintiff company, although butter was (by admission of counsel) available for sale, it wrote a letter to the plaintiff company on March 24, 1982, saying that it was only going to sell bulk butter to four "independent distributors." The plaintiff company was told that if it wanted any bulk butter it should contact the above distributors. It is this decision which the plaintiff company contends is a breach of article 86 of the E.E.C. Treaty. Having issued a writ on April 14, 1982, asking for (a) an injunction against withholding supplies from the plaintiff company and (b) damages, it applied for interlocutory relief in the form of an injunction, following the terms of the writ until judgment or further order. This relief was refused by Parker J. but (subject to the wording of the injunction to which I refer later) was granted by the Court of Appeal. E F

Evidence was filed to support the plaintiff company's application. In the interest of speed, this evidence was not presented in a very regular manner. Parker J. had before him an affidavit of Mr. Bunch showing in some detail the nature of the plaintiff company's business and the orders it placed with the M.M.B. It endeavoured to show that the M.M.B. holds a dominant position as manufacturers of butter in England and Wales. It gave evidence of inquiries made of the M.M.B. after August 1981 whether the board had any butter for sale, to which a negative reply was given, and of the letter of March 24, 1982 (see above). It testified that if the plaintiff company had to go for butter to the four distributors, which are competitors in the same market, it would be unable to compete with them on price when reselling, and "may be forced out of business as it cannot purchase equivalent supplies from other sources." An undertaking in damages which might be suffered by the M.M.B. was offered. On the other side a draft and unsworn affidavit on behalf of the M.M.B. was before the court. It denied any "dominant position" and claimed that the plaintiff G H

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A company could obtain supplies of butter from elsewhere in the E.E.C. It denied any "abuse." It claimed to have entered into commitments with the four distributors for 1982/83 while admitting that details of an agreement remained to be agreed and that the latter "can be expected to have entered into forward commitments." It asserted that, if an injunction were granted, there would be uncertainty as to its application. The plaintiff company could, in any event, have a claim for damages.

B When the case came before the Court of Appeal, further evidence was put in, apparently by agreement, or at least without disagreement, and the Court of Appeal within its powers decided to receive it. We must proceed on the basis of this being evidence in the case. Mr. Bunch amplified his previous evidence as to his company's dependence upon the M.M.B. for bulk butter supply. He specified the only alternative sources in the United Kingdom and established, to my mind beyond doubt, that the plaintiff company could not obtain supplies from them: since trading started it had only been able to buy 38 tonnes as compared with 11,700 from the M.M.B. He explained that even if the plaintiff company could obtain butter from E.E.C. sources (which would be difficult if not impossible) this would not be acceptable to J. Wijffels B.V. He provided figures showing how, if the plaintiff company had to buy butter from the four distributors, it could not sell to J. Wijffels B.V. so as to make any profit. He dealt explicitly with the suggestion that the plaintiff company would have an adequate remedy in damages in the following passage, which I quote:

E "The contention made in paragraph 5 of Mr. C. C. Abram's said affidavit (namely that the plaintiff company would have an adequate remedy in damages against the defendants) is impossible to support. For the reasons explained above, the plaintiff company will not be able to make any profit whatsoever and must inevitably make a loss once its overheads are taken into consideration. There is no question in my mind that any remedy which the plaintiff company may have in damages would be totally inadequate in these circumstances. The fact of the matter is that it will not be able to buy adequate (if any) supplies of butter elsewhere and will not be able to continue trading. F It is therefore essential to the plaintiff company that, if it is to survive, it is able to continue buying butter direct from the defendants and that in so doing it is not discriminated against by the defendants."

He gave further and full evidence as to the practical consequences which would follow if the M.M.B. were to be prevented from excluding the plaintiff company from purchasing butter. This affidavit was accompanied by one from Mr. J. B. Wijffels describing his trading relationship with the plaintiff company and testifying to its expertise. A final affidavit was sworn on behalf of the M.M.B. without adding anything material.

G On this evidence, (including that which was not before the judge), I have, for my own part, no doubt that, subject to consideration of certain points with which I shall deal, a Court of Equity would regard the case as being H one for an interlocutory injunction. If satisfied that a serious case had been made out that the M.M.B. occupied a dominant position in the relevant market, and were abusing it, the M.M.B. would then be engaging in a course of action "prohibited" by the E.E.C. Treaty. By doing so, they would inflict serious injury upon the plaintiff company's business. Every argument including the balance of convenience would seem to fall in favour of maintaining the status quo until determination of the action, which is the normal purpose for which interlocutory injunctions are granted.

In order to satisfy itself that such was the position, the court would, in my opinion, have to give consideration to the following matters: (1) has the plaintiff company made out a case, and if so how strong a case, that the M.M.B. (a) has a dominant position in the common market or in a substantial part of it and (b) is abusing it by the action in question. (2) Is it shown that damages would be (a) available and (b) adequate. (3) Is the balance of convenience in favour of, or against, granting an injunction. (4) Would the M.M.B. be adequately protected by the plaintiff company's cross-undertaking in damages. I include this point for completeness, but I do not find any basis for a suggestion that it would not, nor did the M.M.B. take such a point in their case. Incidentally the order of the Court of Appeal does not (contrary to practice) incorporate any undertaking as to damages—which suggests that this element was not regarded as calling for special consideration. I deal, as briefly as I can, with the other points.

As to (1). Subject to a possible question as to what is the relevant market, it seems to me clear that a strong *prima facie* case is made on the question of dominance. I am less confident on the issue of “abuse.” This is a much more difficult question as to which no settled jurisprudence has emerged either in the European Court of Justice or in the courts of member states. The main relevant decision of the European Court is *United Brands Co. v. Commission of the European Communities* (Case 27/76) [1978] 1 E.C.R. 207 which on the one hand suggests that an abuse may be held to exist in a case such as this—of refusal to supply an established customer, placing orders not out of the ordinary—but also shows that difficulties of proof may face the complainant. However, since all four judges who have considered this case below have felt able, though with differing degrees of conviction (Parker J. describing the case, on this point, as weak) to conclude that a sufficient case of abuse is made out at this stage, and since I understand that your Lordships do not take a different position, I am able, though with some hesitation, to agree. The preliminary requirement that the plaintiff company must be able to make out a *prima facie*, or arguable case (however one expresses it), is therefore satisfied.

(2) This question, a necessary one which has always to be answered in cases when an interlocutory judgment is sought, has become entangled into some confusion. Argument was devoted, both in the courts below and in this House, to the question whether an action for damages can be brought in the courts of this country in respect of article 86 of the E.E.C. Treaty. The position in English law before the present case was obscure. In *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396, Lord Denning M.R., by way of obiter dictum, expressed the view that article 86 (as well as article 85) created a tort, namely, in the case of article 86, the tort of abuse of dominant position within the common market. This was not assented to by the other members of the court. In *Valor International Ltd. v. Application des Gaz S.A.* [1978] 3 C.M.L.R. 87—a relevant case since the claim there was for damages for breach of article 86—Roskill L.J. said, at p. 100 that many questions would have to be argued, in English courts or at Luxembourg, before it could be stated categorically that articles 85 and 86 created new torts or wrongs, i.e. as must follow, as giving rise to a claim for damages. In the present proceedings Parker J., citing Lord Denning M.R.'s dictum, expressed the view that an interlocutory injunction could be granted and later assumed, without supporting argument, that damages could be awarded. In the Court of Appeal [1982] Q.B. 1114 there was obviously substantial argument on this point. Lord Denning

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- A M.R., at p. 1125A, thought that the present was not the occasion to decide the point: he thought there was a good deal to be said for there being a remedy in damages, but it was not altogether certain. He thought that the only effective remedy in such a case was an injunction. May L.J., at p. 1126B-D, thought that a remedy in damages in an appropriate case would be damages but "the contrary is certainly arguable." Sir Sebag Shaw, at p. 1126G, had considerable misgivings whether a remedy in damages lay
- B for a contravention of article 86.

- It can I think be accepted that a private person can sue in this country to prevent an infraction of article 86. This follows from the fact, which is indisputable, that this article is directly applicable in member states. The European Court of Justice has moreover decided in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51, in connection with article 86, that it is for the national courts of member states to safeguard the rights of individuals: paragraph 16, at p. 62. Since article 86 says that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct. But can he recover damages?
- D Your Lordships, I understand, regard the contrary as "unarguable" or indeed "quite unarguable"—a bold proposition in the face of doubts expressed by the learned Lords Justices and one whose confidence I do not share. So far as the Community is concerned, article 86 is enforced under Regulation No. 17 by orders to desist (article 3), and if necessary by fines (article 15), and the Court of Justice has similar powers on review. Fines are not payable to persons injured by the prohibited conduct, and there is
- E no way under Community law by which such persons can get damages. So the question is, whether the situation is changed, and the remedy extended, by the incorporation of article 86 into our law by section 2 of the European Communities Act 1972. To say that thereby what is prohibited action becomes a tort or a "breach of statutory duty" is, in my opinion, a conclusionary statement concealing a vital and unexpressed step.
- F All that section 2 says (relevantly) is that rights arising under the Treaty are to be available in law in the United Kingdom, but this does not suggest any transformation or enlargement in their character. Indeed the section calls them "enforceable Community rights"—not rights arising under United Kingdom law. All that the relevant cases (*Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] 3 E.C.R. 1989, *Amministrazione delle Finanze dello Stato v. M.I.R.E.C.O.* (Case 826/79) [1980] 3 E.C.R. 2559) tell us is that it is for national laws to designate the appropriate courts having jurisdiction, and to establish the precedential conditions. Does this enable national laws to define the remedy? There is of course nothing illogical or even unusual in a situation in which
- G a person's rights extend to an injunction but not to damages—many such exist in English law. Community law which is what the English court would be applying is, in any case, *sui generis* and the wording used in article 86 "prohibited" and "so far as it may affect trade "between member states" suggest that this may be such a case—the purpose of this article in the Treaty being, so far as necessary, to stop such practices continuing. No doubt there are arguments the other way; I am certainly not contending for reverse unarguability, but I regret that this House should take a position on this point, which was only skeletally argued, in an interlocutory proceeding. It seems to me, with respect, and I am supported
- H

by Lord Denning M.R., to deserve consideration in greater depth, and, if I may invoke *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407, the court should not in an interlocutory proceeding “decide difficult questions of law which call for detailed argument and mature considerations.”

If this is right, and the plaintiff company’s right to damages is an uncertain one, that would be, in itself, a strong ground for not leaving the plaintiff company to recover hypothetical damages at the trial but for granting an injunction. But I will now consider the position on the assumption that such a right to damages does exist. Should the plaintiff company be left to this claim? There are here two relevant considerations. In the first place, there can be no doubt that the primary remedy against a prohibited act is an injunction against continuance of it. To allow a defendant to persist in conduct which is prohibited at the price of paying damages is something the court does not countenance. It was precisely this principle which induced this House, in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, overruling the trial judge’s discretionary order, to grant an interim injunction restraining the illegal conduct until trial: the objection would remain, said Lord Reid, at p. 342, if the injunction were refused even on terms, that the law would be disregarded until the case was decided. No doubt, even in such a case, the balance of convenience (including the desirability of maintaining the status quo) has to be considered (cf. *Texaco Ltd. v. Mulberry Filling Station Ltd.* [1972] 1 W.L.R. 814) but it must be for the defendant to make a strong case why the prohibited conduct should not cease. Secondly, from the point of view of the plaintiff company, there is in my opinion good reason for not holding that it would be adequately compensated by damages. It is clear from the evidence, and was made clearer by the new evidence before the Court of Appeal, that the plaintiff company would not, if the M.M.B. were allowed to restrict their sales to the four distributors, be able to carry on their business. To depreciate this argument by representing the company’s business as acting merely as intermediaries through a telephone located at their home, seems to me, with all respect, no part of our task at the present time. Any dealing in commodities, or bullion, or currency, can be so represented, but it remains the case that successfully to operate such a business requires skill, experience, a nice judgment of market movements, a sound reputation in the market, and a willingness to take risks. The evidence shows that the plaintiff company is such a business. To say to the plaintiff company that even if it voluntarily suspends business pending a final decision, it will be able to resume it if it wins together with damages for the period of cessation, must ring hollow. The evidence makes, to my mind, a clear case of what is called “irreparable” damage. Of the many cases in which this has been held, I will cite only the well known judgment of Kay L.J. in *J. Lyons & Sons v. Wilkins* [1896] 1 Ch. 811, 827 where he said:

“in all these cases of interlocutory injunctions where a man’s trade is affected one sees the enormous importance that there may be in interfering at once before the action can be brought on for trial; because during the interval, which may be long or short . . . a man’s trade might be absolutely destroyed or ruined by a course of proceedings which . . . may be determined to be utterly illegal; and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval.”

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- A The only substantial argument in favour of refusing an injunction appears to me to be that the learned judge refused it and that his discretion should not have been interfered with. This argument has two aspects, formal and substantive. The formal argument is that the Court of Appeal did not in terms refer to the discretionary character of the decision below, nor did it cite a passage from the judgment of this House in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191. It might, indeed,
- B have been wiser to have done both of these things but it can, and should be said in the court's favour that *Hadmor* laid down no new law: it restated, by way of reminder, in clear and vigorous terms principles long applied to appeals from discretionary decisions, and it is not lightly to be supposed that an experienced Court of Appeal—including Lord Denning M.R. who heard *Hadmor* in that court—was not fully
- C aware of the limits within which such decisions may be reversed. I should certainly suppose, with some confidence, that these limits would have been urged upon them by the very experienced and able counsel who then represented the M.M.B. and we were assured that this was done. But it is the substance that matters. Did the Court of Appeal properly evaluate the grounds on which the judge's decision was based, and was it justified in finding that these grounds were wrong in law or misapprehended in fact? The critical passage in the judge's judgment was the following—stated after a finding that there was a “ triable issue ”:
- D

“ I reject the application for interlocutory relief on two principal grounds which may overlap each other, which come within the balance of convenience. The position is as follows. If no relief is granted the plaintiff is still able to purchase butter albeit less profitably

E from four appointed distributors and others. It would therefore appear that a remedy of damages would be available in due course. If relief though is granted the defendants will have to disrupt their business and the business of their distributors. It appears to me therefore that this is a sufficient ground for rejecting this application.”

- F There follows a passage about the form of the injunction with which I will deal later. We must recognise that this is a report based on notes, and construe it in bonam partem. This passage was criticised by the respondents in five respects: (1) it assumes, without argument, that a remedy in damages lies under article 86; (2) it does not examine at all the questions of adequacy of damages in the circumstances; (3) it does not give recognition to the fact that, in aid of a legislative prohibition, an injunction is the primary remedy; (4) it misapprehends the evidence as to the economic consequences of having to purchase butter from, in effect, the plaintiff company's own competitors; (5) it does not give recognition to the fact that any dislocation of the defendant's business would arise from their having
- G chosen to embark on prohibited conduct.

- H Of these points, the Court of Appeal [1982] Q.B. 1114 dealt clearly and explicitly with points (1), (3) and (5). On point (2) its judgments are exiguous, at best a short reference by May L.J., but that of the judge is no more expansive. Point (4) was explicitly dealt with by Lord Denning M.R. So I cannot see validity in the argument that the Court of Appeal embarked on a trial de novo and did not examine, as it was entitled to examine, the bases for the learned judge's discretionary decisions. Was its examination correct, or at least more correct than that of the judge? I will test this by stating the alternatives.

On the judge's view, the M.M.B. is to be allowed to continue a course of action as to which a case is made that it is prohibited by article 86. This will have, at least, a seriously disruptive effect on the plaintiff company's business—pending trial it will simply be unable to carry it on. It is faced with the prospect of long and expensive proceedings which may reach this House and/or the European Court of Justice against a defendant with unlimited financial resources. At the end of the day, even assuming that the plaintiff company is held entitled to damages, the quantum must be wholly uncertain and it may not be possible for it to resume business at all. On the decision of the Court of Appeal the status quo is preserved until the trial, i.e. the M.M.B. must observe a policy of "open door" and "no discrimination." The plaintiff company's business is preserved; on the hypothesis that it remains profitable, it will be in a position to pay damages to the M.M.B. if it fails in the action. This course of action is in line with what the European Court of Justice thought appropriate in *Camera Care Ltd. v. Commission of the European Communities* (Case 792/79R) [1980] 1 E.C.R. 119. I cannot avoid the conclusion that the Court of Appeal's order makes for better justice and I see nothing wrong with it in law.

I have left to the end the question of the form of injunction, a problem which has not been satisfactorily solved. It is necessary to distinguish two quite separate arguments. The first is that it is impossible to devise a satisfactory injunction, at least at the interlocutory stage. The second relates to the actual text of an injunction assuming that one is to be granted.

The first argument I emphatically reject. It is a counsel of despair and if accepted would lead to the conclusion that interlocutory injunctions cannot be obtained in cases such as these. There is no greater difficulty (indeed normally there is less) in drafting an injunction suitable for interim relief than one suitable for perpetual relief and I refuse to believe that the Commercial Court is less capable than the Chancery Division of framing a suitable order. In the latter a judge would find no difficulty in so doing. The question of the actual text is a difficult one and I have felt some perplexity how to deal with it. At the trial, two alternatives were suggested, both different from what was claimed by the writ. Parker J. felt unable, understandably, to accept either. In the Court of Appeal, Lord Denning M.R. and May L.J. were in favour of an injunction obliging the M.M.B. to supply bulk butter to the plaintiff company upon terms not significantly less favourable—either as to quantity or as to price—than those normally applied to other persons. Ultimately a draft in a form suggested by Sir Sebag Shaw was commended to the parties. This extended protection beyond the plaintiff company to other persons. After some consideration and correspondence, the M.M.B. did not raise any question as to this except to suggest (unjustifiably) a provision as to credit terms which, on reference back to the Court of Appeal, was rejected by that court. Before this House counsel for the plaintiff company did not seek to uphold this form of injunction though in fact it seems to have worked quite well over the 1982 season, but instead suggested yet another form which did not attract your Lordships. However, he must be taken to have maintained the plaintiff company's claim for some injunctive relief. In these circumstances, without the benefit of your Lordships' views, I can only express my own, that the best course would have been to refer the case back to the Commercial Court to frame an injunction which would prevent the M.M.B., until judgment or further order, from excluding the plaintiff company from purchases of bulk

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A butter and from treating the company less favourably as to quantity, price and conditions of sale than other customers.

I would dismiss the appeal.

B LORD KEITH OF KINKEL. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Diplock, which I have had the benefit of reading in draft and with which I agree, I too would allow the appeal.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend, Lord Diplock. I entirely agree with it and for the reasons he gives I too would allow the appeal.

C LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech proposed by my noble and learned friend, Lord Diplock. I agree with it, and for the reasons which he gives would allow the appeal.

Appeal allowed.

D Solicitors: *Ellis & Fairbairn, Thames Ditton; Joynson-Hicks & Co.*

M. I. H.

E

[HOUSE OF LORDS]

GEORGE MITCHELL (CHESTERHALL) LTD. . . . RESPONDENTS

AND

F FINNEY LOCK SEEDS LTD. APPELLANTS

1983 May 23, 24; Lord Diplock, Lord Scarman, Lord Roskill,
June 30 Lord Bridge of Harwich and Lord Brightman

G *Sale of Goods—Exemptions clause—Limitation of liability—Supply of commercially useless seed of wrong description—Condition limiting liability—Vendors' negligence—Whether "fair or reasonable to allow reliance" upon term—Sale of Goods Act 1979 (c. 54), s. 55 (4) (5) (substituted by s. 55 (3) and Sch. 1, para. 11*

H In December 1973 the plaintiffs orally ordered 30lbs. of Finney's Late Dutch Special cabbage seed from the defendant seed merchants from whom they had purchased seed for many years. The plaintiffs knew that the sale was subject to some conditions of sale. The defendants delivered seeds to the plaintiffs in February 1974 with an invoice in their customary form describing the goods delivered in accordance with the oral order. The conditions of sale on the back of the invoice provided, inter alia, (1) that if the seeds sold or agreed to be sold did not comply with the express terms of the contract or proved defective in varietal purity the liability of the defendant vendors was limited to their replacement or to refund of the

price paid, (2) for the total exclusion of all liability for any loss or damage arising from the use of any seeds supplied save their replacement or price refund, (3) for the exclusion of any express or implied condition or warranty, statutory or otherwise, and they stated (4) that the price of seeds supplied was based upon the stated limitations upon liability. A

Owing to errors by the defendants' suppliers and employees the seed supplied was not late cabbage seed and was unmerchantable. After the seed was planted in an area of over 60 acres by the plaintiffs, it germinated and grew but was commercially useless and had to be ploughed in. The price of the seed was £201.60. The loss to the plaintiffs was over £61,000. B

On the plaintiffs' claim for damages for total failure to perform, breach and fundamental breach of the contract, the defendants relied on the conditions of sale which in reply the plaintiffs claimed were void and unenforceable by section 55 (3) and (4) of the Sale of Goods Act 1893 (now, in relation to a contract made between May 18, 1973, and February 1, 1978, section 55 (3) and (4) of the Sale of Goods Act 1979¹ by virtue of section 55 (3) of and paragraph 11 of Schedule 1 to that Act). Parker J. held that it was making commercial nonsense of the contract to suggest that either party intended it to operate where what had been delivered was wholly different in kind from what had been ordered and agreed to be supplied and he gave judgment for the plaintiffs for £61,513 and interest. The defendants appealed. The Court of Appeal held that albeit the conditions limiting liability applied to the contract they were unenforceable by virtue of section 55 (4) of the Sale of Goods Act 1979 in paragraph 11 of Schedule 1 to that Act, and dismissed the appeal. C D

On appeal by the defendants:—

Held, dismissing the appeal, (1) that on their true construction the conditions limited the liability of the defendants to a refund of the price paid or replacement of the seeds and that the ambit of the conditions could not be confined to breaches of contract arising without negligence on the part of the defendants (post, pp. 166B–E, 169C, F–G, 172G). E

Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827, H.L.(E.) and *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* [1983] 1 All E.R. 101, H.L.(Sc.) applied. F

Canada Steamship Lines Ltd. v. The King [1952] A.C. 192, P.C. considered.

(2) But that in all the circumstances, including the fact of the clear recognition in the seed trade that reliance on the conditions would not be fair or reasonable and that the defendants could insure against crop failure without materially increasing the price of seeds, it would not be “fair or reasonable” within the meaning of section 55 (4) of the Sale of Goods Act 1979 in paragraph 11 of Schedule 1 to that Act to allow reliance on the conditions which were accordingly unenforceable (post, pp. 166B–E, 172C–G, G). G

Per curiam. An appellate court reviewing on appeal the application of a statutory provision requiring determination of the question whether a term in a contract is “fair and reasonable” should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly or obviously wrong (post, pp. 166B–E, 170H–171A, C–D, 172G). H

Decision of the Court of Appeal [1983] Q.B. 284; [1982] 3 W.L.R. 1036; [1983] 1 All E.R. 108 affirmed.

¹ Sale of Goods Act 1979, s. 55 (4) (5): see post, p. 170A–E.

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- A The following cases are referred to in the opinion of Lord Bridge of Harwich:
- Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* [1983] 1 All E.R. 101, H.L.(Sc.).
- Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192; [1952] 1 All E.R. 305, P.C.
- B *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827; [1980] 2 W.L.R. 283; [1980] 1 All E.R. 556, H.L.(E.).

The following additional cases were cited in argument:

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1915] A.C. 79, H.L.(E.).

Green (R. W.) Ltd. v. Cade Bros. Farms [1978] 1 Lloyd's Rep. 602.

Peek v. North Staffordshire Railway Co. (1863) 10 H.L.Cas. 473, H.L.(E.).

C APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords by the appellants, Finney Lock Seeds Ltd., from the judgment dated September 29, 1982, of the Court of Appeal (Lord Denning M.R., Oliver and Kerr L.JJ.) dismissing the appellants' appeal from the judgment dated December 12, 1980, of Parker J. awarding the respondents, George Mitchell (Chesterhall) Ltd., £61,513.78 damages and £30,756 interest for breach of contract.

The facts are stated in the opinion of Lord Bridge of Harwich.

Mark Waller Q.C., Mordecai Levene and Mark Howard for the appellants.

E *Leonard Hoffmann Q.C. and Patrick Twigg* for the respondents.

Their Lordships took time for consideration.

June 30. LORD DIPLOCK. My Lords, this is a case about an exemption clause contained in a contract for the sale of goods (not being a consumer sale) to which the Supply of Goods (Implied Terms) Act 1973 applied. In reliance on the exemption clause the sellers sought to limit their liability to the buyers to a sum which represented only one third of one per cent. of the damage that the buyers had sustained as a result of an undisputed breach of contract by the sellers. The sellers failed before the trial judge, Parker J., who, by placing upon the language of the exemption clause a strained and artificial meaning, found himself able to hold that the breach of contract in respect of which the buyers sued fell outside the clause. In the Court of Appeal both Oliver L.J. and Kerr L.J., by similar processes of strained interpretation, held that the breach was not covered by the exemption clause; but they also held that if the breach had been covered, it would in all the circumstances of the case not have been fair or reasonable to allow reliance on the clause, and that accordingly the clause would have been unenforceable under the Act. Lord Denning M.R. was alone in holding that the language of the exemption clause was plain and unambiguous; that it would be apparent to anyone who read it that it covered the breach in respect of which the buyers' action was brought; and that the passing of the Supply of Goods (Implied Terms) Act 1973 and its successor, the Unfair Contract Terms Act 1977, had removed from judges the temptation to resort to the device of ascribing to words appearing in exemption clauses a tortured meaning so as to avoid giving effect to an exclusion or limitation of liability when the judge thought that in the

circumstances to do so would be unfair. Lord Denning M.R. agreed with the other members of the court that the appeal should be dismissed but solely on the statutory ground under the Act of 1973 that it would not be fair and reasonable to allow reliance upon the clause. A

My Lords, I have had the advantage of reading in advance the speech to be delivered by my noble and learned friend, Lord Bridge of Harwich, in favour of dismissing this appeal upon grounds which reflect the reasoning although not the inimitable style of Lord Denning M.R.'s judgment in the Court of Appeal. B

I agree entirely with Lord Bridge's speech and there is nothing that I could usefully add to it; but I cannot refrain from noting with regret, which is, I am sure, shared by all members of the Appellate Committee of this House, that Lord Denning M.R.'s judgment in the instant case, which was delivered on September 29, 1982 is probably the last in which your Lordships will have the opportunity of enjoying his eminently readable style of exposition and his stimulating and percipient approach to the continuing development of the common law to which he has himself in his judicial lifetime made so outstanding a contribution. C

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives would dismiss the appeal. D

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I would dismiss the appeal. E

LORD BRIDGE OF HARWICH. My Lords, the appellants are seed merchants. The respondents are farmers in East Lothian. In December 1973 the respondents ordered from the appellants 30lb. of Dutch winter white cabbage seeds. The seeds supplied were invoiced as "Finney's Late Dutch Special." The price was £201.60. "Finney's Late Dutch Special" was the variety required by the respondents. It is a Dutch winter white cabbage which grows particularly well in the area of East Lothian where the respondents farm, and can be harvested and sold at a favourable price in the spring. The respondents planted some 63 acres of their land with seedlings grown from the seeds supplied by the appellants to produce their cabbage crop for the spring of 1975. In the event, the crop proved to be worthless and had to be ploughed in. This was for two reasons. First, the seeds supplied were not "Finney's Late Dutch Special" or any other variety of Dutch winter white cabbage, but a variety of autumn cabbage. Secondly, even as autumn cabbage the seeds were of very inferior quality. F G

The issues in the appeal arise from three sentences in the conditions of sale endorsed on the appellants' invoice and admittedly embodied in the terms on which the appellants contracted. For ease of reference it will be convenient to number the sentences. Omitting immaterial words they read as follows: H

1. "In the event of any seeds or plants sold or agreed to be sold by us not complying with the express terms of the contract of sale . . . or any seeds or plants proving defective in varietal purity we will, at our option, replace the defective seeds or plants, free of charge to the

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A buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation."

2. "We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid."

3. "In accordance with the established custom of the seed trade any express or implied condition, statement or warranty, statutory or otherwise, not stated in these conditions is hereby excluded."

C I will refer to the whole as "the relevant condition" and to the parts as "clauses 1, 2 and 3" of the relevant condition.

The first issue is whether the relevant condition, on its true construction in the context of the contract as a whole, is effective to limit the appellants' liability to a refund of £201.60, the price of the seeds ("the common law issue"). The second issue is whether, if the common law issue is decided in the appellants' favour, they should nevertheless be precluded from reliance on this limitation of liability pursuant to the provisions of the modified section 55 of the Sale of Goods Act 1979 which is set out in paragraph 11 of Schedule 1 to the Act and which applies to contracts made between May 18, 1973, and February 1, 1978 ("the statutory issue").

E The learned trial judge, Parker J. [1981] 1 Lloyd's Rep. 476, 480, on the basis of evidence that the seeds supplied were incapable of producing a commercially saleable crop, decided the common law issue against the appellants on the ground that "what was supplied . . . was in no commercial sense vegetable seed at all" but was "the delivery of something wholly different in kind from that which was ordered and which the defendants had agreed to supply." He accordingly found it unnecessary to decide the statutory issue, but helpfully made some important findings of fact, which are very relevant if that issue falls to be decided. He gave judgment in favour of the respondents for £61,513.78 damages and £30,756.00 interest. Nothing now turns on these figures, but it is perhaps significant to point out that the damages awarded do not represent merely "loss of anticipated profit," as was erroneously suggested in the appellants' printed case. The figure includes, as Mr. Waller very properly accepted, all the costs incurred by the respondents in the cultivation of the worthless crop as well as the profit they would have expected to make from a successful crop if the proper seeds had been supplied.

G In the Court of Appeal, the common law issue was decided in favour of the appellants by Lord Denning M.R. [1983] Q.B. 284, 296 who said: "On the natural interpretation, I think the condition is sufficient to limit the seed merchants to a refund of the price paid or replacement of the seeds." Oliver L.J. [1983] Q.B. 284, 305, 306, decided the common law issue against the appellants primarily on a ground akin to that of Parker J., albeit somewhat differently expressed. Fastening on the words "agreed to be sold" in clause 1 of the relevant condition, he held that the clause could not be construed to mean "in the event of the seeds sold or agreed to be sold by us not being the seeds agreed to be sold by us." Clause 2 of the relevant condition he held to be "merely a supplement" to clause 1. He thus arrived at the conclusion that the appellants had only suc-

ceeded in limiting their liability arising from the supply of seeds which were correctly described as “Finney’s Late Dutch Special” but were defective in quality. As the seeds supplied were not “Finney’s Late Dutch Special,” the relevant condition gave them no protection. Kerr L.J. [1983] Q.B. 284, 313, in whose reasoning Oliver L.J. also concurred, decided the common law issue against the appellants on the ground that the relevant condition was ineffective to limit the appellants’ liability for a breach of contract which could not have occurred without negligence on the appellants’ part, and that the supply of the wrong variety of seeds was such a breach. A B

The Court of Appeal, however, were unanimous in deciding the statutory issue against the appellants.

In his judgment, Lord Denning M.R. traces, in his uniquely colourful and graphic style, the history of the courts’ approach to contractual clauses excluding or limiting liability, culminating in the intervention of the legislature, first by the Supply of Goods (Implied Terms) Act 1973, secondly, by the Unfair Contract Terms Act 1977. My Lords, in considering the common law issue, I will resist the temptation to follow that fascinating trail, but will content myself with references to the two recent decisions of your Lordships’ House commonly called the two *Securicor* cases: *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827 (“*Securicor 1*”) and *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* [1983] 1 All E.R. 101 (“*Securicor 2*”). C D

Securicor 1 gave the final quietus to the doctrine that a “fundamental breach” of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability. *Securicor 2* drew an important distinction between exclusion and limitation clauses. This is clearly stated by Lord Fraser of Tullybelton, at p. 105: E

“There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: see particularly the Privy Council case of *Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192, 208, where Lord Morton, delivering the advice of the Board, summarised the principles in terms which have recently been applied by this House in *Smith v. UMB Chrysler (Scotland) Ltd.*, 1978 S.C.(H.L.) 1. In my opinion these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such conditions will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses.” F G

My Lords, it seems to me, with all due deference, that the judgments of the learned trial judge and of Oliver L.J. on the common law issue come dangerously near to re-introducing by the back door the doctrine of “fundamental breach” which this House in *Securicor 1* [1980] A.C. 827, had so forcibly evicted by the front. The learned judge discusses what I may call the “peas and beans” or “chalk and cheese” cases, sc. those in which it has been held that exemption clauses do not apply where there has been a contract to sell one thing, e.g. a motor car, and the seller has supplied quite another thing, e.g. a bicycle. I hasten to add that the judge can in no way be criticised for adopting this approach since counsel appearing for the appellants at the trial had conceded “that if what had been delivered had been beetroot seed or carrot seed, he would not be H

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A able to rely upon the clause": [1981] 1 Lloyd's Rep. 476, 479. Different counsel appeared for the appellants in the Court of Appeal, where that concession was withdrawn.

In my opinion, this is not a "peas and beans" case at all. The relevant condition applies to "seeds." Clause 1 refers to seeds "sold" and "seeds agreed to be sold." Clause 2 refers to "seeds supplied." As I have pointed out, Oliver L.J. concentrates his attention on the phrase "seeds
B agreed to be sold." I can see no justification, with respect, for allowing this phrase alone to dictate the interpretation of the relevant condition, still less for treating clause 2 as "merely a supplement" to clause 1. Clause 2 is perfectly clear and unambiguous. The reference to "seeds agreed to be sold" as well as to "seeds sold" in clause 1 reflects the same dichotomy as the definition of "sale" in the Sale of Goods Act
C 1979 as including a bargain and sale as well as a sale and delivery. The defective seeds in this case were seeds sold and delivered, just as clearly as they were seeds supplied, by the appellants to the respondents. The relevant condition, read as a whole, unambiguously limits the appellants' liability to replacement of the seeds or refund of the price. It is only possible to read an ambiguity into it by the process of strained construction which was deprecated by Lord Diplock [1980] A.C. 827, 851c in
D *Securicor 1* and by Lord Wilberforce in *Securicor 2* [1983] 1 All E.R. 101, 102j.

In holding that the relevant condition was ineffective to limit the appellants' liability for a breach of contract caused by their negligence, Kerr L.J. applied the principles stated by Lord Morton of Henryton giving the judgment of the Privy Council in *Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192, 208. The learned Lord Justice stated
E correctly that this case was also referred to by Lord Fraser of Tullybelton in *Securicor 2* [1983] 1 All E.R. 101, 103. He omitted, however, to notice that, as appears from the passage from Lord Fraser's speech which I have already cited, the whole point of Lord Fraser's reference was to express his opinion that the very strict principles laid down in the *Canada Steamship Lines* case as applicable to exclusion and indemnity clauses cannot
F be applied in their full rigour to limitation clauses. Lord Wilberforce's speech contains a passage to the like effect, and Lord Elwyn-Jones, Lord Salmon and Lord Lowry agreed with both speeches. Having once reached a conclusion in the instant case that the relevant condition unambiguously limited the appellants' liability, I know of no principle of construction which can properly be applied to confine the effect of the limitation to breaches of contract arising without negligence on the part
G of the appellants. In agreement with Lord Denning M.R., I would decide the common law issue in the appellants' favour.

The statutory issue turns, as already indicated, on the application of the provisions of the modified section 55 of the Sale of Goods Act 1979, as set out in paragraph 11 of Schedule 1 to the Act. The Act of 1979 is a pure consolidation. The purpose of the modified section 55 is to
H preserve the law as it stood from May 18, 1973, to February 1, 1978, in relation to contracts made between those two dates. The significance of the dates is that the first was the date when the Supply of Goods (Implied Terms) Act 1973 came into force containing the provision now re-enacted by the modified section 55, the second was the date when the Unfair Contract Terms Act 1977 came into force and superseded the relevant provisions of the Act of 1973 by more radical and far-reaching provisions in relation to contracts made thereafter.

The relevant subsections of the modified section 55 provide as follows: A

“(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negated or varied by express agreement . . . but the preceding provision has effect subject to the following provisions of this section. . . . (4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 above is void in the case of a consumer sale and is, in any other case, not enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term. (5) In determining for the purposes of subsection (4) above whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters—(a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply; (b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply; (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d) where the term exempts from all or any of the provisions of section 13, 14, or 15 above if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; (e) whether the goods were manufactured, processed, or adapted to the special order of the buyer. . . . (9) Any reference in this section to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.” B C D E F

The contract between the appellants and the respondents was not a “consumer sale,” as defined for the purpose of these provisions. The effect of clause 3 of the relevant condition is to exclude, inter alia, the terms implied by sections 13 and 14 of the Act that the seeds sold by description should correspond to the description and be of merchantable quality and to substitute therefor the express but limited obligations undertaken by the appellants under clauses 1 and 2. The statutory issue, therefore, turns on the words in subsection (4) “to the extent that it is shown that it would not be fair or reasonable to allow reliance on” this restriction of the appellants’ liabilities, having regard to the matters referred to in subsection (5). G H

This is the first time your Lordships’ House has had to consider a modern statutory provision giving the court power to override contractual terms excluding or restricting liability, which depends on the court’s view of what is “fair and reasonable.” The particular provision of the modified section 55 of the Act of 1979 which applies in the instant case of limited and diminishing importance. But the several provisions of the Unfair Contract Terms Act 1977 which depend on “the requirement of

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A reasonableness," defined in section 11 by reference to what is "fair and reasonable," albeit in a different context, are likely to come before the courts with increasing frequency. It may, therefore, be appropriate to consider how an original decision as to what is "fair and reasonable" made in the application of any of these provisions should be approached by an appellate court. It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which the modified section 55 (5) of the Act of 1979, or section 11 of the Act of 1977 direct attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.

Turning back to the modified section 55 of the Act of 1979, it is common ground that the onus was on the respondents to show that it would not be fair or reasonable to allow the appellants to rely on the relevant condition as limiting their liability. It was argued for the appellants that the court must have regard to the circumstances as at the date of the contract, not after the breach. The basis of the argument was that this was the effect of section 11 of the Act of 1977 and that it would be wrong to construe the modified section 55 of the Act as having a different effect. Assuming the premise is correct, the conclusion does not follow. The provisions of the Act of 1977 cannot be considered in construing the prior enactment now embodied in the modified section 55 of the Act of 1979. But, in any event, the language of subsections (4) and (5) of that section is clear and unambiguous. The question whether it is fair or reasonable to allow reliance on a term excluding or limiting liability for a breach of contract can only arise after the breach. The nature of the breach and the circumstances in which it occurred cannot possibly be excluded from "all the circumstances of the case" to which regard must be had.

The only other question of construction debated in the course of the argument was the meaning to be attached to the words "to the extent that" in subsection (4) and, in particular, whether they permit the court to hold that it would be fair and reasonable to allow partial reliance on a limitation clause and, for example, to decide in the instant case that the respondents should recover, say, half their consequential damage. I incline to the view that, in their context, the words are equivalent to "in so far as" or "in circumstances in which" and do not permit the kind of judgment of Solomon illustrated by the example.

But for the purpose of deciding this appeal I find it unnecessary to express a concluded view on this question.

My Lords, at long last I turn to the application of the statutory language to the circumstances of the case. Of the particular matters to which attention is directed by paragraphs (a) to (e) of section 55 (5), only those in (a) to (c) are relevant. As to paragraph (c), the respondents

admittedly knew of the relevant condition (they had dealt with the appellants for many years) and, if they had read it, particularly clause 2, they would, I think, as laymen rather than lawyers, have had no difficulty in understanding what it said. This and the magnitude of the damages claimed in proportion to the price of the seeds sold are factors which weigh in the scales in the appellants' favour. A

The question of relative bargaining strength under paragraph (a) and of the opportunity to buy seeds without a limitation of the seedsman's liability under paragraph (b) were inter-related. The evidence was that a similar limitation of liability was universally embodied in the terms of trade between seedsmen and farmers and had been so for very many years. The limitation had never been negotiated between representative bodies but, on the other hand, had not been the subject of any protest by the National Farmers' Union. These factors, if considered in isolation, might have been equivocal. The decisive factor, however, appears from the evidence of four witnesses called for the appellants, two independent seedsmen, the chairman of the appellant company, and a director of a sister company (both being wholly-owned subsidiaries of the same parent). They said that it had always been their practice, unsuccessfully attempted in the instant case, to negotiate settlements of farmers' claims for damages in excess of the price of the seeds, if they thought that the claims were "genuine" and "justified." This evidence indicated a clear recognition by seedsmen in general, and the appellants in particular, that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable. B C D

Two further factors, if more were needed, weight the scales in favour of the respondents. The supply of autumn, instead of winter, cabbage seeds was due to the negligence of the appellants' sister company. Irrespective of its quality, the autumn variety supplied could not, according to the appellants' own evidence, be grown commercially in East Lothian. Finally, as the trial judge found, seedsmen could insure against the risk of crop failure caused by supplying the wrong variety of seeds without materially increasing the price of seeds. E

My Lords, even if I felt doubts about the statutory issue, I should not, for the reasons explained earlier, think it right to interfere with the unanimous original decision of that issue by the Court of Appeal. As it is, I feel no such doubts. If I were making the original decision, I should conclude without hesitation that it would not be fair or reasonable to allow the appellants to rely on the contractual limitation of their liability. F

I would dismiss the appeal. G

LORD BRIGHTMAN. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Bridge of Harwich.

Appeal dismissed.

Solicitors: *Davidson Doughty & Co.; McKenna & Co.* H

J. A. G.

3 W.L.R.

A

[HOUSE OF LORDS]

RICHARDS RESPONDENT

AND

RICHARDS APPELLANT

B

1983 April 18, 19;
June 30Lord Hailsham of St. Marylebone L.C.,
Lord Diplock, Lord Scarman, Lord Bridge of
Harwich and Lord Brandon of Oakbrook

C

Husband and Wife—Injunction—Exclusion from matrimonial home—Wife leaving home because of husband's conduct—Basis of court's jurisdiction to make ouster orders—Matters to be taken into account—Matrimonial Homes Act 1967 (c. 75), s. 1 (1) (2) (3) (6) (as amended by Domestic Violence and Matrimonial Proceedings Act 1976 (c. 50), ss. 3, 4 and Matrimonial Homes and Property Act 1981 (c. 24), s. 1 (1))¹—Guardianship of Minors Act 1971 (c. 3), s. 1 (as amended by Domestic Proceedings and Magistrates' Courts Act 1978 (c. 22), s. 36)²

D

The parties, who married in 1974, had two children, a daughter born in 1977 and a son born in 1979. The family occupied a council house. In January 1982 the wife filed a divorce petition under section 1 (2) (b) of the Matrimonial Causes Act 1973 complaining, inter alia, of the husband's failure to have any regard for her feelings or show her any affection and that he did not take her out socially. The husband did not want a divorce and denied the allegation. In June 1982 the wife left the matrimonial home taking the children with her and went to live with a friend. The children spent every weekend at the matrimonial home in the care of the husband. The wife was eventually asked by her friend to leave by November 23, 1982, but when she sought accommodation for herself and the children from the local authority, they could only offer her a caravan. She sought an injunction to exclude the husband from the matrimonial home so that she could return with the children. The judge held that the allegations made by the wife about the husband's behaviour were "flimsy," and that she had no reasonable grounds for refusing to return to live in the same house, but he made the order sought in the interests of the children. On the husband's appeal, the Court of Appeal held that on an application for an injunction to exclude a husband from the matrimonial home the needs of the children were paramount, and dismissed the appeal.

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On appeal by the husband:—

Held, (1) (Lord Scarman dissenting) that the power of the High Court and the county court to make orders relating to the occupation of the matrimonial home during the subsistence of a marriage was derived from section 1 of the Matrimonial Homes Act 1967, as amended, and was to be exercised having regard to the four matters specified in section 1 (3), namely, the conduct of the spouses in relation to each other and otherwise, the respective needs and financial resources of the parties, the needs of any children and all the circumstances of the case, and that none of those matters was paramount over any other, but the weight to be given to each depended on the facts of each case (post, pp. 175H, 181F-H, 184H, 193A, 199D-E, F-G, 200A-D).

H

¹ Matrimonial Homes Act 1967, s. 1 (as amended): see post, pp. 180A—181D.

² Guardianship of Minors Act 1971, s. 1 (as amended): see post, p. 182C-F.

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[1983]

Samson v. Samson [1982] 1 W.L.R. 252, C.A. disapproved. A
Elsworth v. Elsworth (1978) 1 F.L.R. 245, C.A. and *Myers*
v. Myers [1982] 1 W.L.R. 247, C.A. considered.

(2) Allowing the appeal, that since (*per* Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook) the judge in reaching his decision failed to take into account the wife's conduct in refusing to return to the matrimonial home when there were no reasonable grounds for such refusal and thereby disregarded one of the matters to which section 1 (3) of the Act of 1967 required him to have regard (*per* Lord Hailsham of St. Marylebone L.C. and Lord Scarman), his decision was demonstrably wrong because (*per* Lord Hailsham of St. Marylebone L.C.) it was inconsistent with his provisional findings of fact which did not even disclose a *prima facie* case for the wife (*per* Lord Scarman) the needs of the children did not on the findings of fact require the protection of an ouster order, the judge erred in the exercise of his discretion and his order would accordingly be set aside (post, pp. 178D, 184H, 191F-H, 192D-E, 193A, 201D-F). B

Per Lord Hailsham of St. Marylebone L.C., Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook.

The welfare of a minor is only to be regarded as the first and paramount consideration in the circumstances referred to in section 1 of the Guardianship of Minors Act 1971, where the custody, upbringing or proprietary interests of the minor are directly in issue. The section does not apply in ouster proceedings (post, pp. 182G-H, 184H, 193A-D, 201B-D). C

Decision of the Court of Appeal [1983] 2 W.L.R. 633; [1983] 1 All E.R. 1017 reversed. D

The following cases are referred to in their Lordships' opinions:

Adams v. Adams (1965) 109 S.J. 899. E

Agar-Ellis, In re (1883) 24 Ch.D. 317, C.A.

Bassett v. Bassett [1975] Fam. 76; [1975] 2 W.L.R. 270; [1975] 1 All E.R. 513, C.A.

Davis v. Johnson [1979] A.C. 264; [1978] 2 W.L.R. 553; [1978] 1 All E.R. 1132, H.L.(E.).

Elsworth v. Elsworth (1978) 1 F.L.R. 245, C.A.

Gurasz v. Gurasz [1970] P. 11; [1969] 3 W.L.R. 482; [1969] 3 All E.R. 822, C.A. F

J. v. C. [1970] A.C. 668; [1969] 2 W.L.R. 540; [1969] 1 All E.R. 788, H.L.(E.).

McGrath (Infants), In re [1893] 1 Ch. 143, C.A.

Montgomery v. Montgomery [1965] P. 46; [1964] 2 W.L.R. 1036; [1964] 2 All E.R. 22.

Myers v. Myers [1982] 1 W.L.R. 247; [1982] 1 All E.R. 776, C.A. G

North London Railway Co. v. Great Northern Railway Co. (1883) 11 Q.B.D. 30, C.A.

O'Hara (An Infant), In re [1900] 2 I.R. 232.

Phillips v. Phillips [1973] 1 W.L.R. 615; [1973] 2 All E.R. 423, C.A.

Samson v. Samson [1982] 1 W.L.R. 252; [1982] 1 All E.R. 780, C.A.

Silverstone v. Silverstone [1953] P. 174; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556. H

Spindlow v. Spindlow [1979] Fam. 52; [1978] 3 W.L.R. 777; [1979] 1 All E.R. 169, C.A.

Stewart v. Stewart [1973] Fam. 21; [1972] 3 W.L.R. 907; [1973] 1 All E.R. 31.

Tarr v. Tarr [1973] A.C. 254; [1972] 2 W.L.R. 1068; [1972] 2 All E.R. 295, H.L.(E.).

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- A *Thain (An Infant), In re* [1926] Ch. 676, C.A.
Walker v. Walker [1978] 1 W.L.R. 533; [1978] 3 All E.R. 141, C.A.

The following additional cases were cited in argument:

Eade v. Eade, The Times, December 14, 1982, C.A.

O'Malley v. O'Malley [1982] 1 W.L.R. 244; [1982] 2 All E.R. 112, C.A.

Quinn v. Quinn, The Times, June 24, 1982, C.A.

APPEAL from the Court of Appeal.

This was an appeal by Gordon William Richards from a decision dated December 6, 1982, of the Court of Appeal (Cumming-Bruce and Dillon L.JJ.) dismissing the appellant's appeal from an order of Judge Pennant, sitting as a High Court judge in the Weymouth District Registry, who, on the application of the respondent, Christine Norma Richards, made an order on November 8, 1982, requiring the appellant to vacate the matrimonial home in Wareham, Dorset, on or before November 22, 1982. The Court of Appeal refused leave to appeal, but a petition by the appellant for leave to appeal was allowed by the Appeal Committee of the House of Lords (Lord Diplock, Lord Keith of Kinkel and Lord Brandon of Oakbrook) on February 10, 1983.

The facts are stated in the opinions.

Joseph Jackson Q.C. and *Simon Levene* for the appellant.

Patrick Back Q.C. and *Timothy Coombes* for the respondent.

Their Lordships took time for consideration.

June 30. LORD HAILSHAM OF ST. MARYLEBONE L.C. My Lords, I believe that all your Lordships are agreed that this appeal must be allowed. But there is a difference of opinion as to the ground. My noble and learned friend, Lord Scarman, is content to decide the issue on the ground that the discretionary decision of the learned deputy High Court judge can be demonstrated to be plainly wrong, broadly because it was inconsistent with his plainly stated findings of fact which established that the respondent's application for interlocutory relief never achieved even a prima facie case.

The view of my noble and learned friend, Lord Brandon of Oakbrook, concurred in, as I understand, by the remainder of your Lordships, is based on a proposition of law, namely that, in an application of the kind under consideration in the instant appeal, the court to which the application is made is bound to follow the principles enunciated in section 1 of the Matrimonial Homes Act 1967, as amended by section 38 of the Matrimonial Proceedings and Property Act 1970, and by sections 3 and 4 of the Domestic Violence and Matrimonial Proceedings Act 1976, and no other. From this point of principle I apprehend my noble friend, Lord Scarman, dissents.

My Lords, since I have the pleasure in agreeing with the conclusion of my noble and learned friend, Lord Scarman, that this appeal succeeds independently of the point of principle and with my noble friend, Lord Brandon of Oakbrook, in his analysis and conclusions on the point of principle itself, after some consideration I have decided to set out at length my reasons for these two concurrent grounds of decision.

There is at least no dispute about the facts of the case and the course of the proceedings up to and including the hearing of the appeal before your Lordships' Committee. A

Mr. and Mrs. Richards were married on November 18, 1974. The matrimonial home is a council house rented from the Purbeck District Council. Mr. Richards appears to be the tenant. Mr. Richards is a bricklayer, in regular work.

Mr. and Mrs. Richards have two children, a girl and a boy. The girl is aged six, having been born on April 30, 1977. The boy is aged four, having been born on March 26, 1979. The girl is at school and old enough to know, and to say, that she does not wish her parents to be separated. B

The marriage was not without its ups and downs. According to the welfare report, Mrs. Richards had left Mr. Richards on a number of occasions. Other men had been involved. But Mr. Richards had always forgiven Mrs. Richards and had never referred to these infidelities. These facts were based on Mr. Richard's statements to the welfare officer but have not been challenged. C

In January 1982 while the parties were still cohabiting, Mr. Richards was surprised to receive a divorce petition signed by his wife. It sought, amongst other remedies, dissolution of their marriage. It alleged that their marriage had irretrievably broken down. It sought to establish this by proving that Mr. Richards had "behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." Mr. Richards denies these allegations. According to the welfare report, his interest centres on his family and his home. He still cannot "accept the idea of divorce." The petition is therefore opposed, but without a cross-prayer. It has yet to be heard. According to Judge Pennant, sitting as a High Court judge, the allegations struck the judge as being "rubbishy." Mrs. Richards' own counsel admitted in the Court of Appeal that they were "flimsy in the extreme" and described them as "amounting to no more than that the wife was disenchanted with the husband": see [1983] 2 W.L.R. 633, 646. D

On receipt of the petition Mr. Richards asked his wife whether she still wanted to cook for him and so forth. She said she did. She moved out of their bedroom into one of the children's rooms. Thereafter, the children shared a room. The parties continued under the same roof for some months. Mrs. Richards went out a good deal in the evenings. On one occasion she told her husband that she had been seeing a man called David with whom the children got on very well and with whom she was going to live. There is no means of knowing how much of this was true and nothing came of it until June 1982. E

At the beginning of June 1982, Mrs. Richards left home again. She took the children with her. She went to stay with a Mrs. Moore at Mrs. Moore's house in conditions admittedly overcrowded. Mrs. Moore's house is eight miles away in Swanage. From Friday tea-time to Sunday evening Mrs. Richards took the children to stay with their father in the matrimonial home. During term she drove the daughter to school. When she was on holiday she took the children to stay with their father. At some time during this period she took the children for a short time to stay with a man in Hanworthy. This appears to have been during July 1982. She described this as a business arrangement, but, not altogether surprisingly, the judge said that he had more than a suspicion that she had been committing adultery. On August 2 the court welfare F

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A officer made the report to which reference has already been made with a view to investigating the possibility of reconciliation or a possible order of custody. The welfare officer reported that in view of the children's need for their father, of the couple's proven ability to co-operate and of concern for the children's security, the court might feel that joint custody was desirable and workable. No order for custody has in fact been made. In his answer to the petition, Mr. Richards does not seek care and control.

B So matters rested until October 15, 1982. On that date the wife issued a summons making an application intituled in the pending suit from which the present appeal ultimately stems. There was no reference in the heading indicating which jurisdiction the wife was seeking to invoke. It was simply an interlocutory application in the suit. In it, the wife claimed an injunction against molestation and another restricting communication. Both of these were rejected and are not now persisted in. She also sought an order that the husband should quit and deliver up possession of the matrimonial home, and not return thereto. There was an affidavit in support. Both the summons and the supporting affidavit were served on November 3, 1982. On November 8, 1982, the husband filed an affidavit in reply. This was the date of the hearing before Judge Pennant sitting as a judge of the High Court. Both parties gave brief evidence to the judge. Mrs. Richards said she could not stay at the house of her friend beyond November 22, and that, although she had tried to get accommodation from the council, the best they could offer, at least at that moment, was a caravan. She added that she would not return to the matrimonial home while her husband was there. In these circumstances, Judge Pennant was called upon to make his decision on the wife's application.

E The judge found that Mrs. Richards "has no reasonable ground for refusing to return to live in the same house as her husband," but that the existing accommodation where she was then living was "overcrowded and not a fit home for the children." Contrasting the case with *Samson v. Samson* [1982] 1 W.L.R. 252 he said that the wife in that case had said that she "could not bear to be in the same house as the husband." In the present case, however, he said:

"This wife is strong-willed and does not wish to be in the same house as her husband, and says she cannot bear to be with him. *But it is not true that she cannot.*" (Emphasis mine.)

G The judge further found: "I think it is thoroughly unjust to turn out this father, but justice no longer seems to play any part in this branch of the law." He felt himself constrained to follow *Samson v. Samson* [1982] 1 W.L.R. 252, rather than *Myers v. Myers* [1982] 1 W.L.R. 247, on the ground that the matrimonial home

H "was a house provided by the public as a home for these four people, and that being so, the public interest [sic] is best met by installing the children in that home, which means in practice installing their mother too."

He added:

"I find that it is by no means certain that there will be a divorce on the present grounds, and I have come to the conclusion that although it is unjust to the husband, it seems right to grant the order sought in the interests of the children."

In the event the judge made an order, not in the terms asked for by the wife but in the following terms: A

“that the respondent do vacate the matrimonial home 13, Stoborough Green, Stoborough, Wareham, Dorset on or before November 22, 1982.”

There was no order to the effect that he should not return. In the event Mr. Richards appealed and by an order dated December 6, his appeal was dismissed by the Court of Appeal (Cumming-Bruce and Dillon L.JJ.) [1983] 2 W.L.R. 633 who also refused leave to appeal to the House of Lords. By leave of the Appeal Committee the husband now appeals to your Lordships. It is, however, important to point out that what has in fact happened on the ground is, owing to the good sense of the parties, rather different from what the orders of the courts below might have led one to expect. In fact, the wife occupies the house from Monday to Friday, and the husband from Friday to Monday. The children are permanently in the house and are looked after by the parent in occupation. The husband has no difficulty in looking after them either under this arrangement or when the wife is on holiday, when he stays in the house throughout the week. This rather bears out what the welfare officer said in August 1982: “When I asked whether Mr. Richards could manage the children on his own, he was amused, as, he said, he had been in the habit of looking after them.” B C D

As will appear from the above facts and findings, it must now be clear, and I believe that it ought to have been clear all along, that the wife has never made out a case for excluding the husband from the home. If there had been any doubt about this, the matter has now been established by the subsequent events beyond a peradventure. It therefore follows that I entirely accept the reasoning on this point of my noble and learned friend, Lord Scarman. E

I have now to consider the decision of the Court of Appeal, and the general principles of law involved. The court were quite right in thinking that the previous decisions of the Court of Appeal in this jurisdiction, to mention only *Elsworth v. Elsworth* (1978) 1 F.L.R. 245, *Myers v. Myers* [1982] 1 W.L.R. 247, *Samson v. Samson* [1982] 1 W.L.R. 252 and *Bassett v. Bassett* [1975] Fam. 76, appear to conflict. In the event, the court chose to follow *Bassett v. Bassett* and *Samson v. Samson* and disapprove *Elsworth v. Elsworth* and *Myers v. Myers*. Since I believe all four to have erred to some extent in principle, though not necessarily on the facts before them, I believe it is right to begin at the beginning and trace back the error to its source. F G

From the start it struck me as strange that in none of the cases cited before us was the statutory basis of the jurisdiction to grant these ouster injunctions properly discussed or investigated, and, as a result, the criteria which should actuate the court in exercising it were never properly considered or formulated. This is the more strange, since the jurisdiction of the Supreme Court to grant or withhold ouster injunctions is, I believe, based on statute and statute alone, and the criteria which should be applied are now, to my mind, adequately formulated in the relevant statutory provisions. H

Prior to 1967, the jurisdiction of the High Court to grant or withhold injunctions, final or interlocutory, was contained in what was then section 45 of the Supreme Court of Judicature Act (Consolidation) 1925. With the omission of the now inappropriate reference to mandamus, the section is

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A now found in section 37 of the Supreme Court Act 1981, the material words of which read: "The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so."

B I do not think it necessary to proceed to consider whether, apart from the section, the court has any inherent jurisdiction. If it has, I believe it is indistinguishable in its application to the jurisdiction conferred by the section. I prefer to say that any inherent jurisdiction is absorbed by the section.

C Being in general terms, the section is silent as to the criteria to be followed, and since the section applies to all divisions, such criteria had before 1967 been the subject of case law jurisprudence of a wide and multifarious kind. The section is still in force, and still applies in principle to all divisions of the High Court. Nevertheless, and whilst it is still there in reserve in cases where the special legislation to which I will be referring does not apply, in my opinion, where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act D prescribes.

E Any other conclusion would, I believe, lead to the most serious confusion. The result of a particular application cannot depend on which of two alternative statutory provisions the applicant invokes, where one is quite general and the other deals in precise detail with the situation involved and was enacted at a time when the general provision already existed.

F The rights conferred by section 37 were however subject to one serious limitation which applies to all equitable remedies of this class, whether statutory or arising from inherent jurisdiction, namely that an injunction could only be used in support of a legal right (and therefore only doubtfully in a number of ouster applications in the matrimonial jurisdiction) and despite statements (mostly obiter) to the effect that the court might apply different principles where the welfare of children was in question (cf. *Stewart v. Stewart* [1973] Fam. 21, 23, *Adams v. Adams* (1965) 109 S.J. 899, *Phillips v. Phillips* [1973] 1 W.L.R. 615), neither the extent of the jurisdiction nor the criteria for its exercise were fully explored. Before the passing of the legislation to which I am about to refer this jurisdiction was also regularly invoked in ouster cases: see e.g. *Silverstone v. Silverstone* [1953] P. 174, *Montgomery v. Montgomery* [1965] P. 46, 51. G There was, indeed, no other basis for its exercise, since the section is wide enough to cover applications for ouster, and all-embracing enough to make any inherent jurisdiction superfluous.

H Nevertheless, in my opinion, a new era opened with the passage of the Matrimonial Homes Act 1967, which however in *Tarr v. Tarr* [1973] A.C. 254, proved to contain an important but, in my opinion probably unintentional, casus omissus. This was repaired by section 3 of the Domestic Violence and Matrimonial Proceedings Act 1976, and the jurisdiction was extended by the application of section 4 of the same Act as regards section 1 (3), (4) and (6) of the Matrimonial Homes Act 1967 to joint interests owned by each of two spouses.

In its amended form, as it applied at the material time and which in my view is applicable to and decisive of the present proceedings, section 1 of the Matrimonial Homes Act 1967 now reads as follows:

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"Protection against eviction, etc., from matrimonial home of spouse not entitled by virtue of estate, etc., to occupy it." A

"1. (1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as 'rights of occupation') :—(a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section; (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house." B

"(2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or prohibiting, suspending or restricting the exercise by either spouse of the right to occupy the dwelling house or requiring either spouse to permit the exercise by the other of that right." C

"(3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,—(a) may except part of the dwelling house from a spouse's rights of occupation (and in particular a part used wholly or mainly for or in connection with the trade, business or profession of the other spouse); (b) may order a spouse occupying the dwelling house or any part thereof by virtue of this section to make periodical payments to the other in respect of the occupation; (c) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house." D

"(4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order." E

"(5) Where a spouse is entitled under this section to occupy a dwelling house or any part thereof, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, mortgage payments or other outgoings affecting the dwelling house shall, whether or not it is made or done in pursuance of an order under this section, be as good as if made or done by the other spouse; and a spouse's occupation by virtue of this section shall for purposes of the Rent Act 1977 (other than Part V and sections 103 to 106) be treated as possession by the other spouse. . . . Where a spouse entitled under this section to occupy a dwelling house or any part thereof makes any payment in or towards satisfaction of any liability of the other spouse in respect of mortgage payments affecting the dwelling house, the person to whom the payment is made may treat it as having been made by that other spouse, but the fact that that person has treated any such payment as having been so made shall not affect any claim of the first-mentioned spouse against the other to an interest in the dwelling house by virtue of the payment." F

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A “(6) The jurisdiction conferred on the court by this section shall be exercisable by the High Court or by a county court, and shall be exercisable by a county court notwithstanding that by reason of the amount of the net annual value for rating of the dwelling house or otherwise the jurisdiction would not but for this subsection be exercisable by a county court.

B “(7) In this Act ‘dwelling house’ includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling house and occupied therewith.

C “(8) This Act shall not apply to a dwelling house which has at no time been a matrimonial home of the spouses in question; and a spouse’s rights of occupation shall continue only so long as the marriage subsists and the other spouse is entitled as mentioned in subsection (1) above to occupy the dwelling house, except where provision is made by section 2 of this Act for those rights to be a charge on an estate or interest in the dwelling house.

D “(9) It is hereby declared that a spouse who has an equitable interest in a dwelling house or in the proceeds of sale thereof, not being a spouse in whom is vested (whether solely or as a joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling house, is to be treated for the purpose only of determining whether he or she has rights of occupation under this section as not being entitled to occupy the dwelling house by virtue of that interest.”

E Subsection (5) of this section appears as amended by the Rent Act 1977; subsection (9) of this section was added by the Matrimonial Proceedings and Property Act 1970. But the vital subsections of this all-important change in the law, affecting the present appeal, are subsections (1), (2), (3) and (6).

F Of these subsections, subsection (3) makes it clear that when exercising this jurisdiction, both the conduct of the spouses and the needs of the children are, with other considerations, matters to which the court must have regard and which require to be weighed together so as to provide a just and reasonable result.

G I do not for a moment suggest that the general jurisdiction conferred by section 37 of the Supreme Court Act 1981 has been abolished or that it cannot be invoked in appropriate cases (e.g. molestation) for the protection of minors. But in my view the effect of section 1 of the Matrimonial Homes Act which was in no way referred to in argument in the Court of Appeal or, so far as I can make out, in any of the reported cases cited, is to codify and spell out where it is applicable the jurisdiction of the High Court and county court in ouster injunctions between spouses whether in pending proceedings or by way of originating applications and the criteria to be applied are those referred to in subsection (3) and not any other criteria sometimes treated as paramount by reported decisions of the court. I do not know that they differ very much from those developed by the case law evolved prior to 1967 and 1976 as respects the more limited jurisdiction of the court. But in so far as any decisions of the Court of Appeal whether before or after the passing of the Matrimonial Homes Act 1967 (with its amendments and additions) suggests any other criteria than those set out in subsection (3), particularly any which may claim that one set of criteria are to be treated as prior to, or paramount over, any or all of the others, in my opinion they are not to be regarded as sound law, although I wish to say that most if not all the decisions in which such dicta occur are probably

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to be justified on the particular facts, and even the general observations when taken in the context of their particular facts but not out of context may well be justifiable. A

In particular I contrast the language of section 1 of the Matrimonial Homes Act 1967, which I have set out in full above, and especially sub-section (3), with the language of the first and paramount consideration or criterion laid down in the Guardianship of Minors Act 1971 which has been the law at least since 1925 but has a different legislative pedigree and covers (in my judgment) a different field from the legislation which I have been endeavouring to describe and is designed to prevent an altogether different "mischief." In my view this Act was passed in order to lay to rest once and for all decisions and doubts which had been expressed in proceedings of a limited kind as to the respective rights of the parents inter se and against their children. I regard it as significant and probative of this view that the priority and paramountcy of the principle enunciated by this section is absolute and not qualified as in the two sections conferring jurisdiction to pronounce interlocutory injunctions by any requirement that the result should be "just and reasonable." B C

The section 1 as amended by section 36 of the Domestic Proceedings and Magistrates' Courts Act 1978 reads as follows: "Principle on which questions relating to custody, upbringing etc. of minors are to be decided." These words are in a side note and do not, of course, form part of the section to be construed. "1. Where in any proceedings before any court (whether or not a court as defined in section 15 of this Act)—(a) the legal custody or upbringing of a minor; or (b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, *is in question*, the court, *in deciding that question*, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father . . . in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." (The emphasis when it occurs above is, of course, mine). D E F

I do not believe that an application for ouster is "a proceeding" in which "the custody or upbringing of a minor is in question," although of course "the needs of the children" are expressly required by section 1 of the Act of 1967 to be taken into account in an application under that section, and may of course prevail in any given case where it is "just and reasonable" that they should. G

In the Matrimonial Homes Act, the "needs of [the] children" are an important and specified, but not in every case first or paramount, consideration to be applied. In the Guardianship of Minors Act, the "welfare" of the children is the "first and paramount" consideration. In my view, the Guardianship of Minors Act criterion is to be applied only in the proceedings of the type specified in the section, i.e. proceedings in which custody, upbringing, or the proprietary jurisdiction implied by section 1 (b) fall to be decided as a matter directly in issue, and not in cases to which section 1 (3) of the Matrimonial Homes Act 1967 is to be applied so as to produce a just and reasonable result, even though in these cases the interests of the children are directly or indirectly affected, when the various considerations must be balanced in the light of the particular facts. The same I consider would be true of the criteria set forth in section 25 of the Matrimonial H

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- A Causes Act 1973, another section which gives rise to poignant and emotionally charged decisions with which the interests of children may often be directly or indirectly intimately bound up. When Parliament has told the courts the criteria to be applied in a particular class of case it is not for the courts either to invent new criteria or to apply new and absolute priorities of their own whether derived from some other and differing statutory provision or not. The apparent conflict between the rival decisions of the Court of Appeal which have given rise to the controversy in the present case is due in my view to the failure in repeated instances of successive divisions of that court to remind itself of the correct legislative framework within which it should act. It should further be noted that section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 conferring jurisdiction on the county court is expressed to be without prejudice to the High Court jurisdiction here in question, and is relevant if at all only for purposes of comparison.

- It follows, I think, that the present decision cannot be supported either on the grounds expounded by my noble and learned friend, Lord Scarman, or the ground of principle on which my noble and learned friend, Lord Brandon, founds his opinion. It is plain that Judge Pennant would not have reached the decision he did if he had not felt himself constrained by conflicting decisions of the Court of Appeal which he sought vainly to reconcile by appeal to the "public interest," itself not one of the criteria set forth in section 1 (3) of the Matrimonial Homes Act 1967, unless it can be subsumed under the general rubric "all the circumstances of the case." It is clear that he did not consider the result "just and reasonable" as section 1 (3) of the Act of 1967 requires and it is clear that it was not so even if the paramountcy principle were applicable. In any event, for the reason that it no longer corresponds to what, owing to the good sense of the parties, is now actually happening, his order could not stand. For the same reason if no other, the passage in the judgment of Cumming-Bruce L.J. [1983] 2 W.L.R. 633, 643G; [1983] 1 All E.R. 1017, 1026E must also fall as overtaken by events.

- It follows also from what I have said that in my view both judgments are vulnerable to the objection of principle which I have tried to summarise in what I have already said. I do not think the principle enunciated in the Guardianship of Minors Act 1971 is applicable for the following reasons.

- (1) This application is not and cannot be construed as being a proceeding in which "the legal custody or upbringing of a minor; or . . . the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question," i.e. to adopt Lord Scarman's phrase "is in issue and has to be decided" in the application, though no doubt legal custody will fall to be decided in the suit.

- (2) Although, for the reasons given by my noble and learned friend, Lord Brandon, it may have been wrongly intitled, the application is one to which the Matrimonial Homes Act 1967 as amended does apply, and accordingly "the needs of the children," although one of the factors to be considered and weighed, is not the only factor, and to make it the "first and paramount" consideration is to fly in the face of section 1 (3). This is not, of course, to say that if, on consideration, the "needs of the children" are so clamant as in the circumstances of the case require them to be given paramountcy the court should not in the proper exercise of its discretion give effect to precisely that.

- (3) To come to a different conclusion would be to fly in the face of

the express words of section 1 (1) (a) that a spouse in occupation is not to be evicted "except with the leave of the court given by an order under" section 1. The fact that in the instant case the spouse against whom the ouster order was sought was the spouse entitled to occupy the dwelling house under "an estate or interest or contract" is a fortiori to this provision since it cannot be supposed that a spouse so entitled is in a worse position than a spouse "not so entitled."

(4) So far as regards the cases cited, I am far from saying that *Elsworth v. Elsworth*, 1 F.L.R. 245, *Myers v. Myers* [1982] 1 W.L.R. 247, *Samson v. Samson* [1982] 1 W.L.R. 252, *Bassett v. Bassett* [1975] Fam. 76 (all cited supra) or *Walker v. Walker* [1978] 1 W.L.R. 533, were wrongly decided on their own facts. But their rationes decidendi, if taken as universal expressions of principle, are inconsistent with one another, and, if so taken, are wrong in so far as one line of cases purports to subordinate the "needs of the children" to "the conduct of the spouses" in every case or vice versa or in so far as an ouster application is said to be treated as a "housing matter." I venture to think, however, that the facts in matrimonial proceedings are so varied in their nature that courts should be extremely careful before reading into judgments which are uttered in the context of a particular case universal principles which may have the virtue of simplicity but which if so treated are at variance with the fuller and more appropriate criteria prescribed by Parliament, and in particular with the requirement that the total result should be just and reasonable.

(5) I would venture to add that whether one treats the "needs" of children as a relevant factor or their "welfare" as paramount, the court ought not to confine itself to a consideration of purely material requirements or immediate comforts. These may have to be given priority in a given case either owing to their urgency or the seriousness of denying them. But it is not necessarily for the interests of children that either parent should be allowed to get away and be seen to get away with capricious, arbitrary, autocratic, or merely eccentric behaviour. It may well be difficult for a court to exercise control. But the difficulty is not rendered less if it is prepared to throw its hand in so readily.

At all events the appeal must be allowed. The order of ouster cannot stand. For myself, I would deprecate the parties taking too much advantage of this. Despite their estrangement which may or may not prove permanent, subsequent events endorse the welfare report as to their ability to co-operate. If either acts unreasonably, the courts are still open. What is now proposed does not deprive the parties of their right to come to a business-like agreement voluntarily or to apply for a suitable order should either act unreasonably.

In the event I agree with my noble and learned friends on both the grounds proposed in their several judgments. The appeal must be allowed, the order appealed from be set aside, and there must be a legal aid taxation of costs on both sides.

LORD DIPLOCK. My Lords, I too would allow this appeal for the reasons given by my noble and learned friends, the Lord Chancellor and Lord Brandon of Oakbrook, whose speeches I have had the privilege of reading in advance. Like them and my noble and learned friend, Lord Bridge of Harwich, I find myself unable to accept the view of my noble and learned friend, Lord Scarman, that the provisions of section 1 of the Guardianship of Minors Act 1971 are applicable to ouster proceedings.

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A LORD SCARMAN. My Lords, in this appeal the House is called upon to determine the principle governing the exercise of a court's discretion where, during the subsistence of a marriage where there are children to be considered, it is invited upon application by one spouse to make an order excluding the other spouse from the matrimonial home. The specific question for decision is whether the court must, as a matter of law, treat the interests of the children as the first and paramount consideration.

B In the present case, the trial judge in ordering the husband out of the home, and the Court of Appeal in upholding his decision, acted on this principle. The husband, as appellant before your Lordships, submits that they erred in law. It is his submission that, though the interests of the children are always important and often critically important, there is no rule of law which requires the courts, when considering an application to oust a spouse from his home, to give them priority. The court's duty, it is submitted, is to weigh the conflicting interests, to have regard to the needs of all who are affected, and to make an order which is fair, just and reasonable in all the circumstances. He then asks the House to conclude that on the facts it would be unfair, unjust and unreasonable to exclude him from the home.

C Two statutes fall to be considered. First in order of date is section 1 of the Guardianship of Infants Act 1925 as now re-enacted and amended by section 1 of the Guardianship of Minors Act 1971, which has itself been amended. I shall refer to this legislation as "the Guardianship Act" and to the principle there enunciated, as "the principle of paramountcy." The second is the Matrimonial Homes Act 1967 as amended. I shall refer to this legislation as "the Act of 1967" and to the test it requires as "the fair and reasonable test." There is no express reference to either piece of legislation in the judgments below, although the principle of paramountcy of the children's interests emerges clearly as the ground of decision. This omission—for that is what it is—is commonly found in the case law. I do not know of a case where a court invited to make an ouster order has addressed itself to the question of construction of section 1 of the Guardianship Act, though in making ouster orders courts have frequently assumed it applies. Nor do I know of any case in which the court has asked itself whether "the fair and reasonable test," as set forth in section 1 (3) of the Act of 1967, excludes the guardianship "principle of paramountcy." This inattention to the statute law explains, I believe, the divergence of views in the case law dealing with the question now in issue before the House, and renders it unnecessary to consider the cases in any detail.

G In this appeal the House is concerned with an ouster order granted as interlocutory relief in a pending divorce suit. But there exist other statutory powers to make ouster orders, and it is notable that the case law has tended to pay scant regard to the particular statutory power being invoked. The statutory provision is a hotchpotch of enactments of limited scope passed into law to meet specific situations or to strengthen the powers of specified courts. The sooner the range, scope, and effect of these powers are rationalised into a coherent and comprehensive body of statute law, the better. Briefly, the various jurisdictions are these: (1) the jurisdiction (which the wife invoked in this case) of the divorce court to grant interlocutory relief in pending matrimonial causes: Matrimonial Causes Act 1973 and section 37 (1) of the Supreme Court Act 1981 re-enacting section 45 of the Supreme Court of Judicature (Consolidation) Act 1925; in this jurisdiction custody is in issue. (2) The jurisdiction conferred upon the High Court and county court by the Act of 1967 in protection of the spouse

who is given by that Act a statutory right of occupancy of the home; the exercise of this jurisdiction does not directly raise the custody issue but it can, and frequently does, have a great impact on the welfare and upbringing of children. (3) The jurisdiction of the county court under section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976; custody is not in issue, but the comment on the Act of 1967 power applies here also. (4) The jurisdiction of the magistrates under section 16 of the Domestic Proceedings and Magistrates' Courts Act 1978. The magistrates have extensive powers in respect of the custody, welfare and upbringing of children.

I would make three comments at this stage. The divorce court is able to make an interlocutory order excluding a spouse from the home under the statutory power mentioned above because, as I shall emphasise later, it has an inherent power independent of statute to protect the parties in a pending matrimonial suit and their children. My second comment is that a court exercising the wardship jurisdiction would seem also to have an inherent power to exclude a parent from the matrimonial home: if it has, its discretion would appear to be governed by the Guardianship Act, since wardship in its modern dress is concerned directly with questions as to the custody, care and upbringing of children. Thirdly, the common feature in all these jurisdictions is that the court has a discretion. But only in the case of magistrates is there to be found an express incorporation of the priority conferred by the Guardianship Act in relation to the custody and upbringing of children: section 15 of the Domestic Proceedings and Magistrates' Courts Act 1978. Is this statutory priority generally applicable wherever and in whatever context the court has to have regard to the welfare of children of a family? Or is it limited? And, if limited, what is the range of its application? More specifically, does it apply in cases in which the spouse making the application possesses the Act of 1967's statutory right of occupation of the matrimonial home?

These questions have, so far as I am aware, never been directly faced by any court exercising any of the jurisdictions listed above. The courts have, understandably, sought to establish a common basis of principle in deciding whether or not to make an ouster order. They have signally failed. Contrast *Myers v. Myers* [1982] 1 W.L.R. 247, where the Court of Appeal allowed a husband's appeal against an ouster order because the judge failed to consider whether the wife's refusal to live with him in the home was reasonable, with *Samson v. Samson* [1982] 1 W.L.R. 252, where another division of the Court of Appeal had regard to the welfare of the children, adopted the principle of paramountcy and upheld the ouster order. The reason for such divergence may well be that the courts have sought to establish a principle independently of the statute law. For myself, I believe a full consideration of the statute law will establish not only that *Samson's* case was correctly decided but also that the principle of paramountcy does afford a common basis of principle.

It is necessary, however, to have regard not only to the language of section 1 of the Guardianship Act, but also to the law, whether it be statutory provision or the inherent power of the court, conferring the jurisdiction which is being invoked. An illustration of the danger of ignoring the statute law can be found in the way in which the Court of Appeal, in *Spindlow v. Spindlow* [1979] Fam. 52, handled an application under section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976. It must be unlikely that the section, though it offers no express guidance, can be applicable unless there be shown violence, or the threat

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- A of it, or a reasonable apprehension that the presence of the man (or woman) in the house constitutes a danger to the physical or emotional health or well-being of the woman (or man) and the children: see *Davis v. Johnson* [1979] A.C. 264. But whatever be the scope of the section (a question which does not arise in this appeal), the question whether or not to make an order under the section cannot be classified as “essentially a housing matter, housing for the children” as the Court of Appeal classified it in *Spindlow’s* case [1979] Fam. 52, 59E, *per* Ormrod L.J. Yet the Court of Appeal was right to seek a rationalisation of principle covering the whole field of ouster orders under whatever jurisdiction they are made. As Ormrod L.J. later observed in *Samson v. Samson* [1982] 1 W.L.R. 252, 254, an application for an ouster order cannot be considered in isolation from questions as to the custody, care and control of the children.
- C In deciding, therefore, whether to make an order or not, a court must, unless the statute which confers the powers is to the contrary effect, bear in mind that it is the will of Parliament expressed in the Guardianship Act that in questions of custody the principle of paramouncy is to be applied.

The Guardianship Act

- D The development of the law’s protection of the welfare of children took a new direction with the enactment of the Guardianship of Infants Act 1886. In 1883 Bowen L.J. was able to say that it would be fallacious to accept the recognised test in custody cases of “the benefit of the infant” as permitting the court, save in exceptional cases, to interfere with the rights of the father: *In re Agar-Ellis* (1883) 24 Ch.D. 317, 337.
- E But by 1893 Lindley L.J., delivering the judgment of the Court of Appeal, could say: “The dominant matter for the consideration of the court is the welfare of the child”: *In re McGrath (Infants)* [1893] 1 Ch. 143, 148. In 1925 the principle of paramouncy, by now well recognised by the courts, was fully formulated in section 1 of the Guardianship of Infants Act 1925. Indeed, in *In re Thain (An Infant)* [1926] Ch. 676 the section was said by the Court of Appeal to be declaratory of the existing law.
- F The case law, like the statute law, was concerned with the right of parents to the custody, care and control of the infant: but the law by judicial decision and statutory enactment did proclaim the principle of paramouncy as a principle which could not be said to be irrelevant in other contexts where the welfare of children fell to be considered by a court. It could not be confined, save by the pedantry of literalism, to the issue of custody with such strictness that its guidance
- G was to be rejected in other cases where problems as to the welfare of children and their upbringing fell to be considered.

I turn now to consider the Guardianship Act. The current statutory provision is section 1 of the Act of 1971, as amended. The side note is in these terms: “Principle on which questions relating to custody, upbringing etc. of minors are to be decided.” The section is as follows:

- H “Where in any proceedings before any court (whether or not a court as defined in section 15 of this Act)—(a) the legal custody or upbringing of a minor, or (b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common

law possessed by the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.” A

The term “legal custody” was substituted for “custody” by section 36 of the Domestic Proceedings and Magistrates’ Courts Act 1978. Its meaning is to be found in section 86 of the Children Act 1975:

“unless the context otherwise requires, ‘legal custody’ means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent); . . .” B

Legal custody, therefore, includes the custody, the care and control of a child, and access to him. It embraces all the parental rights and duties in respect of the person of the child. C

Two points of construction of the section were settled by your Lordships’ House in *J. v. C.* [1970] A.C. 668. The first is the universality of the application of its principle of paramountcy. In whatever court and between whatever parties (be they parents, foster-parents, institutions or strangers), if legal custody is in issue, the principle applies. The second point is the meaning of “first and paramount consideration.” It is a principle not of exclusion but of priority. In *J. v. C.* Lord MacDermott put it thus, at p. 715: D

“3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation, the broad nature of which is still as described in the fourth of the principles enunciated by FitzGibbon L.J. in *In re O’Hara (An Infant)* [1900] 2 I.R. 232, 240.” E

“Unimpeachable” is, perhaps, stating an unattainable ideal. “Good,” however, would be a worthy substitute. The reference to *O’Hara’s* case was to the following passage: F

“4. In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously . . . acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.” G

J. v. C. [1970] A.C. 668 was a ward of court case: and in *O’Hara’s* case [1900] 2 I.R. 232, FitzGibbon L.J. was considering a choice between institutional care and parental care. But the section applies in *any* proceedings in *any* court where legal custody is in question. H

It is clear that, as a matter of strict literal construction, the section imposes the principle of paramountcy only where legal custody (or the property of the child) is in issue and has to be decided. But, unless it can be shown to have been excluded by express enactment or by necessary implication, the principle must guide the exercise of a court’s discretion in every case in which the court is required to consider the welfare and upbringing of minor children. It would be contrary to the will of Parliament for a court to make an order directly affecting the rights, duties and responsibilities of parents in respect of the personal life of their children without ensuring that its order did not obstruct, or

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A offend against, the principle which must govern judicial decision as to legal custody. Upon this broad ground I would hold that, unless expressly or by necessary implication excluded by statute, the principle of section 1 of the Guardianship Act applies wherever there are children whose interests must be considered before an order is made excluding one parent from the family home.

B It is, however, submitted, and, as I understand, your Lordships accept the submission, that in cases in which the spouse seeking an ouster order has the Act of 1967's right of occupation, the Guardianship Act's paramountcy of the interests of the children is excluded. I turn, therefore, to the Act.

The Matrimonial Homes Act 1967

C The Act confers on a spouse who has no beneficial estate or interest in the matrimonial home a right (a) if in occupation, not to be excluded except by leave of the court given by order, and (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the home: section 1 (1). Subsection (2) provides for application to the court: so long as one spouse has the statutory right of occupation, either spouse may apply for "an order . . . prohibiting, suspending or restricting the exercise by either spouse of the right to occupy the dwelling house or requiring either spouse to permit the exercise by the other of that right."

D Subsection (3) provides for the manner in which the court is to exercise its discretion on an application for an order under the section:

E "the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case . . ."

The Act is essentially one which governs the exercise of the property rights of the spouse who enjoys the legal right to the home so as to confer upon the other spouse a judicially protected right of occupation.

F The Act applies only during the subsistence of the marriage, and only while the other spouse has a legal right of occupation. It has, therefore, no application to the situation which arises on divorce: and none where neither spouse has any property or contractual or statutory right to the matrimonial home, a situation not so improbable as might appear at first sight.

G Indeed, most of its provisions are concerned with the adjustment of a spouse's property rights and liabilities to give effect to the statutory right of occupation conferred upon the other spouse.

Finally, an application under the Act may be made either by originating summons in the High Court or by originating application in the county court: rule 107 of the Matrimonial Causes Rules 1977 (S.I. 1977 No. 344 (L. 6)) and Order 47 of the County Court Rules 1981 (S.I. 1981 No. 1687 (L. 20)).

H The Act stands independently, therefore, of other judicial proceedings; it is not tied to a matrimonial cause or any other proceeding. It does apply during the pendency of a divorce suit, but not after decree. The Act is of general application, I have no doubt, so long as the marriage is in being, i.e. until death or a decree pronounced in a matrimonial cause.

In an appropriate case, therefore, a wife petitioner in a pending suit

will have her right of occupancy under the Act. But she also has her right under the inherent jurisdiction of the court to be protected with the children of the family in the matrimonial home. I do not construe the Act of 1967 as a substitute for the court's inherent power to protect but as conferring an additional right. There may be cases where the Act cannot be invoked but the court's inherent power to protect the wife and children can: e.g. where the family is living in premises in which neither has a property right. But there will also be many cases where the protective power cannot be invoked (there being no threat to the wife or children), but the Act's right of occupation exists.

I accept, of course, the appellant's contention that, where the statutory right of occupancy exists, section 1 (3) of the Act sets out the matters to be considered by the court in deciding whether it is just and reasonable to make an order evicting a husband from the home. But is it necessary to construe section 1 (3) as excluding the principle of paramountcy where there are children to whom the principle would apply if custody were being decided?

It would be very strange if it did: for it would mean that in pending divorce proceedings, where custody is in issue and the wife has the right of occupation conferred by the Act, she would be able to secure an order evicting the husband from the home without regard to the principle of paramountcy which would, but for the Act of 1967, apply. I do not believe for one moment that Parliament intended any result so anomalous as that. When an ouster order is sought in pending divorce proceedings, the court is being invited to intervene at a most critical period in the lives of the children, the relationship between their parents having broken down (possibly irretrievably). The court is seized with the question of their welfare and upbringing. If ever there was a time to apply the principle of paramountcy of their needs and interest, it is in pending divorce proceedings. If the conclusion against its application is compelling upon the construction of the statute, so be it. But I would not be persuaded so to hold, unless the language was clear or the implication irresistible. And, even if the Guardianship Act be of limited application, it is open to the courts to accept the principle as relevant when the welfare of the children has to be considered—as it must be before making an ouster order.

But there is, in my view, no inconsistency between section 1 (3) of the Act of 1967 and section 1 of the Guardianship Act. The principle of paramountcy is a rule of priority, not of exclusion. All the matters which section 1 (3) specify can be considered: indeed, they must be. The Guardianship Act excludes none of them but establishes a priority. The Act of 1967 is silent upon priorities: but silence cannot be construed as exclusion, unless inconsistency emerges so as to make the implication necessary.

It has long been recognised that the divorce court has an inherent power to protect parties and their children by the grant of interlocutory injunctive relief and that the power extends to the granting of an order excluding, if necessary, the husband from the home pending suit. The jurisdiction was recognised by Pearce J. in *Silverstone v. Silverstone* [1953] P. 174, and by Ormrod J. in *Montgomery v. Montgomery* [1965] P. 46, 51. Statute, however, governs the exercise of this power. Section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which, of course, consolidated existing law, provided that the High Court may grant an injunction by interlocutory order in all cases in which it appears

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- A to the court to be just or convenient so to do. This section has now been replaced in substantially the same terms by section 37 of the Supreme Court Act 1981. There is, however, an important limitation upon the power: it can be exercised only if there is a right recognised by law independently of the Act: *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 40. The right in this class of case is to the protection by the court of the right of the wife and children to occupy the matrimonial home while matrimonial proceedings are pending. If their occupancy is endangered by the presence of the husband he may be excluded.

- B Has this right of protection while matrimonial proceedings are pending been superseded by the Act of 1967 in cases to which that Act applies? For the reasons already given, I do not so construe the Act of 1967. And the Guardianship Act, in my view, applies either as a matter of construction or because its principle of paramountcy cannot properly be excluded in the exercise of the court's inherent power to protect children. For in divorce proceedings custody of the children of the family is in issue. Indeed, the court cannot make a decree of divorce or nullity absolute or grant a decree of judicial separation unless it is satisfied as to the arrangements for the children: section 41 of the Matrimonial Causes Act 1973.

- D Accordingly, I would accept that section 1 of the Guardianship Act establishes a principle of priority to which the court, in this case, was bound to have regard. The courts below were correct to adopt it as their guide. In a pending matrimonial cause custody is in issue and the Act of 1967 is no bar to the application of the principle of paramountcy. In other proceedings also for an ouster order, where there are children but custody is not directly in issue, the courts should apply the principle of paramountcy for the reason I have earlier given, namely, that the question whether or not to make the order cannot be considered without having regard to the issue of custody. Upon an application by originating summons under the Act of 1967 where there are children to be considered, this will be so as in the other jurisdictions in which ouster orders may be made.

- F But that is not enough to determine the appeal: for the principle is one of priority, not exclusion. The husband's case that it was neither just nor reasonable to make the order may well succeed, even if the principle does apply. If, for instance, it can be shown that the ouster order was not needed in the interests of the children, he succeeds. And, in my view, that is the demonstrable truth in this case. It is the duty of an appellate court to intervene, where a judge has exercised a discretionary power, not only if he has erred in law but also if his decision can be demonstrated to be plainly wrong. This is what can be demonstrated in this case. Upon his provisional findings of fact (and, of course, they were only provisional as the suit was pending and the issues unresolved), the judge went wrong in finding that it was necessary in the interests of the two children of the family that their father be excluded from the home. He found that the mother had no reasonable ground for refusing to return to live in the same house as her husband. "This wife," he said, "is strong-willed and does not wish to be in the same house as her husband, and says she cannot bear to be with him. But it is not true that she cannot." It was not suggested in evidence that the husband was a violent man: indeed, the judge thought that the allegations of unreasonable behaviour against him were "rubbishy." He was an excellent parent and

the elder child had made it plain that she did not want her parents to separate. The judge recognised that, whatever order he might make, “the practical probability” was that the children would continue to live with their mother but that their father would look after them when he was not working, i.e. at weekends. And he certainly found that the matrimonial home was the place where the children should live. The accommodation available to mother and children since leaving home was overcrowded. His conclusion was that

“it is thoroughly unjust to turn out this father, but justice no longer seems to play any part in this branch of the law . . . the public interest is best met by installing the children in that home, which means in practice installing their mother too.”

No doubt it did; but on his findings as to future “practical probability” and the attitude, will and feelings of the wife towards her husband it by no means followed that in order to instal mother it was necessary to exclude father. And subsequent events have shown how right the judge was in his assessment of the future practical probability and how wrong he was in thinking it necessary to exclude the father from the home. Husband and wife have come to a sensible arrangement which on the evidence is clearly in the best interests of the children. The children are installed in the matrimonial home; their mother lives with them there from Monday to Friday; their father takes over on Friday and lives with them there during the weekend. Upon the facts, therefore, it was neither just (here I agree with the judge) nor reasonable nor necessary to oust the father. Had no order been made, the “practical probability” is that the same result would have been reached. If it had not, there might then have arisen a need for the intervention of the court. The evidence did not justify the making of the order. The needs of the children did not, on the judge’s findings, require the protection of an ouster order.

The Court of Appeal [1983] 2 W.L.R. 633 fell into the same error. Both judges misinterpreted the crucial finding of the judge which was in terms which I make no apology for repeating: “This wife is strong-willed . . . says she cannot bear to be with him. But it is not true that she cannot.” They failed to pay sufficient regard to this finding, or to the evidence of the welfare officer that the children needed their father, or to the admitted fact that he was a good, affectionate and loved father.

Notwithstanding, therefore, that I must, regretfully, respectfully but firmly, dissent from your Lordships on the point of legal principle, I have no doubt that the appeal should be allowed. The existing agreed arrangement should, however, continue until further order. If it is threatened in any way, either spouse can apply to the court to embody it, or a variation of it, in a formal order.

At the conclusion of his speech my noble and learned friend, Lord Brandon of Oakbrook, makes certain recommendations as to the future practice and procedure where there are pending divorce proceedings and the wife has rights under the Act of 1967. It will be obvious that I do not think the changes which he proposes are either necessary or convenient. Indeed, I think they would obstruct the will of Parliament. If, as is my view, the Act of 1967 does not supersede, but does co-exist with the inherent power of the divorce court to protect the wife and children, it would be convenient as well as just and reasonable for the court which has before it the whole family problem arising from the breakdown of

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- A the relationship between husband and wife to make whatever order with respect to the matrimonial home is necessary in the family interest.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in advance the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook and I entirely agree with it.

- B For my part, pace my noble and learned friend Lord Scarman, I cannot see how, in proceedings brought by one spouse seeking to evict the other from the matrimonial home (the only proceedings with which this appeal is concerned), there can be any room for the application of the provisions of section 1 of the Guardianship of Minors Act 1971. That section applies only to proceedings in which

- C “(a) the legal custody or upbringing of a minor; or (b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question”

and requires the court “*in deciding that question*,” (my emphasis) to “regard the welfare of the minor as the first and paramount consideration.” In “ouster” proceedings no question as to the custody, upbringing or property of a minor falls to be decided.

- D I would allow this appeal.

- E LORD BRANDON OF OAKBROOK. My Lords, this appeal arises in the field of family law and is concerned with what are commonly and not inappropriately described as “ouster orders.” Such an order takes the form of an injunction granted to one spouse (usually the wife) requiring the other spouse (usually the husband) to vacate the matrimonial home previously occupied by both and not to return to it until further order. An ouster order can be made either in the High Court or in a county court, and its effect upon the spouse against whom it is directed will often be extremely serious. This is because such an order involves turning such spouse, usually at very short notice, out of what is in most cases the only home which he or she possesses, and leaving him or her to find, often with great difficulty, alternative accommodation in which to live.

- F My Lords, I apprehend that it was the potentially serious effect of ouster orders, coupled with a marked divergence of opinion which has arisen between different divisions of the Court of Appeal concerning the principles in accordance with which applications for such orders should be granted or refused, which led the Appeal Committee to give the husband in the present case leave to appeal to your Lordships’ House after the Court of Appeal had earlier declined to do so.

- G My Lords, the essential facts of the present case can be summarised as follows. The husband and the wife were married on November 18, 1974. They have two children, a girl, now aged 6, and a boy, now aged 4. Before the wife left the husband in circumstances which I shall describe later the family was, and had been for some time, living in a three-bedroomed council house known as 13, Stoborough Green, Stoborough, Wareham, Dorset.

H On January 8, 1982, while the family was still living in that home, the wife presented in the Weymouth County Court a petition for divorce on the ground that the marriage had broken down irretrievably. In support of that case she relied on facts of the kind specified in section 1 (2) (b) of the Matrimonial Causes Act 1973, namely, that the husband had behaved in such a way that she could not reasonably be expected to live with him.

The particulars of the husband's behaviour complained of contained no allegation which could be regarded, on paper at any rate, as being at all serious. It was, as it was later described, an extremely thin case.

The service of the petition on the husband shortly after its presentation came as a complete surprise to him. He thought that the marriage was reasonably happy, despite earlier infidelities of the wife which he had forgiven and forgotten, and wished that it should continue. On March 8, 1982, the husband filed an answer to the petition, as a result of which the suit became a defended one and was on that account transferred immediately to the Weymouth District Registry of the High Court. In that answer, subject to certain pleas of confession and avoidance, the husband denied all the wife's allegations about his behaviour, and further denied that the marriage had broken down irretrievably.

Following the service of the petition and answer the wife remained for nearly three months in the matrimonial home. She cooked and performed other wifely duties for the husband, but ceased to share the same bedroom with him. On June 1, 1982, the wife left the matrimonial home, taking the children with her. She did not inform the husband beforehand of her intention to leave, nor did she tell him afterwards where she had gone. She had in fact gone, as the husband later discovered, with the children to a cottage in Swanage belonging to a Mrs. Moore, who was a friend of hers. Her intention appears to have been to stay there only temporarily, and then to go to live with the children in a house at Hamworthy belonging to a man called Alan. Although the evidence is not entirely clear, it appears that the wife and children went to Alan's house for a few days in about the middle of July 1982, but that her plan, whatever it was, miscarried, as a result of which she returned with the children to Mrs. Moore's cottage in Swanage.

Some three months later, on October 15, 1982, the wife issued in the Weymouth District Registry of the High Court an application headed in the divorce suit for three interlocutory injunctions against the husband: the first restraining him from molesting her; the second restraining him from communicating with her except through her solicitors; and the third requiring him to leave the matrimonial home and not to return to it. The wife's application was heard on November 8, 1982, by Judge Pennant, sitting as a High Court judge. The evidence before him consisted of affidavits and some oral evidence from both spouses, and a court welfare officer's report dated August 2, 1982. At the conclusion of the hearing the judge did not grant either of the first two injunctions sought by the wife, but, in relation to the third injunction sought by her, made an order that the husband should vacate the matrimonial home by November 22, 1982. He did not include in the order a prohibition against the husband returning to the matrimonial home, but no point arises on that omission.

The husband complied with the judge's order and went to live with his elderly father in the latter's two-bedroomed council home in Corfe Castle. Having done so, he lodged notice of appeal to the Court of Appeal against the order. The husband's appeal came before a division of the Court of Appeal [1982] 2 W.L.R. 633 consisting of Cumming-Bruce and Dillon L.JJ. on December 6, 1982, and was dismissed. As I indicated earlier, the Court of Appeal refused the husband leave to bring a further appeal to your Lordships' House, but such leave was later given to him by the Appeal Committee.

My Lords, Judge Pennant, when he came to give judgment on the wife's application, expressed himself as being in a legal dilemma. He had been

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Lord Brandon
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- A referred by counsel for the husband to the decision of one division of the Court of Appeal in *Myers v. Myers* [1982] 1 W.L.R. 247, in which it was held that the judge below had erred in principle in failing to consider whether on the facts before him the wife's conclusion that she was unwilling to return to the matrimonial home while the husband was still there was a reasonable conclusion having regard to the personalities of both the husband and the wife. The learned judge had also been referred by counsel
- B for the wife to the decision of another division of the Court of Appeal in *Samson v. Samson* [1982] 1 W.L.R. 252, in which it was held that, where there were young children, the first consideration was their welfare, and that the court should not consider whether the wife was justified in leaving and refusing to return to the matrimonial home while the husband was still there or not. The learned judge, correctly in my view, regarded these two decisions
- C of different divisions of the Court of Appeal as incompatible with each other, and asked himself the difficult question which of them he should follow.

- My Lords, so far as the facts of the case are concerned the learned judge made the following findings: (1) that the practical probability was that the children would continue to live with the wife; (2) that the allegations in the wife's petition relating to the behaviour of the husband were
- D "rubbishy" and "very flimsy indeed"; (3) that the elder child, did not want her parents to separate; (4) that the wife was living in over-crowded accommodation not fit as a home for the children; (5) that the wife had no reasonable grounds for refusing to return to live in the same house as the husband; and (6) that the wife's assertion that she could not bear to live in the same house as the husband was untrue, the reality being that
- E she was a strong-willed woman who simply did not wish to do so. On these facts he said that he thought that it was thoroughly unjust to turn the husband out, but justice no longer seemed to play any part in this branch of the law. The matrimonial home was a house provided by the public as a home for the four persons concerned, and, that being so, the public interest was best met by installing the children in that home, which meant in practice installing the wife there also. He went on to say that it was
- F by no means certain that there would be a divorce on the existing grounds, and he had come to the conclusion that, although it was unjust to the husband, it seemed right to grant the ouster order sought in the interests of the children. It will be apparent that, in reaching that conclusion, he decided to apply *Samson v. Samson* [1982] 1 W.L.R. 252 rather than *Myers v. Myers* [1982] 1 W.L.R. 247.

- G My Lords, in his judgment in the Court of Appeal Cumming-Bruce L.J. recognised that there was a conflict of authority in that court with regard to the principles on which ouster orders should be granted or refused. According to two authorities, *Elsworth v. Elsworth*, 1 F.L.R. 245 and *Myers v. Myers*, an ouster order should be refused unless the wife has reasonable grounds for refusing to live in the same house as the husband.
- H According to another authority, *Samson v. Samson*, where there are children whose welfare demands that they should be looked after by the wife, the question whether the wife has reasonable grounds for refusing to live in the same house as the husband is irrelevant, the welfare of the children is the first consideration, and the question whether the husband should be ousted or not must be decided by reference to that first consideration. After reviewing a considerable number of authorities in this class of case, the outcome of which necessarily depended on the widely differing facts of

each, the learned Lord Justice came to the conclusion that the approach in *Samson v. Samson* should be preferred, and that Judge Pennant had been right to apply that decision rather than the conflicting decision in *Myers v. Myers*. A

Dillon L.J., who also made a careful examination of the authorities, reached the same conclusion as to which should be preferred as Cumming-Bruce L.J. In doing so, he [1983] 2 W.L.R. 633, 647 laid stress on the judgment of Geoffrey Lane L.J., as he then was, in *Walker v. Walker* [1978] 1 W.L.R. 533. In that case Geoffrey Lane L.J. expressed the view at p. 536 that authority was of little value in cases of this kind, and that what the court had to do was to decide what was in all the circumstances of the case fair, just and reasonable, and if it was fair, just and reasonable that the husband should be excluded from the matrimonial home, then that is what must happen. It appears to me, however, that Dillon L.J. took that passage from the judgment of Geoffrey Lane L.J. in isolation, without regard to the fact that the latter went on to say that, among the circumstances to be regarded, were the behaviour of the husband and the behaviour of the wife. Be that as it may, Dillon L.J. was in substantial agreement with Cumming-Bruce L.J. that Judge Pennant had applied the right principle to the problem before him, that he had come to the right conclusion, and that the husband's appeal should be dismissed accordingly. B C D

My Lords, I think that it was with growing astonishment, as the citation of the relevant authorities by counsel for the appellant husband proceeded, that your Lordships found that they contained for the most part no reference whatever either to the statutory powers which enable courts to make ouster orders at all, or to the statutory principles which, in most cases arising today, govern the exercise of such powers. It appears to me that, in these circumstances, it falls to your Lordships, in order to determine this appeal and to give guidance for the future, to do what the courts below have signally failed to do, namely, to examine, and having examined to pay proper regard to, the statutory framework within which courts dealing with applications for ouster orders are not only empowered, but also obliged, to operate. E

Before 1967 the only power which the High Court had to make an ouster order was the general power to grant injunctions conferred on it by section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 ("the Act of 1925"). That subsection provided, so far as material: "The High Court may grant . . . an injunction . . . in all cases in which it appears to the court to be just and convenient so to do." The subsection replaced in substantially the same terms section 25 (8) of the Supreme Court of Judicature Act 1873, in respect of which it had long been held that, despite the apparently wide words of the subsection, the High Court only had jurisdiction to grant injunctions for the purpose of protecting legal or equitable rights: *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 40, *per* Cotton L.J. It follows that section 45 (1) of the Act of 1925, and section 37 (1) of the Supreme Court Act 1981, by which it has now been replaced in similar terms, must be interpreted as subject to the like limitation in their scope. F G H

My Lords, until the radical social changes which have occurred in this country during the last two or three decades, the usual situation with regard to the ownership of a matrimonial home was that the whole estate in it, both legal and equitable, was vested in the husband. It followed from this that most wives could not apply for an ouster order under section 45 (1) of the Act of 1925 on the ground that they had any legal or equitable

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- A interest in the matrimonial home which such an order could protect. However, a wife against whom no disqualifying matrimonial offence had been proved had a common law right to be provided by her husband with a home in which to live, and the High Court regarded itself as having jurisdiction under section 45 (1) of the Act of 1925 to make an ouster order against a husband in order to protect that right pending suit: *Silverstone v. Silverstone* [1953] P. 174; *Gurasz v. Gurasz* [1970] P. 11.
- B Parliament, however, did not regard this limited right of protection under section 45 (1) of the Act of 1925 as adequate, as a result of which it passed the Matrimonial Homes Act 1967 ("the Act of 1967"). Section 1 of the Act of 1967 provided, so far as material, as follows:
- C " (1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as 'rights of occupation') :—(a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section; (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house. (2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house. (3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case . . . (4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order. . . . (6) The jurisdiction conferred on the court by this section shall be exercisable by the High Court or by a county court . . . (8) . . . a spouse's rights of occupation shall continue only so long as the marriage subsists and the other spouse is entitled as mentioned in subsection (1) above to occupy the dwelling house . . . "
- D
- E
- F

- G My Lords, experience of the working of the Act of 1967 revealed a serious weakness in it. That weakness was that, by reason of the terms of section 1 (1), the Act afforded no protection to wives who had an equitable interest in the matrimonial home, as many either had, or at any rate wished to reserve their right to claim that they had. In order to remedy this weakness in the Act of 1967, it was provided by section 38 of the Matrimonial Proceedings and Property Act 1970 ("the Act of 1970") that there should be inserted in section 1 of the Act of 1967 a new subsection
- H (9) in these terms:

"(9) It is hereby declared that a spouse who has an equitable interest in a dwelling house or in the proceeds of sale thereof, not being a spouse in whom is vested (whether solely or as a joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling house, is to be treated for the purpose only of determining whether he or she has rights of occupation under this section as not being entitled to occupy the dwelling house by virtue of that interest."

In 1976 the legislature enacted the Domestic Violence and Matrimonial Proceedings Act of that year ("the Act of 1976") in order to deal with the problem of those persons who are commonly called "battered wives." Section 1 of the Act of 1976 conferred on county courts, without prejudice to the jurisdiction of the High Court, power to grant, on the application of one party to a marriage, injunctions containing one or more of the following provisions: (a) a provision restraining the other party to the marriage from molesting the applicant; (b) a provision restraining the other party from molesting a child living with the applicant; (c) a provision excluding the other party from the matrimonial home or part of the matrimonial home or from a specified area in which the matrimonial home is included; (d) a provision requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home.

Section 2 of the Act of 1976 empowered judges, when granting certain kinds of injunctions designed to protect one party to a marriage, or a child living with that party, from violence by the other party to the marriage, in certain specified circumstances to attach a power of arrest to such injunctions.

Sections 3 and 4 of the Act of 1976 provided:

"3. In section 1 (2) of the Matrimonial Homes Act 1967 (which provides for applications for orders of the court declaring, enforcing, restricting or terminating rights of occupation under the Act or regulating the exercise by either spouse of the right to occupy the dwelling house),—(a) for the word 'regulating' there shall be substituted the words 'prohibiting, suspending or restricting'; and (b) at the end of the subsection there shall be added the words 'or requiring either spouse to permit the exercise by the other of that right.'

"4. (1) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant. (2) In relation to orders under this section, section 1 (3), (4) and (6) of the Matrimonial Homes Act 1967 (which relate to the considerations relevant to and the contents of, and to the jurisdiction to make, orders under that section) shall apply as they apply in relation to orders under that section; and in this section 'dwelling house' has the same meaning as in that Act. (3) Where each of two spouses is entitled to occupy a dwelling house by virtue of a contract, or by virtue of any enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly."

The provision in paragraph (a) of section 3 was enacted in order to reverse the effect of the decision of your Lordships' House in *Tarr v. Tarr* [1973] A.C. 254, in which it had been held that the expression "regulating," as used in section 1 (2) of the Act of 1967 in its original form, was not wide enough to include total prohibition or exclusion. Section 4 extended further the process begun by section 38 of the Act of 1970.

A further amendment to section 1 of the Act of 1967 was made by section 1 (1) of the Matrimonial Homes and Property Act 1981, the effect of which was to substitute for the words "any estate or interest" in section

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A 1 (1) of the Act of 1967 the words "a beneficial estate or interest." This amendment was made to cover the case of matrimonial homes held by trustees.

B My Lords, the Act of 1967 contained in its original form, and still contains in a form extensively amended by subsequent Acts, various provisions relating to the registration as a charge on a matrimonial home of the rights of occupation conferred by it; to the situation arising when a matrimonial home is let on a tenancy to which the Rent Acts apply or on a tenancy made a secure tenancy by the Housing Act 1980; and to matrimonial homes subject to mortgages. Save that the matrimonial home in the present case was let to the husband on a tenancy made a secure tenancy by the Housing Act 1980 (a circumstance which is not material to the appeal), none of the matters to which I have just referred arise in the present case, and I shall therefore make no further reference to them.

C My Lords, I indicated earlier my view that, in order to determine this appeal and to give guidance for the future, it was necessary for your Lordships to examine, and having examined to pay regard to, the statutory framework within which courts to which applications for ouster orders are made are not only empowered, but also obliged, to operate.

D Having performed the first part of that task by setting out, or referring to, what appear to me to be the essential statutory provisions applicable, I conclude that it was the intention of the legislature, in passing and later amending and extending the scope of the Act of 1967, and in passing the Act of 1976, that the power of the High Court to make, during the subsistence of a marriage, orders relating to the occupation of a matrimonial home, including in particular an ouster order, which had previously been derived from section 45 (1) of the Act of 1925, should for the future be derived from, and exercised in accordance with, section 1 of the Act of 1967. In this connection it is to be observed that, in section 1 (1) of the Act of 1967 as originally enacted, it was expressly provided that, where one of the spouses was entitled to occupy the matrimonial home by virtue of any estate, interest or enactment, and the other spouse was not so entitled, the latter should have rights of occupation, including a right "not to be evicted or excluded . . . *except with the leave of the court given by an order under this section.*" (My emphasis.) If spouse A can only oust spouse B pursuant to an order made under section 1 of the Act of 1967, it must surely follow that spouse B can only oust spouse A pursuant to a like order.

G I reach a similar conclusion with regard to ouster orders made in a county court, namely, that it was the intention of the legislature that the power of a county court to make ouster orders, which had been previously derived from the very general provisions of section 74 of the County Courts Act 1959, should for the future be derived from, and exercised in accordance with, the provisions of the Act of 1967. County courts were given an additional power to make ouster orders by section 1 of the Act of 1976, but it seems to me to be a necessary inference that the legislature intended such additional power to be exercised in accordance with the principles laid down in the Act of 1967.

H The result of the conclusion which I have reached on these matters, when applied to the facts of the present case, is that the application issued by the wife in the Weymouth District Registry on October 15, 1982, in so far as it sought an ouster order against the husband, was in substance, though not in form (a matter to which I shall return later), an application

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for an order under section 1 of the Act of 1967. The case was one in which, because the requirements of section 1 (1) of the Act of 1967 as amended were fulfilled, the wife had the rights of occupation given by that subsection, and was therefore entitled to apply to the court for whatever order might be appropriate under section 1 (2) and (3).

On the footing that the wife's application was one made under the Act of 1967, the court to which it was made was obliged to follow the principles relating to such applications prescribed by that Act. Those principles are contained in section 1 (3), the essential parts of which I set out earlier. That subsection requires the court to make such order as it thinks just and reasonable having regard to a number of specified matters. The matters so specified are these: (1) the conduct of the spouses to each other and otherwise; (2) the respective needs and financial resources of the spouses; (3) the needs of any children; and (4) all the circumstances of the case. With regard to these matters it is, in my opinion, of the utmost importance to appreciate that none of them is made, by the wording of section 1 (3), necessarily of more weight than any of the others, let alone made paramount over them. All the four matters specified are to be regarded, and the weight to be given to any particular one of them must depend on the facts of each case.

My Lords, *Samson v. Samson* [1982] 1 W.L.R. 252, which Judge Pennant felt that he should apply in the present case, proceeds on the basis that it is not relevant, on an application for an ouster order, to consider whether the applicant wife has reasonable grounds for refusing to return to the matrimonial home while the husband remains in it or not. To treat that matter as irrelevant appears to me to be in direct conflict with the principles laid down in section 1 (3) of the Act of 1967. That subsection, as I have already said, obliges the court to make such order as it thinks just and reasonable having regard to a number of specified matters; and the first matter so specified is the conduct of the spouses in relation to each other and otherwise. The conduct of a wife, who has no reasonable grounds for refusing to return to the matrimonial home so long as her husband remains in it but nevertheless asserts that she will not do so, is clearly "conduct of the spouses in relation to each other and otherwise" within the meaning of that expression as used in section 1 (3) of the Act of 1967. It follows that the court, when adjudicating on a wife's application for an order under section 1 of that Act, must have regard to her conduct in this respect, and is not entitled to treat it as irrelevant to the decision which has to be made.

My Lords, I do not go so far as to say that the conduct of an applicant wife in the particular respect under discussion is necessarily and in all cases decisive, in a manner adverse to her, of the question whether the order for which she has applied should be made or not. It is, however, an important factor to be weighed in the scales, along with the other matters specified in section 1 (3) of the Act of 1967; and in a substantial number of cases at any rate it will be a factor of such weight as to lead a court to think that it would not be just or reasonable to allow her application. I regard the two cases of *Elsworth v. Elsworth*, 1 F.L.R. 245 and *Myers v. Myers* [1982] 1 W.L.R. 247 as cases which come into that category. In saying that, I do not overlook the fact that these two cases were appeals from decisions of county courts relating to applications made otherwise than under the Act of 1967. In *Elsworth v. Elsworth* it appears that the application was made (erroneously in my view) under the general jurisdiction conferred by section 74 of the County Courts Act

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A 1959 to which I referred earlier, while the application in *Myers v. Myers* was clearly made under the Act of 1976. As I have already indicated, however, it was, in my view, the intention of the legislature that the same principles should govern the making of ouster orders under the Act of 1976 as under the Act of 1967.

B The approach adopted in *Samson v. Samson* [1982] 1 W.L.R. 252 comes very near to treating the needs of any relevant children, not just as one of a number of matters to which section 1 (3) of the Act of 1967 requires the court to have regard, but as a paramount matter overriding all others. That approach would certainly be justified in a case to which section 1 of the Guardianship of Minors Act 1971 ("the Act of 1971") applied, including in particular a case in which the custody or upbringing of a child was in question. In my opinion, however, section 1 of the Act of 1971, which re-enacted in like terms section 1 of the Guardianship of Infants Act 1925, only applies where the custody or upbringing of a child is directly in question, and does not apply to a case where such matters are not directly in question but only arise incidentally in relation to other matters which are directly in question. In this connection it is to be observed that section 1 of the Guardianship of Infants Act 1925 was in force when section 1, including in particular subsection (3) of that section, was enacted, and the only inference which can, in my view, be drawn is that, in relation to ouster orders, section 1 (3) of the Act of 1967, making the needs of any children only one of a number of factors to be considered, was intended to exclude the paramount status which such needs would have had if section 1 of the Act of 1925 were treated as applicable.

E My Lords, in the present case Judge Pennant, by applying *Samson v. Samson* [1982] 1 W.L.R. 252 rather than *Myers v. Myers* [1982] 1 W.L.R. 247, failed to have regard to one of the matters which section 1 (3) of the Act of 1967 required him to have regard to, namely, the conduct of the wife in refusing to return to the matrimonial home when there were, as he had found on the evidence before him, no reasonable grounds for such refusal. The Court of Appeal, in affirming his decision, were guilty of the same omission. Both courts having failed, in exercising their discretionary powers under section 1 of the Act of 1967, to have regard to the reasonableness or unreasonableness of the wife's conduct as section 1 (3) required them to do, it seems to me that your Lordships have no alternative but to set aside both the ouster order made by the learned judge on November 8, 1982, and the order of the Court of Appeal affirming that order made on December 6, 1982.

G Your Lordships were informed by counsel that, since the order of the Court of Appeal, the two spouses have made an amicable arrangement between them under which the wife occupies the matrimonial home and looks after the children in it from Monday morning to Friday evening, when she leaves and goes to another place which was not disclosed, and the husband then occupies the matrimonial home and looks after the children in it from Friday evening to Monday morning. Your Lordships were H further informed that this arrangement had been working well and in a manner satisfactory to both spouses.

My Lords, it does not necessarily follow, if your Lordships' House decides this appeal in the way that I have indicated that I think it ought to be decided, that the arrangement between the spouses to which I have just referred should be disturbed so long as the divorce suit remains pending. An expedited hearing of that suit is clearly required, and it may well be that it would be sensible if no further alterations in the situation with

regard to occupation of the matrimonial home were made until that hearing has taken place. Your Lordships would not, however, be justified in compelling the husband, against his wishes, to accept a continuation of the present arrangement. A

My Lords, I recognise that your Lordships' House does not, as a general rule, concern itself with questions of practice and procedure, on the ground that such matters are best left for regulation by the Court of Appeal. In the present case, however, it seems to me that there is a good reason why your Lordships should depart from the general rule to which I have referred, and deal with certain questions of practice and procedure relating to applications for orders under section 1 of the Act of 1967. That reason is that, in my opinion, if what I regard as the proper practice and procedure in relation to such applications had been followed in the past, it is unlikely that the courts would over a long period have dealt with applications for ouster orders without any reference to the statutory provisions applicable to them, and in particular the all-important provisions contained in section 1 (3) of the Act of 1967. B C

The practice has grown up, when an application for an ouster order is made during the pendency of a suit, to make it by issuing a summons in that suit. It has further become the practice to ask in such summons for an order requiring the husband to vacate the matrimonial home and not to return to it. These practices may well have the advantage of convenience, but the first seems to me to be in conflict with the relevant rules of court, and the second with the terms of the Act of 1967 as amended. D

So far as the first practice to which I have referred is concerned, rule 107 (1) of the Matrimonial Causes Rules 1977 (S.I. 1977 No. 344 (L.6)) provides: E

“The jurisdiction of the High Court under section 1 of the Matrimonial Homes Act 1967 may be exercised in chambers and the provisions of rule 104 (except paragraph (2)) shall apply, with the necessary modifications, to proceedings under that section as they apply to an application under section 17 of the Act of 1882.”

The reference to the Act of 1882 is a reference to the Married Women's Property Act (45 & 46 Vict. c. 75) of that year, and rule 104, which falls to be incorporated, with the necessary modifications, into rule 107, provides in paragraph (1): “An application to the High Court under section 17 of the Act of 1882 shall be made by originating summons in form 23 . . .” Form 23, which is to be found in Appendix 1 to the Matrimonial Causes Rules 1977, when used for an application under section 1 of the Act of 1967, carries the following heading: “In the matter of an application by.....under section 1 of the Matrimonial Homes Act 1967.” F G

It follows, in my view that the correct way, and the only correct way, of initiating an application for an order under section 1 of the Act of 1967 whether there is a suit pending or not, is by the issue of an originating summons in form 23 with the heading which I have just set out. There is no other rule of court which, where a suit is pending, authorises such an application to be made by a summons in that suit. The situation in the county court is similar to that in the High Court: see Ord. 47, rr. 4 and 2 of the County Court Rules 1981 (S.I. 1981 No. 1687 (L.20)). H

So far as the second practice to which I have referred is concerned, the form of order which should be asked for in an application under section 1 of the Act of 1967 should, in my view, be a form which follows, so far as is

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- A reasonably practicable, the wording of that Act as amended. For instance, if what I have so far described as an ouster order is sought, the form of order applied for should be an order (1) declaring the applicant's rights of occupation of the matrimonial home, and (2) prohibiting the respondent from exercising any right to occupy such home from a specified date and time until further order. In the event of the application then being successful, the order made by the court should, again so far as is reasonably practicable, be in the like form.
- B

- C That concludes the observations with regard to practice and procedure which it seemed to me appropriate to make in relation to cases of this kind. It only remains for me to say that, for the reasons which I gave earlier, I would allow the appeal and set aside both the order of Judge Pennant dated November 8, 1982, and the order of the Court of Appeal dated December 6, 1982.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for Edmund Buck & Co., Swanage; Iliffes for Neville-Jones & Howie, Wareham.*

M. I. H.

D

[HOUSE OF LORDS]

- E SCANDINAVIAN TRADING TANKER CO. A.B. RESPONDENTS
AND
FLOTA PETROLERA ECUATORIANA APPELLANTS

1983 May 11; Lord Diplock, Lord Keith of Kinkel, Lord Scarman,
June 30 Lord Roskill and Lord Bridge of Harwich

F

*Shipping — Charterparty — Time charter — Hire — Non-payment —
Withdrawal of vessel—Whether charterers entitled to relief
from forfeiture*

*Equity—Relief from forfeiture—Time charter—Withdrawal of
vessel for late payment of hire—Whether doctrine of relief
against forfeiture applicable to time charter*

Ships' Names—Scaptrade

G

The respondent owners let the *Scaptrade* to the appellant charterers under a time charterparty, clause 8 of which provided for payment of the hire monthly in advance. The clause further provided that "in default of such payment owners may withdraw the vessel from the service of the charterers, without prejudice to any claim owners may have on charterers under this charter." When the charterers failed to pay on time the hire instalment that fell due on July 8, 1979, the owners, on July 12, sent a telex withdrawing the vessel. The owners subsequently sought a declaration in the Commercial Court that they had been entitled to withdraw the vessel from the charterers' service. The charterers, inter alia, asked for relief against forfeiture. Lloyd J., inter alia, held that, assuming that he had jurisdiction to grant relief from forfeiture, he would not, in his discretion, have done so. The Court of Appeal dismissed an appeal by the charterers, holding that the judge had had no jurisdiction to grant relief from forfeiture.

H

Scandinavian Trading v. Flota Ecuatoriana (H.L.(E.))**[1983]**

On appeal by the charterers by leave of the House of Lords:—

Held, dismissing the appeal, that the concept of equitable relief from forfeiture was inappropriate in the case of the exercise by the shipowner under a time charterparty not by demise, which was a contract for services in respect of which specific performance would not be ordered, of his contractual right to withdraw the vessel from the charterers in the event of their non-payment of the hire; that no such jurisdiction existed and, moreover, there were practical reasons of legal policy why such a jurisdiction should not be created (post, pp. 207E–G, 209F–G, 211A–C).

Shiloh Spinners Ltd. v. Harding [1973] A.C. 691, H.L.(E.) considered.

Dicta of Lord Uthwatt in *Tankexpress A/S v. Campagnie Financière Belge des Pétroles S.A.* [1949] A.C. 76, 100, H.L.(E.); Lord Simon of Glaisdale in *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] A.C. 850, 873–874, H.L.(E.) and Lloyd J. in *Afivos Shipping Co. S.A. v. R. Pagnan and F.lli (The Afivos)* [1980] 2 Lloyd's Rep. 469 not applied.

Decision of the Court of Appeal [1983] 2 W.L.R. 248; [1983] 1 All E.R. 301 affirmed.

The following cases are referred to in the opinion of Lord Diplock:

Afivos Shipping Co. S.A. v. R. Pagnan and F.lli (The Afivos) [1980] 2 Lloyd's Rep. 469; [1982] 1 W.L.R. 848; [1982] 3 All E.R. 18, C.A.

A/S Awilco of Oslo v. Fulvia S.p.A. di Navigazione of Cagliari (The Chikuma) [1981] 1 W.L.R. 314; [1981] 1 All E.R. 652, H.L.(E.).

Clarke v. Price (1819) 2 Wils. 157.

Lumley v. Wagner (1852) 1 De G.M. & G. 604.

Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia (The Laconia) [1977] A.C. 850; [1977] 2 W.L.R. 286; [1977] 1 All E.R. 545, H.L.(E.).

Shiloh Spinners Ltd. v. Harding [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.).

Stockloser v. Johnson [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A.

Tankexpress A/S v. Compagnie Financière Belge des Pétroles S.A. [1949] A.C. 76; [1948] 2 All E.R. 939, H.L.(E.).

The following additional cases were cited in argument:

Barton Thompson & Co. Ltd. v. Stapling Machines Co. [1966] Ch. 499; [1966] 2 W.L.R. 1429; [1966] 2 All E.R. 222.

Gatoil Anstalt v. Omennial Ltd. (The Balder London) [1980] 2 Lloyd's Rep. 489.

Starside Properties Ltd. v. Mustapha [1974] 1 W.L.R. 816; [1974] 2 All E.R. 567, C.A.

Tradax Export S.A. v. Dorada Compania Naviera S.A. (The Lutetian) [1982] 1 Lloyd's Rep. 140.

APPEAL from the Court of Appeal.

This was an appeal by the charterers, Flota Petrolera Ecuatoriana, by leave of the House of Lords from the decision of the Court of Appeal (Sir John Donaldson M.R., May and Robert Goff L.JJ.) on November 26, 1982, dismissing their appeal from a judgment of Lloyd J. [1981] 2 Lloyd's Rep. 425 on July 3, 1981, in favour of the respondent owners, Scandinavian Trading Tanker Co. A.B. The Court of Appeal refused the charterers leave to appeal, but on January 20, 1983, the Appeal Committee

3 W.L.R. **Scandinavian Trading v. Flota Ecuatoriana (H.L.(E.))**

A of the House of Lords (Lord Diplock, Lord Roskill, and Lord Brandon of Oakbrook) allowed a petition by the charterers for leave.

The facts are set out in the opinion of Lord Diplock.

Johan Steyn Q.C. and *Anthony Bompas* for the charterers.

Kenneth Rokison Q.C. and *Timothy Saloman* for the owners.

B Their Lordships took time for consideration.

June 30. LORD DIPLOCK. My Lords, in this appeal between the appellant ("the charterers") and the respondent ("the owners") of the tanker *Scaptrade*, your Lordships have heard argument upon one question only: "Has the High Court any jurisdiction to grant relief against the exercise by a shipowner of his contractual right, under the withdrawal clause in a time charter, to withdraw the vessel from the service of the charterer upon the latter's failure to make payment of an instalment of the hire in the manner and at a time that is not later than that for which the withdrawal clause provides?" I call this the jurisdiction point.

C Since, at the conclusion of the argument on the jurisdiction point, your Lordships were unanimously of opinion that there is no such jurisdiction, D it became unnecessary to consider whether Lloyd J., who tried the case at first instance in the Commercial Court [1981] 2 Lloyd's Rep. 425 and was willing to assume that he did have jurisdiction to grant relief in his discretion, exercised that discretion in a manner that was erroneous in law when he refused to grant relief to the charterers. I call this the discretion point.

E The time charter concerned was on the standard printed "Shelltime 3" form with typed additions that are not material to the question that your Lordships have to decide. This form of charterparty is expressed to be governed by the law of England, and to be subject to the jurisdiction of the English court. The relevant wording of the payment of hire clause, which, as is usual in most standard forms of time charter, incorporated the withdrawal clause, was:

F "Payment of the said hire shall be made in New York monthly in advance . . . In default of such payment owners may withdraw the vessel from the service of charterers, without prejudice to any claim owners may otherwise have on charterers under this charter."

G The charter had become by extension a three-year charter. In July 1979 when it had still a year to run the freight market was rising steeply. The charterers were unfortunate enough, through some slip-up in their own office, to fail to pay on July 8, 1979, the instalment of hire due upon that date. Four days later, on July 12, the owners gave notice to the charterers withdrawing the vessel. Tender of the overdue hire was made on the following day but was refused. After negotiations had taken place, the vessel was rechartered by the owners to the charterers on a "without H prejudice" agreement of the usual kind, the rate of hire (i.e. charter rate or market rate) to abide the result of litigation, which in the event, came before Lloyd J.

My Lords, the jurisdiction point which your Lordships have to decide is a compact one. In order to deal with it I see no need to mention any more facts than those that I have now stated; although there were other issues that were canvassed at the trial, some of which were canvassed again in the Court of Appeal. That being so, I should like to say how helpful I

have found both the typewritten summary of the propositions intended to be developed and the chronological table of relevant events that leading counsel for the charterers handed in at the beginning of his oral argument. This response to suggestions that have recently been made in this House has shown how useful it can be in shortening the time needed for the hearing and in concentrating the attention of your Lordships (and of counsel) upon those points that are essential to the argument that is being presented.

Lloyd J. adopted the course that he had previously adopted in *Afovos Shipping Co. S.A. v. R. Pagnan and F.lli (The Afovos)* [1980] 2 Lloyd's Rep. 469. He assumed that the jurisdiction point could be decided in the charterers' favour; but on the particular facts he decided against them on the discretion point. The charterers appealed to the Court of Appeal. The Court of Appeal, while expressing doubt as to the adequacy in law of the judge's reasons for refusing to grant relief in the circumstances of the case, if there were vested in him a discretion to grant it, decided against the charterers on the jurisdiction point, and dismissed their appeal.

My Lords, the judgment of the Court of Appeal [1983] 2 W.L.R. 248, delivered by Robert Goff L.J., on the jurisdiction point was the first direct decision by any English court, given after hearing argument, upon the question that I have set out at the beginning of this speech. For reasons admirably expressed, and which, for my part, I find convincing, the Court of Appeal held that there was no such jurisdiction. The argument that there was jurisdiction in the court to grant relief against the withdrawal of the vessel from the charterer's service for default in punctual payment of an instalment of hire pursuant to the terms of the withdrawal clause in a time charter could, however, be supported by certain obiter dicta to be found in speeches in this House; in particular that of Lord Simon of Glaisdale in *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] A.C. 850, 873-874. Since such large sums of money may be at stake when rights to withdraw a vessel under a time charter are exercised at a time of rising freight rates (which, except where insolvency of the charterer is feared, is normally the only time when such rights are exercised), it seemed desirable to the Appeal Committee of this House that leave to appeal should be granted to the charterers, not, I must confess, with any great expectation that fuller consideration would show that on the jurisdiction point the Court of Appeal had got it wrong, but in order that a matter of such practical importance to the shipping world should, by a decision of the highest appellate court, be put beyond reach of future challenge.

Apart from a throw-away sentence in the speech of Lord Uthwatt in *Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A.* [1949] A.C. 76, 100, in which he said: "Courts of equity, indeed, in appropriate cases relieve against failure to pay on a stipulated day . . ." but did not suggest that the operation of a withdrawal clause in a time charter provided a case that was "appropriate," the origin of what I will, proleptically at this stage, describe as a beguiling heresy, which the Court of Appeal rejected in the instant case, is to be found in Lord Simon of Glaisdale's speech in *The Laconia* [1977] A.C. 850. In *The Laconia* itself the availability of equitable relief had not been raised in the courts below; and since it had not occurred to anyone to invite the judge to exercise a discretion to grant relief, the House had ruled that the point could not be taken in argument in the appeal.

I need not cite the passages in Lord Simon of Glaisdale's speech that

3 W.L.R. **Scandinavian Trading v. Flota Ecuatoriana (H.L.(E.))** Lord Diplock

A gave encouragement to future charterers to claim equitable relief against withdrawal of the vessel under a withdrawal clause in a time charter, except to note that after referring to a possible analogy to relief against forfeiture for non-payment of rent under leases of real property he says, at p. 874:

“in any case, English law develops by applying an established rule of law to new circumstances which are analogous to the circumstances in which the established rule was framed: . . .”

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Nor need I cite the passages in the speeches of Lord Wilberforce and Lord Salmon in which the analogy with leases of real property is decried.

A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance: *Clarke v. Price* (1819) 2 Wils. 157; *Lumley v. Wagner* (1852) 1 De G.M. & G. 604. In the event of failure to render the promised services, the party to whom they were to be rendered would be left to pursue such remedies in damages for breach of contract as he might have at law. But as an unbroken line of uniform authority in this House, from *Tankexpress* [1949] A.C. 76 to *A/S Awilco of Oslo v. Fulvia S.p.A. di Navigazione of Cagliari (The Chikuma)* [1981] 1 W.L.R. 314, has held, if the withdrawal clause so provides, the shipowner is entitled to withdraw the services of the vessel from the charterer if the latter fails to pay an instalment of hire in precise compliance with the provisions of the charter. So the shipowner commits no breach of contract if he does so; and the charterer has no remedy in damages against him.

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To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English courts have always disclaimed any jurisdiction to grant. This is, in my view, sufficient reason in itself to compel rejection of the suggestion that the equitable principle of relief from forfeiture is juristically capable of extension so as to grant to the court a discretion to prevent a shipowner from exercising his strict contractual rights under a withdrawal clause in a time charter which is not a charter by demise.

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My Lords, Lloyd J., who, as counsel for the charterers in *The Laconia* [1977] A.C. 850, had been prevented from arguing the point, was enabled to return to the charge when there came before him as judge of the Commercial Court *The Afivos* [1980] 2 Lloyd's Rep. 469, in which the question of jurisdiction to grant relief against the operation of a withdrawal clause was argued. That case also ultimately reached this House where it was decided on the ground that upon the true construction of a “non-technicality clause” included in a time charter in New York Produce Exchange form, the shipowner's notice of withdrawal was invalid. This made it unnecessary to refer in the speeches in this House to that part of Lloyd J.'s judgment where he had discussed the jurisdiction to grant a

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charterer relief from the operation of a withdrawal clause. In this House A
that was a question that was never reached.

In dealing with the jurisdiction point in *The Afivos* Lloyd J., in addition to adopting Lord Simon of Glaisdale's suggested analogy in *The Laconia* between re-entry on leasehold premises for non-payment of rent and withdrawal of a ship for non-payment of hire (an analogy which I reject for the reasons that I have already given), sought to extract from the speech of Lord Wilberforce in *Shiloh Spinners Ltd. v. Harding* [1973] B
A.C. 691 a more general proposition that wherever a party to a contract was by its terms given a right to terminate it for a breach which consisted only of non-payment of a sum of money and the purpose of incorporating the right of termination in the contract was to secure the payment of that sum, there was an equitable jurisdiction to grant relief against the exercise of the right of termination. C

My Lords, *Shiloh Spinners Ltd. v. Harding* was a case about a right of re-entry upon leasehold property for breach of a covenant, not to pay money but to do things on land. It was in a passage that was tracing the history of the exercise by the Court of Chancery of its jurisdiction to relieve against forfeiture of property that Lord Wilberforce said, at p. 722:

"There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs. . . ." D

That this mainly historical statement was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights, but providing for a right to determine the contract in default of punctual payment of a sum of money payable under it, is clear enough from Lord Wilberforce's speech in *The Laconia* [1977] A.C. 850. Speaking of a time charter he said, at p. 870: "It must be obvious that this is a very different type of creature from a lease of land." E

Moreover, in the case of a time charter it is not possible to state that the object of the insertion of a withdrawal clause, let alone the transaction itself, is essentially to secure the payment of money. Hire is payable in advance in order to provide a fund from which the shipowner can meet those expenses of rendering the promised services to the charterer that he has undertaken to bear himself under the charterparty; in particular the wages and victualling of master and crew, the insurance of the vessel and her maintenance in such a state as will enable her to continue to comply with the warranty of performance. G

This, the commercial purpose of obtaining payment of hire in advance, also makes inapplicable another analogy sought to be drawn between a withdrawal clause and a penalty clause of the kind against which courts of law, as well as courts of equity, before the Judicature Acts had exercised jurisdiction to grant relief. The classic form of penalty clause is one which H
provides that upon breach of a primary obligation under the contract a secondary obligation shall arise on the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of

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- A primary obligation instead. Lloyd J. in *The Afvos* [1980] 2 Lloyd's Rep. 469 attached importance to the majority judgments in *Stockloser v. Johnson* [1954] 1 Q.B. 476 which expressed the opinion that money already paid by one party to the other under a continuing contract prior to an event which under the terms of the contract entitled that other party to elect to rescind it and to retain the money already paid might be treated as money paid under a penalty clause, and recovered to the extent that it exceeded to
- B an unconscionable extent the value of any consideration that had been given for it. Assuming this to be so, however, it is incapable of having any application to time charters and withdrawal notices. Moneys paid by the charterer prior to the withdrawal notice that puts an end to the contract for services represent the agreed rate of hire for services already rendered, and not a penny more.
- C All the analogies that ingenuity has suggested may be discovered between a withdrawal clause in a time charter and other classes of contractual provisions in which courts have relieved parties from the rigour of contractual terms into which they have entered can in my view be shown upon juristic analysis to be false. Prima facie parties to a commercial contract bargaining on equal terms can make "time to be of the essence" of the performance of any primary obligation under the contract that they
- D please, whether the obligation be to pay a sum of money or to do something else. When time is made of the essence of a primary obligation, failure to perform it punctually is a breach of a condition of the contract which entitles the party not in breach to elect to treat the breach as putting an end to all primary obligations under the contract that have not already been performed. In *Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A.* [1949]
- E A.C. 76 this House held that time was of the essence of the very clause with which your Lordships are now concerned where it appeared in what was the then current predecessor of the Shelltime 3 charter. As is well-known, there are available on the market a number of so-(mis)called "anti-technicality clauses," such as that considered in *The Afvos*, which require the shipowner to give a specified period of notice to the charterer in order to make time of the essence of payment of advance hire; but at
- F the expiry of such notice, provided it is validly given, time does become of the essence of the payment.

My Lords, quite apart from the juristic difficulties in the way of recognising a jurisdiction in the court to grant relief against the operation of a withdrawal clause in a time charter there are practical reasons of legal policy for declining to create any such new jurisdiction out of sympathy

G for charterers. The freight market is notoriously volatile. If it rises rapidly during the period of a time charter, the charterer is the beneficiary of the windfall which he can realise if he wants to by subchartering at the then market rates. What withdrawal of the vessel does is to transfer the benefit of the windfall from charterer to shipowner.

The practical objections to any extension to withdrawal clauses in time charters of an equitable jurisdiction to grant relief against their exercise

H are so convincingly expressed by Robert Goff L.J. in the judgment of the Court of Appeal [1983] 2 W.L.R. 248, 257-258 in the instant case that I can do no better than to incorporate them in my own speech for ease of reference:

"Parties to such contracts should be capable of looking after themselves: at the very least, they are capable of taking advice, and the services of brokers are available, and are frequently used, when

negotiating terms. The possibility that shipowners may snatch at the opportunity to withdraw ships from the service of time charterers for non-payment of hire must be very well known in the world of shipping: it must also be very well known that anti-technicality clauses are available which are effective to prevent any such occurrence. If a prospective time charterer wishes to have any such clause included in the charter, he can bargain for it. If he finds it necessary or desirable to agree to a charter which contains no such clause, he can warn the relevant section of his office, and his bank, of the importance of securing timeous payment. But the matter does not stop there. It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions—for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly. In particular, when a shipowner becomes entitled, under the terms of his contract, to withdraw a ship from the service of a time charterer, he may well wish to act swiftly and irrevocably. True, his problem may, in any particular case, prove to be capable of solution by entering into a without prejudice agreement with the original time charterer, under which the rate of hire payable in future will be made to depend upon a decision, by arbitrators or by a court, whether he was in law entitled to determine the charter. But this is not always possible. He may wish to refix his ship elsewhere as soon as possible, to take advantage of a favourable market. It is no answer to this difficulty that the ship may have cargo aboard at the time, so that her services cannot immediately be made available to another charterer . . . For one thing, the ship may not have cargo on board, and for another she can be refixed immediately under a charter to commence at the end of her laden voyage. Nor is it an answer that the parties can immediately apply to arbitrators, or to a court, for a decision, and that both maritime arbitrators and the Commercial Court in this country are prepared to act very quickly at very short notice. For, quite apart from the fact that some delay is inherent in any legal process, if the question to be decided is whether the tribunal is to grant equitable relief, investigation of the relevant circumstances, and the collection of evidence for that purpose, cannot ordinarily be carried out in a very short period of time.”

For all these reasons I would dismiss this appeal. I do so with the reminder that the reasoning in my speech has been directed exclusively to time charters that are not by demise. Identical considerations would not be applicable to bareboat charters and it would in my view be unwise for your Lordships to express any views about them.

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A LORD KEITH OF KINKEL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock, and for the reasons given by him, with which I agree, I too would dismiss the appeal.

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Diplock. B I agree with it, and for the reasons he gives would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Diplock. For the reasons he gives I, too, would dismiss this appeal.

C LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Diplock, with which I entirely agree, I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Elborne Mitchell & Co.; Sinclair Roche & Temperley.*

M. G.

[HOUSE OF LORDS]

WRIGHT APPELLANT
AND
BRITISH RAILWAYS BOARD RESPONDENTS

F	1983 April 27, 28; June 23	Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman, Lord Bridge of Harwich and Lord Brandon of Oakbrook
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Interest—Award of damages—Personal injury cases—Sum for pain, suffering and loss of amenities—Appropriate rate 'of interest on award

G The plaintiff brought an action against the defendants for damages in respect of personal injuries sustained by him in the course of his employment with them, and the trial judge awarded him general damages for pain and suffering and loss of amenities of £15,000. He held that he was bound by the decision of the Court of Appeal in *Birkett v. Hayes* [1982] 1 W.L.R. 816 to award 2 per cent. interest on that sum for the period from service of the writ to date of judgment.

On appeal by the plaintiff direct to the House of Lords contending that the rate of interest awarded was too low:—

Held, dismissing the appeal, that the interest to be awarded on damages for non-economic loss, like the assessment of compensation for that loss, could only be a conventional figure for which the Court of Appeal was generally the best qualified to lay down guidelines; that the House of Lords should hesitate long before departing from those guidelines and, since judges were required to assess damages for non-economic loss in the money of the day at the date of trial, 2 per cent. from the date of service of the writ to the date of judgment repre-

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sent an appropriate rate of interest; that although the rate of 2 per cent. had been recommended at a time when the rate of inflation was high and the anxiety of investors to preserve the real value of their money made them willing to accept a much lower "real" rate of interest as a reward for foregoing the use of their money, that guideline, which like other guidelines served the purpose of promoting predictability and thus facilitating settlements, should not be varied until the long term trend of future inflation became predictable and expert evidence showed that 2 per cent. was no longer the appropriate rate of interest (post, pp. 217F-G, 218F-G, 220D-E, H-221A, B-D, G-222B).

Birkett v. Hayes [1982] 1 W.L.R. 816, C.A. approved.

Per curiam. Though guidelines should be altered if relevant circumstances change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial (post, p. 221D-E).

Decision of Judge Bennett Q.C. sitting as a judge of the Queen's Bench Division affirmed.

The following cases are referred to in the opinion of Lord Diplock:

Birkett v. Hayes [1982] 1 W.L.R. 816; [1982] 2 All E.R. 710, C.A.

Cookson v. Knowles [1977] Q.B. 913; [1977] 3 W.L.R. 279; [1977] 2 All E.R. 820, C.A.; [1979] A.C. 556; [1978] 2 W.L.R. 978; [1978] 2 All E.R. 604, H.L.(E.).

Jefford v. Gee [1970] 2 Q.B. 130; [1970] 2 W.L.R. 702; [1970] 1 All E.R. 1202, C.A.

London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429, H.L.(E.).

O'Brien v. McKean (1968) 42 A.L.J.R. 223.

Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1978] 3 W.L.R. 955; [1979] 1 All E.R. 774, H.L.(E.).

Walker v. John McLean & Sons Ltd. [1979] 1 W.L.R. 760; [1979] 2 All E.R. 965, C.A.

Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 568, C.A.

The following additional cases were cited in argument:

Macrae v. Reed and Mallik Ltd., 1961 S.C. 68.

Mecca, The [1968] P. 665; [1968] 3 W.L.R. 497; [1968] 2 All E.R. 731.

Roberts, In re, (1880) 14 Ch.D. 49, C.A.

Wallersteiner v. Moir (No. 2) [1975] Q.B. 373; [1975] 2 W.L.R. 389;

[1975] 1 All E.R. 849, C.A.

APPEAL from Judge Bennett Q.C. sitting as a judge of the Queen's Bench Division.

By writ issued on December 4, 1978, the plaintiff, Lawrence Kenneth Wright, claimed against the defendants, the British Railways Board, damages for personal injuries and consequential loss and expense sustained by him owing to the negligence and/or breach of duty of the defendants, their servants or agents, at Up Decoy Yard, Doncaster in the county of York on or about February 6, 1976.

At the trial of the action, on October 27, 1982, Judge Bennett found in favour of the plaintiff on liability and gave judgment for £29,528.03, made up of £7,466.03 special damages with £904 agreed interest thereon and £20,000 general damages including £15,000 for pain and suffering and loss of amenities with interest on the latter sum agreed by way of calculation of £1,158, the judge having ruled that he was bound by the decision

3 W.L.R.

Wright v. British Railways Board (H.L.(E.))

A of the Court of Appeal in *Birkett v. Hayes* [1982] 1 W.L.R. 816 to award interest on that sum at the rate of 2 per cent.

On November 9, 1982, the judge granted the plaintiff a certificate for leave to appeal direct to the House of Lords pursuant to section 12 of the Administration of Justice Act 1969. In accordance with section 13 (3) of the Act of 1969 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Templeman) on
 B January 26, 1983, gave the plaintiff leave to appeal. He appealed.

The facts are set out in the opinion of Lord Diplock.

David Croft Q.C. and *John Bowers* for the plaintiff.

Anthony Scrivener Q.C. and *John Hampton* for the defendants.

C Their Lordships took time for consideration.

June 23. LORD DIPLOCK. My Lords, this is an appeal in an action for damages for personal injuries. It comes directly to this House from the trial judge under the "leap-frog" procedure for which section 13 of the Administration of Justice Act 1969 provides.

D The only question that arises on the appeal is whether the judge was right to award to the plaintiff/appellant interest at the rate of 2 per cent. per annum from the date of service of the writ to the date of judgment, on the sum of £15,000 assessed as general damages for pain and suffering and loss of the amenities of life. I will call this head of damages (Scottice solatium) non-economic loss.

E There was nothing special about the facts of the case. It was a typical case of a severe industrial injury causing disabilities that are likely to endure after the date of the judgment. The judge accordingly felt constrained to follow the guidance given six months before by the Court of Appeal in *Birkett v. Hayes* [1982] 1 W.L.R. 816 when it was laid down, as a guideline to judges exercising their statutory functions in relation to awarding interest on damages, that interest on non-economic loss should be at the rate of 2 per cent. In effect, therefore, this is an appeal against the reasoning
 F of the Court of Appeal in *Birkett v. Hayes* which led them to substitute for the amount of interest upon damages for non-economic loss awarded by the trial judge for the period from the date of service of the writ to the date of judgment interest at the rate of 2 per cent., in place of interest at the average rates paid on money in court placed on short term investment account over that period that the trial judge had adopted.

G My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ. This
 H is only possible if there is some reasonable degree of predictability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability.

The principal characteristics of actions for personal injuries that militate against predictability as to the sum recoverable are, first, that the English legal system requires that any judgment for tort damages, not being a continuing tort, shall be for one lump sum to compensate for all loss sustained by the plaintiff in consequence of the defendant's tortious act

whether such loss be economic or non-economic, and whether it has been sustained during the period prior to the judgment or is expected to be sustained thereafter. The second characteristic is that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of *measurement* in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be “basically a conventional figure derived from experience and from awards in comparable cases.”

So Lord Denning M.R. put it, speaking for a unanimous five-member Court of Appeal in *Ward v. James* [1966] 1 Q.B. 273, 303. This was the case in which the Court of Appeal laid down a guideline for the exercise by judges of the discretion, conferred upon them by section 6 of the Administration of Justice (Miscellaneous Provisions) Act 1933, to order trial by jury in civil actions, where the action concerned was one for damages for personal injuries. It was in the interests of uniformity and thus of predictability in these, the commonest of civil actions, that the guideline that was there laid down and has been followed ever since was that the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances.

The need for a judge in assessing damages for non-economic loss to have regard to awards in comparable cases has led to progressive general increases in the level of awards particularly for serious injuries. These have been intended to reflect, though admittedly imperfectly, the general increase in the level of salaries and wages and, more particularly since inflation became rampant, the decrease in the real value of the money due to this cause.

It is with the increase in the nominal amount of awards in “the money of the day” (to borrow the apt phrase used by Barwick C.J. in *O'Brien v. McKeen* (1968) 42 A.L.J.R. 223, 224) due to inflation that your Lordships are primarily concerned in the instant case. That increase in awards has taken place irregularly by fits and starts rather than followed the actual shape of the rising curve of inflation; and there have been periods, particularly between 1973 and 1979, when it lagged significantly behind the decrease in real value of the money of the day. This was pointed out in *Walker v. John McLean & Sons Ltd.* [1979] 1 W.L.R. 760, 765, where the Court of Appeal re-affirmed the rule of practice that damages for non-economic loss are to be assessed by reference to the value of money at the date of the trial and not at some other and lower sum calculated by reference to an earlier and higher value of the pound.

Guidelines on the rates of interest appropriate to be applied by the judge to damages for non-economic loss in the exercise of his discretion to include such interest in the sum for which judgment is given were first laid down by the Court of Appeal in *Jefford v. Gee* [1970] 2 Q.B. 130, after the change in the law brought about by the Administration of Justice Act 1969.

The discretion to award interest on damages for non-economic loss was first conferred upon the court by section 3 of the Law Reform (Miscellaneous Provisions) Act 1934. Broadly speaking, the discretion was unfettered but in the case of actions for personal injuries an award of interest was made mandatory by the additional subsections to section 3 that were added by section 22 of the Act of 1969. So far as relevant the section now reads:

“(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there

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- A shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section—(a) shall authorise the giving of interest upon interest; . . . (1A) Where in any such proceedings as are mentioned in subsection (1) of this section judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages. (1B) An order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section. . . .”
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- C
- D

In *Jefford v. Gee* the court laid down two guidelines as to interest to be awarded on damages for non-economic loss. The first was: that the period for which interest should be awarded was one beginning on the date of service of the writ and ending on the date of judgment. The second was: that the rate of interest should be the same as that which is payable on money paid into court which is placed on short term investment account, i.e., the short term investment account rate.

- E
- The guideline as to the date from which interest should be awarded has been followed ever since. It has not been questioned in the instant appeal. There are several considerations that justify the selection of this date rather than the date of the accident in the general run of personal injury cases. Since this guideline has not been attacked and was adopted sub silentio by this House in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136, to which I shall be referring, I can state those considerations briefly.
- F

- The starting point for any consideration of the inclusion of a sum for interest in an award of damages is the oft-cited statement of Lord Herschell L.C. in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429, 437 expressing his regret that under Lord Tenterden's Act of 1833 [the Civil Procedure Act 1833 (3 & 4 Wm. 4, c. 42)] interest could not be included in the judgment in an action claiming an unliquidated amount for what, in that case, was economic loss:
- G

- “I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give
- H

the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events." A

Non-economic loss in personal injury cases is not sustained eo instanto when the accident takes place. As Lord Denning M.R. said in *Jefford v. Gee* [1970] 2 Q.B. 130, 147, it is "spread indefinitely into the future." The loss is not capable of being quantified then and, when injuries are serious and stabilisation of medical condition slow, some considerable time may have to elapse before it is possible to make an informed estimate of the amount that ought to be awarded. Furthermore, a person can hardly be said to be "wrongfully withholding" a sum of money owing to another at a time when the amount, if any, that will ultimately be found to have been owing remains unknown and no demand has yet been made for it. In *Jefford v. Gee* Lord Denning M.R. giving the judgment of the court did not exclude the possibility that in some cases the appropriate starting point from which interest should run might be the date of the letter before action. But this would be only in the simplest type of case where liability was not seriously in doubt and the medical condition of the plaintiff had by then become stabilised. "Speaking generally, . . ." said Lord Denning M.R. at p. 147, "we think that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial." He added the important practical consideration: "This should stimulate the plaintiff's advisers to issue and serve the writ without delay—which is much to be desired." In *Birkett v. Hayes* [1982] 1 W.L.R. 816 the Court of Appeal took the occasion to suggest that where the plaintiff was guilty of unreasonable delay in bringing the action to trial it would not be inappropriate to make a corresponding reduction in the period for which interest was given. B C D E

The second guideline laid down in *Jefford v. Gee* relating to rate of interest is that with which your Lordships are particularly concerned. It has had a more chequered history. In *Cookson v. Knowles* [1977] Q.B. 913, 921, which was a fatal accident case involving only economic loss, Lord Denning M.R. giving the judgment of the court made use of the occasion to alter that guideline to take account of the fact that owing to inflation awards of damages for pain and suffering and loss of amenities of life were of a higher nominal sum in the money of the day at the time of trial than the nominal sum that would have been awarded had the trial taken place at the date of service of the writ. "The plaintiff," he said, at p. 921: F

"thus stands to gain by the delay in bringing the case to trial. He ought not to gain still more by having interest from the date of service of the writ. We would alter the guideline, therefore, by suggesting that no interest should be awarded on the lump sum awarded at the trial for pain and suffering and loss of amenities." G

Cookson v. Knowles went to the House of Lords [1979] A.C. 556 upon the question whether in awarding damages for future economic loss allowance ought to be made for future inflation. The House upheld the decision of the Court of Appeal that no such allowance should be made. The House had no occasion to deal with interest on non-economic loss; and it did not do so. The only relevance of the case to the appeal with which your Lordships are now concerned is that, as appears from the speeches in this House, the expert evidence in *Cookson v. Knowles* had shown that interest rates obtainable by prudent investment, even in what was a time of H

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A high inflation between December 1973 and July 1976, were, very broadly speaking, sufficient to offset the fall in the real value of money due to inflation.

B The guideline recommending that no interest be awarded on damages for non-economic loss prevailed during the interval between the date of the judgment of the Court of Appeal in *Cookson v. Knowles*, in July 1977, and the decision of this House in November 1978 in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136. Although most of the argument and their Lordships' speeches in that case were directed to the question whether damages could be recovered for economic loss during the "lost years," the House also held that interest *should* be awarded upon damages for non-economic loss. Nothing, however, was said about the rate at which interest should be allowed, since this had apparently been the subject of an agreement between counsel.

C Lord Wilberforce, Lord Edmund-Davies and Lord Scarman pointed out the fallacy underlying the new "no interest" guideline propounded by Lord Denning M.R. in *Cookson v. Knowles* [1977] Q.B. 913. As Lord Wilberforce succinctly put it, at p. 151:

D "Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained, nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same."

E My noble and learned friend, Lord Scarman, at p. 173, in addition to referring to the fallacy, also relied upon the construction of the statute which makes mandatory the award of interest on damages, or such part of the damages as the court considers appropriate, "unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages": Administration of Justice Act 1969, section 3 (1A). He pointed out that inflation is an economic and financial condition of general application. Its impact on any particular plaintiff has been

F neither more nor less than upon everybody else; there is nothing special about it.

G My Lords, just as the lump sum of money assessed as being the appropriate compensation for past and future pain and suffering and loss of amenities cannot be other than a conventional figure, since such non-economic loss is not susceptible of measurement in money, so too an award of simple "interest" on that lump sum as the method of assessing compensation for the temporary loss of the use of it between the date of service of writ and the date of judgment is wholly conventional; but it is the method that the court is commanded by the statute to adopt. To what use the particular plaintiff would have actually put that capital sum during the period for which "interest" is to be given is utterly irrelevant. It is most unlikely that if he had received it he would have invested and

H kept it in income-earning securities throughout that period. Yet that is the assumption that judges are called upon to make; and its artificiality is enhanced by the fact that whereas the market rate of interest, at any time, represents the return *after deduction of tax* that lenders are able to obtain from borrowers for foregoing the use of money, interest on damages for personal injuries that is included in a judgment is exempted from liability to income tax by section 19 of the Finance Act 1971. So one would expect a lender to accept as compensation for foregoing the use of

his money a rate of interest lower than the market rate, if the interest that he received was free of tax. A

My Lords, it has been recognised since mediaeval times that interest exacted for the loan of a capital sum of money may comprise two elements: one, a reward for taking a risk of loss or reduction of capital; the other, a reward for foregoing the use of the capital sum for the time being. The former, or risk element, was early recognised in canon law and the law merchant as legitimate; the latter element was regarded as the sin of usury; it was visited originally by ecclesiastical sanctions and was the subject of successive statutory curbs, the history of which is to be found in *Holdsworth, A History of English Law*, vol. VIII, pp. 100–113. B

This distinction, though not the sanctions that once attached to it, still holds good today. In times of stable currency the rate of interest obtainable on money invested in government stocks includes very little risk element. In such times it is, accordingly, a fair indication of the “going rate” of the reward for temporarily foregoing the use of money. Inflation, however, when it occurs, exposes all capital sums of money that are invested temporarily in securities of any kind instead of being spent at once in tangibles to one form of risk, amounting to a certainty that upon realising the security there will be *some* reduction in the “real” value of the money received for it, whatever other kind of risk the security selected for investment may attract. C D

As was pointed out in *Cookson v. Knowles* [1977] Q.B. 913 that element of risk which is presented by inflation is taken care of in a rough and ready way by higher rates of interest obtainable as one of the consequences of it. It cannot be more than rough and ready because, as has since been explained in the expert evidence that was called in *Birkett v. Hayes* [1982] 1 W.L.R. 816, there are other factors which have temporary effects upon interest rates, notably government policy; and, in any event, the risk element due to inflation that is reflected in interest rates is not actual past inflation (as measured by an appropriate index such as the I.M.F. consumer price index or the U.K. retail price index), but what it is anticipated the rate of inflation will be in the future until the date of maturity of the security. Nevertheless, inflation has provided over the last few years what is far and away the greatest risk element in the interest rates obtainable on government stocks and other securities in which other risk elements are minimal. E F

If judges carry out their duty of assessing damages for non-economic loss in the money of the day at the date of the trial—and this is a rule of practice that judges are required to follow, not a guideline from which they have a discretion to depart if there are special circumstances that justify their doing so—there are two routes by which the judge’s task of arriving at the appropriate conventional rate of interest to be applied to the damages so assessed can be approached. The starting point for each of them is to ascertain from the appropriate table of retail price indices covering the period between service of writ and trial what would have been the equivalent of those damages in the money of the day at the date of service of writ, reckoned in pounds sterling at the higher value that they then stood at at the very beginning of the period for which simple interest is to be given. That figure represents both the real value, and what was then the nominal value also, of the sum of money for the loss of use of which the plaintiff is to be compensated by interest. Such interest, like the damages on which it is to be given, is to be calculated in the money of G H

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A the day at the date of trial, the real value of which has been depreciated by the full amount of the inflation that has taken place since the date of service of the writ.

B The first route by which an informed choice of the appropriate rate of interest can be reached has only been accessible since the United Kingdom Government started to issue index-linked (i.e., inflation-proof) bonds: first, retirement bonds, popularly known as "granny bonds," then save-as-you-earn investments, and, most relevant for present purposes, medium and long-term index-linked Treasury stock, first issued in 1981. The realisation of an index-linked investment that has been held for a period equivalent to that between service of writ and trial presents the closest analogy in the investment market to an award of damages for personal injuries assessed at a sum of money which takes account of the depreciation in the real value of the pound sterling due to inflation since the date upon which the plaintiff is to be treated as having been entitled to a sum which in the money of the day at the date of service of the writ represented the same "real" value. In effect, he may be regarded as having held an inflation-proof investment between the date of service of the writ and the date of trial; and the rate of interest accepted by investors in index-linked government securities should provide a broad indication of what is the appropriate rate of interest to be awarded him.

D Index-linked government securities are of recent origin and comparatively rare; and there are limitations upon the acquisition of some. The other route by which the choice of an appropriate rate of interest may be approached is: first, to see what were the actual rates of interest that were obtainable over the relevant period on various kinds of government or other securities in which the risk element apart from inflation is minimal; next to deduct from the actual rates of interest that were obtainable over the relevant period on various kinds of government or other securities in which the risk element apart from inflation is minimal the rate of interest over the same period; and then to treat the difference as representing the element in the interest that represents the reward for foregoing temporarily the use of the invested money.

F In the instant case no expert evidence on either of these lines of approach was tendered; but it had been given in *Birkett v. Hayes* [1982] 1 W.L.R. 816 and the relevant periods in respect of which interest was to be awarded were broadly comparable in the two cases. In *Birkett v. Hayes* the period was roughly five years ending in July 1981; in the instant case it was roughly four years ending in October 1982. Each of these periods started after the period that was the subject of expert evidence in *Cookson v. Knowles* [1979] A.C. 556 had ended. In the absence of any expert evidence leading to a different conclusion, the trial judge in the instant case considered that the 2 per cent. guideline laid down by the Court of Appeal in *Birkett v. Hayes* ought to be applied by him.

G My Lords, in *Cookson v. Knowles* I said, at p. 571:

H "In times of stable currency the multipliers that were used by judges," i.e. to estimate the present value of future economic loss, "were appropriate to interest rates of 4 per cent. to 5 per cent. whether the judges using them were conscious of this or not."

It does not follow from this, however, that, in times of highly unstable currency, the part of the interest rate that represents the reward obtained for foregoing the use of money still remains at 4 to 5 per cent. The virtually unchallenged expert evidence that was given in *Birkett v. Hayes* goes far to

show that it does not. On index-linked securities the rate of return on retirement bonds after being held for five years was 0·8 per cent. per annum free of tax; on the save-as-you-earn investment, it was 1·3 per cent. per annum also free of tax; and on the 15-year and 25-year index-linked Treasury stock issued in 1981, it was 2 per cent. In effect subscribers to this stock obtained that 2 per cent. free of tax since initially, at any rate, it was only available to gross funds—pension funds, life funds and the like, not liable to income tax; but medium and long-term index-linked issues at 2 per cent. or $2\frac{1}{2}$ per cent. have latterly been made available to private individuals who, if liable to income tax, obtain a net return of 2 per cent. to $2\frac{1}{2}$ per cent. less tax, and even now are currently traded at around about par.

The expert's examination of the rate of return obtained upon a range of investments that were not inflation-proof but in which the risk element, apart from inflation, was small led him to the conclusion that no better return than 2 per cent. in excess of the rate of inflation could be expected during that period of recession and inflation as the real reward for foregoing the use of money. The success of the index-linked issue of long-dated Treasury stock carrying 2 per cent. interest came after his original report in which he had expressed that conclusion and provided powerful confirmation of it. Although 4 per cent. to 5 per cent. may again become an appropriate rate to allow for foregoing the use of money if currency becomes stable again, when inflation is rampant and recession has increased the risk of investment in equities, anxiety to preserve the "real" value of money that is not immediately needed but is saved for future use makes investors willing to accept a much lower "real" rate of interest; and I see no ground for rejecting, for the time being, the 2 per cent. rate adopted by the Court of Appeal in *Birkett v. Hayes* as the rate to be used for calculating the conventional "interest" on an award for damages for non-economic loss that the statute requires the court to include in the sum for which judgment is given.

In *Birkett v. Hayes* [1982] 1 W.L.R. 816, 824 Eveleigh L.J. drew particular attention to the artificiality to which I initially referred, of treating the sum ultimately assessed at the trial as damages for non-economic loss, both that which the plaintiff had sustained by that date and also that which he was likely to sustain thereafter (although no discount for its deferment was made in the lump sum awarded), as if it were a debt for a sum certain of the same "real" value, payable on the date of service of the writ. Even assuming, as he was prepared to do, that after elimination of the risk element due to inflation the market rate of interest obtainable by investors as a reward for foregoing the use of their money remained at 4 per cent. gross before deduction of tax, notwithstanding that the currency was rapidly depreciating, Eveleigh L.J. would have regarded it as fair to apply a rate lower than the net rate of 2·8 per cent. which represented the gross rate of 4 per cent. less tax. The 2 per cent. fairly represented an appropriate lower rate.

My Lords, given the inescapably artificial and conventional nature of the assessment of damages for non-economic loss in personal injury actions and of treating such assessment as a debt bearing interest from the date of service of the writ, it is an important function of the Court of Appeal to lay down guidelines both as to the quantum of damages appropriate to compensate for various types of commonly occurring injuries and as to the rates of "interest" from time to time appropriate to be given in

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- A respect of non-economic loss and of the various kinds of economic loss. The purpose of such guidelines is that they should be simple and easy to apply though broad enough to permit allowances to be made for special features of individual cases which make the deprivation caused to the particular plaintiff by the non-economic loss greater or less than in the general run of cases involving injuries of the same kind. Guidelines laid down by an appellate court are addressed directly to judges who try
- B personal injury actions; but confidence that trial judges will apply them means that all those who are engaged in settling out of court the many thousands of claims that never reach the stage of litigation at all or, if they do, do not proceed as far as trial will know very broadly speaking what the claim is likely to be worth if 100 per cent. liability is established.

- C The Court of Appeal, with its considerable case-load of appeals in personal injury actions and the relatively recent experience of many of its members in trying such cases themselves, is, generally speaking, the tribunal best qualified to set the guidelines for judges currently trying such actions, particularly as respects non-economic loss; and this House should hesitate before deciding to depart from them, particularly if the departure will make the guideline less general in its applicability or less simple to apply.
- D A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach. But though guidelines should be altered if circumstances relevant
- E to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial.

- F As regards assessment of damages for non-economic loss in personal injury cases, the Court of Appeal creates the guidelines as to the appropriate conventional figure by increasing or reducing awards of damages made by judges in individual cases for various common kinds of injuries. Thus so-called "brackets" are established, broad enough to make allowance for circumstances which make the deprivation suffered by an individual plaintiff in consequence of the particular kind of injury greater or less than in the general run of cases, yet clear enough to reduce the unpredictability of what is likely to be the most important factor in arriving at settlement of claims. "Brackets" may call for alteration not only to take account of
- G inflation, for which they ought automatically to be raised, but also it may be to take account of advances in medical science which may make particular kinds of injuries less disabling or advances in medical knowledge which may disclose hitherto unsuspected long term effects of some kinds of injuries or industrial diseases.

- H As regards the fixing of the conventional rate of interest to be applied to the conventional figure at which damages for non-economic loss have been assessed, the rate of 2 per cent. adopted and recommended as a guideline by the Court of Appeal in *Birkett v. Hayes* [1982] 1 W.L.R. 816 covered a period during which inflation was proceeding at a very rapid rate. As I have already said, I see no ground that would justify this House in holding that guideline to have been wrong, or to overrule the trial judge's application of it to the instant case. Although the rate of inflation has slowed, at least temporarily since the period in respect of which the 2 per

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cent. guideline in *Birkett v. Hayes* was laid down, no one yet knows what the long term future of the phenomenon of inflation will be; and the guideline, if it is to serve its purpose in promoting predictability and so facilitating settlements and eliminating the expense of regularly calling expert economic evidence at trials of personal injury actions, should continue to be followed for the time being, at any rate, until the long term trend of future inflation has become predictable with much more confidence. When that state of affairs is reached—and it would be unrealistic to suppose that it will be in the immediate future—it may be that the 2 per cent. guideline will call for examination afresh in the light of fresh expert economic evidence, which may show that assumptions that could validly be made at the time of *Birkett v. Hayes* as to what was the current rate of interest obtainable in the market that was attributable to foregoing the use of money will have ceased to hold good. But there is no material before your Lordships to suggest that the time is yet ripe for this. Accordingly, I would dismiss this appeal.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Diplock. For the reasons given by him I would dismiss this appeal.

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Diplock. I agree with it, and for the reasons he gives I would dismiss the appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Diplock, with which I agree, I too would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Pattinson & Brewer; Solicitor, British Railways Board.*

M. G.

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[COURT OF APPEAL]

LLOYD AND OTHERS v. WRIGHT

DAWSON v. SAME

B

1983 Jan. 26, 27;
Feb. 23

Eveleigh and Dunn L.JJ.

Arbitration—Arbitrator—Jurisdiction—High Court action brought claiming similar relief to claim in arbitration—Whether arbitrator functus officio—Action discontinued—Whether arbitration proceedings to continue

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Disputes between the six plaintiffs, partners in a firm of solicitors, and the defendant, the senior partner, were referred to arbitration. The plaintiffs subsequently issued a writ in the Chancery Division and their statement of claim substantially repeated the points of claim in the arbitrations. At a hearing attended by both parties on October 7, 1982, the arbitrator consolidated the arbitrations and ordered the defendant to make discovery, to allow the inspection of documents and to serve further and better particulars of defence in two of the arbitrations within 21 days. On October 28, the defendant issued a summons to stay the Chancery action but at a hearing before a master on November 25, he withdrew the summons and an order was made by consent extending his time for service of a defence in the action. The following day the parties appeared before a master on the plaintiffs' summons for an order requiring the defendant to comply with the arbitrator's directions of October 7. The master dismissed the summons on the ground that the commencement of the Chancery action by the plaintiffs and the steps taken in the action by the parties on the previous day rendered the arbitrator functus officio. On December 17 the plaintiffs discontinued the Chancery action and on December 20, they successfully appealed to a judge in chambers against the master's dismissal of their summons.

On the defendant's appeal on the ground, inter alia, that the judge erred in law in failing to hold that the issue of the writ in the Chancery proceedings, coupled with steps taken in the action brought the arbitration proceedings to an end:—

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Held, dismissing the appeal, that there was no principle that required arbitration proceedings to terminate if a party to the arbitration evoked the assistance of the court; that, unless the party consented not to continue with his action or the court ordered a stay of the proceedings, the court would grant its assistance and, if necessary, retain control of the matter but the arbitration proceedings could continue concurrently; and that, accordingly, the plaintiffs, who had by their actions neither repudiated the arbitration agreement nor elected to abandon the arbitration proceedings, had not brought the arbitration proceedings to an end by issuing the writ and the master had had jurisdiction to make orders enforcing the arbitrator's directions (post, pp. 226A, 227B–C, 229B–C, H, 230B–G).

H

Doleman & Sons v. Ossett Corporation [1912] 3 K.B. 257, C.A. considered.

Tradax Internacional S.A. v. Cerrahogullari T.A.S. (The M. Eregli) [1981] 2 Lloyd's Rep. 169 approved.

Decision of Drake J. affirmed.

Lloyd v. Wright (C.A.)**[1983]**

The following cases are referred to in the judgments:

Doleman & Sons v. Ossett Corporation [1912] 3 K.B. 257, C.A.

Tradax Internacional S.A. v. Cerrahogullari T.A.S. (The M. Eregli) [1981] 2 Lloyd's Rep. 169.

The following additional cases were cited in argument:

City Centre Properties (I.T.C. Pensions) Ltd. v. Matthew Hall & Co. Ltd. [1969] 1 W.L.R. 772; [1969] 2 All E.R. 1121, C.A.

Heyman v. Darwins Ltd. [1942] A.C. 356; [1942] 1 All E.R. 337, H.L.(E.).

Hosier & Dickinson Ltd. v. P. & M. Kaye Ltd. [1972] 1 W.L.R. 146; [1972] 1 All E.R. 121, H.L.(E.).

Rederi Kommanditselskaabet Merc-Scandia IV v. Couniniotis S.A. (The Mercanaut) [1980] 2 Lloyd's Rep. 183.

Vawdrey v. Simpson [1896] 1 Ch.D. 166.

APPEAL from Drake J.

The parties were partners in a firm of solicitors, C. R. Thomas & Son. The plaintiffs, Hugh Richard Rowland Meirion Lloyd, John Jeremy Howorth, Timothy Workman, Malcolm John Tanner, Jeremy Nicholas Dawson and David Anthony Kempton, under the terms of the partnership agreement began separate arbitration proceedings against the senior partner, the defendant Ian McDonald Wright. In the arbitration proceedings, which were consolidated, the arbitrator, Mr. Richard Scott Q.C., made directions including directions that the defendant give discovery.

By writ dated July 28, 1982, the plaintiffs brought an action against the defendant in the Chancery Division for, inter alia, the dissolution of the partnership. On October 28, the defendant took out a summons for the stay of the action but he withdrew the application and, by consent, Master Gowers made an order on November 25 extending the time for service of the defence. On November 28, Master Grant dismissed a summons by all the plaintiffs and a summons by the plaintiff Mr. Dawson that the defendant comply with the arbitrator's directions relating, inter alia, to discovery and inspection of documents. On December 17, the plaintiffs discontinued their action and, on December 20, Drake J. allowed their appeal against the dismissal of their summonses by Master Grant.

By notice of appeal dated January 14, 1983, the defendant sought to set aside the order of Drake J. and to restore the decision of Master Grant on the grounds (1) that the judge erred in law in holding that the steps taken by the plaintiffs in applying before Master Gowers for an order requiring the defendant to deliver a defence in the Chancery proceedings when such steps were made within six weeks of the date fixed for the hearing of the arbitration, did not amount to an election not to proceed with the arbitration proceedings; (2) that the judge erred in law in deciding that the majority judgment of the Court of Appeal in *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257 did not bind him to hold that the issue of the writ in the Chancery proceedings coupled with the steps taken by the plaintiffs referred to in paragraph (1) hereof brought the arbitration proceedings to an end did not effectively end the arbitration; and (3) that the judge misdirected himself in failing to give any or any sufficient weight to the practice of the courts in assuming paramount jurisdiction over disputes submitted simultaneously to them and to arbitration.

The facts are stated in the judgment of Eveleigh L.J.

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- A *Eysr Lewis Q.C. and David H. J. G. Powell* for the defendant.
Anthony Scrivener Q.C. and Ian Croxford for the first to fourth and sixth plaintiffs.
David Ritchie for the fifth plaintiff.

Cur. adv. vult.

- B February 23. The following judgments were read.

- EVELEIGH L.J. The appellant defendant is the senior partner in a firm of solicitors. The respondent plaintiffs are the other partners. Disputes between the defendant and his partners led to five submissions to arbitration. On October 7, 1982, the arbitrator made orders in the arbitrations. He consolidated all five. He ordered the defendant within 21 days to serve lists of documents, and to give further and better particulars of defences in the fourth and fifth arbitrations. The plaintiffs were also required to serve lists of documents. On August 20, 1982, the plaintiffs served on the defendant a writ with a statement of claim in which they claimed an order for the dissolution of the partnership. For the purposes of this judgment I can assume that the statement of claim was a repetition of the points of claim in the arbitration, although the plaintiffs would, if necessary, argue that there were minor differences. There were further claims for relief in the arbitrations in addition to a claim for dissolution, but again for the purposes of my judgment I attach no significance to this.

- On October 28, the defendant took out a summons to stay the action.
- E On November 25 before Master Gowers the defendant withdrew his application and, with the consent of all parties, an order was made extending the defendant's time to serve his defence until Monday, December 20; but on December 17 the plaintiffs discontinued the Chancery action. Before that, however, the following matters occurred. As a result of summonses issued on November 12 and 19, the parties appeared before Master Grant on November 26. He refused the plaintiffs' application
- F for an order compelling the defendant to comply with the directions of the arbitrator made on October 7, on the ground that, as an action had been commenced in which a step had been taken, the arbitrator was functus officio in accordance with the decision of the Court of Appeal in *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257. On December 20, Drake J. allowed an appeal against Master Grant's decision. The
- G defendant now asks that the decision of the master be restored.

- By the first ground of appeal it is submitted that the judge erred in law in holding that the steps taken by the plaintiffs in applying before Master Gowers for an order requiring the defendant to deliver a defence in the Chancery proceedings did not amount to an election not to proceed with the arbitration proceedings. This argument was advanced before the judge upon another basis also, namely, that the plaintiffs expressly
- H or by inference repudiated the arbitration agreement and the defendant accepted such repudiation. Before us, this ground has not been pursued with enthusiasm. The plaintiffs had commenced their action as they were in doubt whether the arbitrator had power to order a dissolution in addition to the other relief asked for in the arbitration proceedings. They did not make their intentions clear. However, it is apparent that on October 7, all the parties were accepting that the arbitration was still alive, for in addition to the other directions given by the arbitrator on

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that date, a date for hearing, namely, January 4, 1983, was fixed. Furthermore, after the hearing on November 25, when all parties were aware that the summons before Master Grant was to be heard the following day, there was an argument between counsel after the hearing before Master Gowers as to whether or not the arbitrator was functus officio. I agree with the judge that the plaintiffs had not repudiated the arbitration proceedings or elected to abandon them.

By his second ground the defendant submits that, on the authority of *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257, the issue of the writ followed by a step in the action brought the arbitration proceedings to an end. This argument was also put in another form, namely, that it is the practice of the courts to assume paramount jurisdiction over disputes submitted simultaneously to them and to arbitration.

In *Doleman's* case, the contract between the parties contained a provision for reference to arbitration to a named arbitrator who should be competent to enter upon the subject matter of disputes between the parties without formal reference or notice to the parties. Subsequent to the commencement of the plaintiffs' action claiming damages, the arbitrator, without giving notice to the parties and without the knowledge or consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action. The defendants pleaded this award in bar to the plaintiffs' claim in the action. It was held that it was not competent for the arbitrator to determine the matters in question pending the action, and therefore the award was no bar. Counsel for the defendants referred to the judgment of Fletcher-Moulton L.J. where he said, at p. 269:

"If the court has refused to stay an action, or if the defendant has abstained from asking it to do so, the court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is functus officio, unless the parties agree de novo that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the court would be to say that, in all cases in which section 4 of the Arbitration Act 1889 applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the courts to decide the question they have in hand. In each case where the court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal which should be the first to give a decision in the matter. The learned judge has decided that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the decision of the arbitrator, and not that of the court, decides the rights of the parties. If this

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A were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the court in a most ignominious way.”

B The principle that the court will not allow its jurisdiction to be ousted is at the root of the defendant’s argument. However, the court does not claim a monopoly in deciding disputes between parties. It does not, of its own initiative, seek to interfere when citizens have recourse to other tribunals. The court exercises its jurisdiction when appealed to. Until then, the court is not conscious of ignominy if an arbitrator decides a question with which the court is competent to deal. Furthermore, the court will not refuse to allow the subject matter of an action already begun to be referred to arbitration, if the parties so agree, as Fletcher-Moulton L.J. makes clear in the above passage. The court, however, will not permit its assistance to be denied to a party who has invoked it except by that party’s consent or by its own ruling. If the defendants in *Doleman’s* case had been able to plead the award in bar, the principle thus stated would be breached. In my opinion, the judgments in *Doleman’s* case show that the court was not seeking to assert a wider principle than this.

D Referring to the Common Law Procedure Acts and the Arbitration Act 1889, Fletcher-Moulton L.J. said, at p. 268:

“Prior to these statutable provisions the court could not refuse to settle any such dispute which was brought before it, because it not only had the jurisdiction but also the duty to decide that dispute if called upon so to do.”

E It is clear that the court has no burning desire of its own to retain the settlement of a dispute in its own hands. Farwell L.J. said, at p. 272:

F “It is also clear that any binding agreement between the parties settling all the disputes raised in the action made after writ is a good defence as a plea puis darrein continuance (now pleaded under Order XXIV), whether such agreement is a direct settlement between the parties themselves, or made by means of a third person to whom they have referred the dispute after writ, or by means of an award made after writ in an arbitration existing before writ, if both parties subsequent to writ carry on the arbitration, and agree to an award being made notwithstanding the action. But this is because it is always open to litigants to settle their differences after writ as they please. The case is quite different if there is no such agreement after writ.”

H The reference to “an award made after writ in an arbitration existing before writ” is not intended, in my opinion, to be qualified by adding “provided neither party has taken any further step in the action.” I take those words to refer to an award made at any time with the agreement of the parties. While Farwell L.J. refers to the agreement of the parties subsequent to writ, it is significant that he envisages the arbitration as existing before writ. He clearly does not regard the arbitration as being extinguished by the writ. He said, at p. 273:

“The plaintiffs cannot be deprived of their right to have recourse to the court when the agreement is a mere agreement to refer, unless the court makes an order to that effect under section 4 of the Arbitration Act. They can, of course, deprive themselves of such right

by their own act after writ, as for example by going on with the arbitration and obtaining an award; . . .” A

Again, he does not regard the arbitration as being at an end; but, of course, he makes it clear that the existence of arbitration proceedings will have no effect upon the court's power to decide the question which the plaintiff asks it to decide, unless it entertains an application under section 4 of the Act. B

The reference by Fletcher-Moulton L.J. to the private tribunal being “functus officio” is not necessarily inconsistent with the passages which I have quoted from the judgment of Farwell L.J. Whether or not Fletcher-Moulton L.J. intended to say that the arbitration must be treated as being at an end, he was contemplating the position where an action was proceeding. However, I do not think that he was saying that the arbitration was dead. I regard him as saying that the arbitrator was not in a position to make an effective award without the agreement of the parties. C

In *Tradax Internacional S.A. v. Cerrahogullari T.A.S. (The M. Eregli)* [1981] 2 Lloyd's Rep. 169, there were two proceedings issued by the plaintiff charterers: a writ and an application for summary judgment under R.S.C., Ord. 14 for dispatch money, and an application for extension of time, under section 27 of the Arbitration Act 1950, to validate the appointment of an arbitrator which was made out of time. The defendant submitted that the plaintiffs were barred from applying for the extension of time because the courts were already seised of their claim in an action, and they relied upon *Doleman's* case. Kerr J. said, at p. 174: D

“All that the case decided, I think, as correctly stated in the first paragraph of the headnote, is that when the court is seised of a dispute in an action, an arbitrator cannot (in effect) oust the jurisdiction of the court by purporting to make a final award in a concurrent arbitration, and that any award so made cannot be a defence to the action before the court. . . . In my view the legal position is clear. E

The fact that arbitration proceedings are pending between parties is clearly not in itself any ground for preventing the courts from becoming seised of the same dispute in an action. Conversely, as it seems to me, the concurrent existence of an action should not preclude an application under section 27 of the Arbitration Act 1950, to remove the time bar to a claim imposed by an arbitration clause. F

The contrary conclusion would be highly inconvenient and make little sense in practice. It would mean that a claimant or plaintiff would have to pursue his possible remedies consecutively instead of concurrently, perhaps even to the extent of having to discontinue his action, obtain relief under section 27, and then start a fresh action in order to apply for summary judgment on a claim which is then no longer barred and which may be indisputably due. I think that the practice of this court shows that the formal requirements of the law do not go as far as this. Claims which are covered by an arbitration clause, but which are said to be indisputable, are nowadays frequently put forward in an arbitration, but then also pursued concurrently by an attempt to obtain summary judgment in the courts. In effect, a claimant can—and in my view should be able to—obtain an order for payment in such cases by either means, and the co-existence of both avenues towards a speedy payment of an amount which is indisputably due was recently referred to in this court by Robert G

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A Goff J. in *The Kostas Melas* [1981] Lloyd's Rep. 18, 27. It was there held that, as an alternative to an application for summary judgment under R.S.C., Ord. 14 in an action, there was jurisdiction to make an interim award for an indisputable part of the claim in an arbitration; which also shows, incidentally, the misconception of the plaintiffs' first submission in the present case with which I have already dealt."

B In my judgment, therefore, it is wrong to treat the arbitration proceedings as having ceased to exist once a step was taken in the Chancery action. The existence of the action will no doubt be a relevant consideration in determining what steps shall be taken, if any, in the arbitration proceedings. Certainly an award without the consent of both parties would have no effect. We are not concerned to decide what

C precise orders Master Grant might have made. In my opinion, however, he did have jurisdiction to entertain the application which was before him. By the time the matter came before the judge the action had been discontinued and so no longer remained a consideration in deciding whether or not to make the order.

I therefore would dismiss this appeal.

D DUNN L.J. The question of law which arises in this appeal is: "What is the effect on arbitration proceedings if, during the currency of those proceedings, one of the parties to the arbitration issues a writ claiming similar relief to that claimed in the arbitration?"

E It was not seriously suggested in this court that the judge was wrong in holding that the issue of a writ by the plaintiffs, coupled with an application for directions to Master Gowers on November 25, constituted a repudiation of the arbitration agreement itself. What was said was that once the plaintiffs had taken a step in the action by applying for directions, then the court was seised of the dispute, and the arbitrator became functus officio. Thereafter the arbitration could only be revived by a further reference, so that the fact that the action was discontinued on

F December 17 was irrelevant because the arbitrator had been functus officio since November 25.

This submission was based on the judgments of the majority, and in particular on certain dicta of Fletcher-Moulton L.J., in *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257. The facts in that case were very different to the facts in this appeal. In that case an action was

G commenced on a contract which contained an arbitration clause providing for reference of all disputes between the parties to the defendants' engineer. The defendants did not apply for a stay of the action, but the engineer, without giving notice to the parties and without the knowledge or consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action. The defendants pleaded

H the award in bar to the plaintiffs' claim in the action. It was held that the award was no bar to the plaintiffs' claim. In the course of his judgment, Fletcher-Moulton L.J. made the general observations cited by Eveleigh L.J. but, like him, I do not read those observations as meaning that the arbitration was dead. I understand them to mean that, notwithstanding the existence of the arbitration, the plaintiffs had a right of recourse to the court, subject to its power to order a stay. This view is consistent with the judgment of Farwell L.J. when he said, at p. 273:

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“ [The plaintiffs] can, of course, deprive themselves of such right by their own act after writ, as for example by going on with the arbitration and obtaining an award; but, when nothing has been done by them since writ, and the only matter relied upon is an award made since writ without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement, because there is no act of the plaintiffs subsequent to the writ on which reliance can be placed, and is bad.”

In the instant case, the arbitration was already in existence when the writ was issued. I ask: “ Why, on principle, should the arbitration and the action not proceed side by side? ” To maintain the action is not a contempt of court: see Vaughan Williams L.J.—whose dissent did not cover this point in *Doleman's* case—at p. 262; and the court has ample powers to restrain further proceedings in the arbitration by an injunction, or to refuse a stay of the action if the appropriate applications are made to it. In those circumstances, there can be no question of a race between the arbitration and the court proceedings. The court retains control throughout, if it is asked to do so. In the absence of any such application and in the absence of any intervention by the court, I can see no reason why the arbitration should not continue, and so long as the arbitration continues the parties to the reference are bound to comply with the requirements of the arbitrator: section 12 (1) of the Arbitration Act 1950.

Fletcher-Moulton L.J. referred in *Doleman's* case to the arbitrator becoming “ functus officio ” apparently because the court was seised of the dispute. With great respect to Fletcher-Moulton L.J., he must have been using that expression in a different sense to that in which it is used now. The expression “ functus officio ” in relation to arbitrators is used nowadays to describe the position of an arbitrator once he has made his award. Until then he has the power and the duty to deal with any application which is made to him in the arbitration, notwithstanding the existence of a concurrent action.

The position in this case therefore was, in my judgment, that the arbitration continued notwithstanding the existence of the action; that the arbitrator was not functus officio; and that this situation existed on December 17 when the action was discontinued. Thereafter, the court was no longer seised of the matter. This view of the law was the one adopted by Kerr J. in *Tradax Internacional S.A. v. Cerrahogullari T.A.S. (The M. Eregli)* [1981] 2 Lloyd's Rep. 169.

For those reasons and for the reasons given by Eveleigh L.J., I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Woodroffes; Collyer-Bristow; Oswald Hickson Collier & Co.*

[Reported by ISOBEL COLLINS, Barrister-at-Law]

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A

[COURT OF APPEAL]

ETON COLLEGE v. BARD AND ANOTHER

[1971 C. No. 4602]

B 1983 April 14;
May 17

Oliver and Slade L.JJ.

Landlord and Tenant—Leasehold enfranchisement—“Long tenancy”—Lease granted by housing association for 93½ years or until lease ceasing to be vested in member of association—Covenant against assignment to non-member—Whether tenancy for “term of years certain”—Whether “long tenancy”—Leasehold Reform Act 1967 (c. 88), s. 3 (1)

C

The plaintiff owned the freehold of a house occupied by the second defendant under a sub-underlease granted by a housing association for a specified period, which constituted 93½ years, “or until this lease shall cease (otherwise than by death or bankruptcy) to be vested in a member of the association (whichever shall be the earlier).” The sub-underlease contained a covenant against assignment other than to a member of the housing association. Following the service by the second defendant of a notice of a claim to acquire the freehold of the house under the Leasehold Reform Act 1967, the plaintiff issued a summons to determine, *inter alia*, whether the sub-underlease was a “long tenancy” as defined by section 3 (1) of the Act of 1967.¹ The judge held that the sub-underlease was a “long tenancy” within the meaning of section 3 (1) and made a declaration accordingly.

D

E

On appeal by the plaintiff:—

Held, dismissing the appeal, that “terminable” in the definition of “long tenancy” in section 3 (1) of the Leasehold Reform Act 1967 was a word applicable both to “a liability to be determined” and “a liability to terminate” and that “otherwise included the happening of any event on which the lease was limited to determine before the expiration of the maximum stated duration of the term; and that, accordingly, the sub-underlease was “a tenancy granted for a term of years certain exceeding 21 years” within the meaning of section 3 (1) and, therefore, a “long tenancy” for the purposes of the Act (post, pp. 237E–F, 240c).

F

Decision of Whitford J. affirmed.

The following cases are referred to in the judgments:

G

Lace v. Chantler [1944] K.B. 368; [1944] 1 All E.R. 305, C.A.
Orman Brothers Ltd. v. Greenbaum [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731.

Roberts v. Church Commissioners for England [1972] 1 Q.B. 278; [1971] 3 W.L.R. 566; [1971] 3 All E.R. 703, C.A.

H

No additional cases were cited in argument.

APPEAL from Whitford J.

By a summons dated January 22, 1981, the plaintiff, The Kings College of Our Lady of Eton Beside Windsor otherwise called Eton College,

¹ Leasehold Reform Act 1967, s. 3: “(1) . . . ‘long tenancy’ means . . . a tenancy granted for a term of years certain exceeding 21 years, whether or not the tenancy is (or may become) terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise . . .”

applied, inter alia, for it to be determined whether a lease dated November 17, 1969, and made between the Eton Housing Association Ltd. and James Ralph McCarthy and vested in the second defendant, Peter St. John Hevey Langan, was, on its true construction and in the events which had happened, a long tenancy within the meaning of section 3 (1) of the Leasehold Reform Act 1967. On October 8, 1981, Whitford J., inter alia, made a declaration that the lease was a long tenancy within the meaning of section 3 (1).

By notice of appeal dated November 18, 1981, the plaintiff appealed against that declaration on the grounds that (1) the judge erred in law in holding that the lease was granted for a term of years certain exceeding 21 years; (2) the judge was wrong in law in rejecting the argument that the word "terminable" in section 3 (1) of the Leasehold Reform Act 1967 meant capable of being terminated by the act of one or more of the parties to the lease or their respective successors in title and that accordingly the expression in section 3 (1) "is (or may become) terminable" did not mean and was not equivalent to "will (or may) come to an end"; and (3) the judge was wrong in law in rejecting the argument that in section 3 (1) the words "or otherwise" had to be construed ejusdem generis with re-entry and forfeiture and accordingly did not include the happening of an event upon which the lease was limited to determine.

The facts are stated in the judgment of Slade L.J.

Julian Byng for the plaintiff.

The second defendant in person.

The first defendant took no part in the proceedings.

Cur. adv. vult.

May 17. The following judgments were handed down.

SLADE L.J. This is an appeal by Eton College from part of a judgment of Whitford J. given on October 12, 1981. It raises the question whether a lease dated November 17, 1969, and relating to a property known as 29, Fellows Road, London, N.W.3 ("the property") is a "long tenancy" within the meaning of section 3 (1) of the Leasehold Reform Act 1967. Part I of that Act has the effect of conferring on the tenant of a leasehold house, occupying the house as his residence, a right to acquire the freehold of the premises, where certain conditions are fulfilled. Among other conditions, the tenant for this purpose has to show that his tenancy is a "long tenancy," as defined by section 3 (1), and that it is at a "low rent," as defined by section 4 (1).

The lease in question ("the lease") was granted by Eton Housing Association Ltd. as sub-underlessor to Mr. J. R. McCarthy as sub-underlessee. The freehold of the property is vested in Eton College, which is the plaintiff in the proceedings. According to the evidence there is no connection between the plaintiff and Eton Housing Association Ltd., notwithstanding the name of the association.

Since September 25, 1974, the interest of the lessee under the lease has been vested, either jointly or solely, in Mr. Peter Langan Q.C. He is the second defendant in the proceedings and on this occasion we have had the pleasure of hearing him appearing in person. The first defendant is a Mrs. Bard. She has taken no part in the proceedings in this court or the court below.

A On August 29, 1980, Mr. Langan served notice of a claim to acquire the freehold of the property under the Act of 1967. The plaintiff disputed this claim and on January 22, 1981, issued a summons to have determined two questions, namely (a) whether the lease is "a long tenancy" within the meaning of section 3 (1) of that Act; (b) if the answer to question (a) is in the affirmative, whether the lease is a tenancy "at a low rent" within the meaning of section 4 (1).

B Whitford J. answered question (a) in the affirmative, but question (b) in the negative. The effect of his decision was thus to leave Mr. Langan with no immediate right to acquire the freehold. Nevertheless, Mr. Langan does not seek to challenge the judge's decision on question (b) because certain subsequent events, which need not be related, have now occurred; and he considers that they may or will enable him to assert that, notwithstanding that decision, his tenancy has become one "at a low rent" in the relevant sense. Question (a), on which the plaintiff seeks to challenge the judge's decision, is thus the only issue before this court.

C The summons is supported by an affidavit sworn by Mr. Lockhart, a partner in the firm of the plaintiff's solicitors. There is exhibited to this affidavit a full statement of facts which had been agreed between him and Mr. Langan. I need not refer to many of these facts. The property forms part of an estate known as the Chalcots Estate at Hampstead of which the freehold has been vested in the plaintiff for over 400 years. By a lease dated January 4, 1965 ("the head lease"), the plaintiff demised a part of the estate, which included the land on which the property is situated and is referred to in the statement of facts as "the housing association area," to the Metropolitan Borough of Hampstead for 99 years from September 29, 1964. Following the enactment of the London Government Act 1963, the head lease became vested in the London Borough of Camden, which, by an underlease of December 20, 1967, demised the housing association area to the association for 97½ years less 10 days from June 24, 1966.

E On November 17, 1969, the association granted to Mr. McCarthy the lease of the property which is in issue in the present case. The habendum clause to the lease (clause 1) began with the following words:

F "In consideration of the rents and the members covenants hereinafter reserved and contained the association demises unto the member the premises (including the rights demised therewith) described in the first schedule hereto (hereinafter called 'the unit') with the exceptions and reservations specified in the second schedule hereto to hold the premises from November 17, 1969, until June 24, 2063, or until this lease shall cease (otherwise than by death or bankruptcy) to be vested in a member of the association (whichever shall be the earlier) and subject to the provisions for determination hereinafter contained yielding and paying therefor during the said term . . ."

G Clause 1 of the lease then set out a number of provisions in regard to the payment of rent and additional rent. I need not refer to them or to any other provisions of the lease save, perhaps, to the covenants in clause 2 (9) and (10) which permit the lessee to assign the lease of the whole property to a member of the association, but otherwise preclude him from assigning, sub-letting or parting with possession of all or any part of the property. The effect of the provisions of the lease to which I have referred is to oblige a person to become a member of the association before he can become qualified to take an assignment of the lease. Mr. Langan became

a member of the association shortly before September 25, 1974, and has remained a member ever since. A

Mr. Lockhart's affidavit exhibited a copy of the rules of the association. They have, I understand, since been amended, but it is common ground that the amendments are not material to the legal issue now before the court; the rules in force at the date of the lease are the relevant ones. I do not find it necessary to make more than a passing reference to the contents of the rules. It suffices to say that rule 12 provided for the cessation of a member's membership of the association in a number of contingencies and rule 15 gave the other members certain express rights to expel a member for conduct "detrimental to the interests of the association." B

Having first become a member of the association and then taken an assignment of the lease, Mr. Langan served the notice of August 29, 1980, which gave rise to the present proceedings. I now turn to consider the legal position. Section 3 (1) of the Act of 1967, so far as material for present purposes, states: C

"In this Part of this Act 'long tenancy' means, subject to the provisions of this section, a tenancy granted for a term of years certain exceeding 21 years, whether or not the tenancy is (or may become) terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise, and includes a tenancy for a term fixed by law under a grant with a covenant or obligation for perpetual renewal unless it is a tenancy by sub-demise from one which is not a long tenancy . . ." D

There then follow certain provisos to the subsection to which I need not refer, since it has not been suggested that they assist the determination of the question now before the court. The judge dealt with this question succinctly in the following passage of his judgment: E

"Certainly this is, on the face of it, a tenancy granted for a term of years exceeding 21 years. But is it for a term of years certain exceeding 21 years? It is a lease which will cease if it becomes vested in somebody who is not a member of the association. Mr. Langan is of course a member of the association. However improbable it may seem, it would appear that, according to the rules of the association, he might be expelled from the association. Although the requirement so far as he is concerned if he were to desire to part with his interest is that he should only part with it to a member of the association, he might, I suppose, purport not so to do. But the words which I have read indicate that what one has to consider when one is considering whether one is dealing with a long tenancy is whether it is granted for a term of years certain exceeding 21 years whether or not the tenancy is or may become terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise. This is, as I understand the terms of the lease, a lease for a term of years certain exceeding 21 years which may become terminable in certain circumstances, which I have already indicated. I think for myself that, so far as question 2 (a) is concerned, which is whether or not the relevant lease is upon its true construction a long tenancy within the meaning of section 3 (1), that question must be answered in the affirmative." F G H

The first ground upon which Mr. Byng, for the plaintiff, attacks this part of the judgment is that the term under the lease held by Mr. Langan

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A is not a "term of years certain" within the meaning of section 3 (1) of the Act of 1967. In these circumstances, in his submission, it is unnecessary to consider whether the lease was one for a term "exceeding 21 years" or whether the tenancy was or might become "terminable" in the manner mentioned in the subsection.

B For the purpose of this submission the crucial word is "certain." The Act of 1967 contains no definition of this word, but Mr. Byng submits that useful guidance to its construction is to be found in section 205 (1) (xxvii) of the Law of Property Act 1925, which, for the purposes of that Act, defines "term of years absolute" as meaning:

C "a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within 21 years after the creation thereof where required by this Act to take effect within that period; and in this definition the expression 'term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year."

E The wording of this particular definition thus indicates a clear dichotomy between a term of years which is "certain" and one which is "liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event . . ." A term of years which falls into the latter category was clearly not regarded as "certain" by the draftsman of the Act of 1925.

F Mr. Byng submits by analogy that the habendum to the lease by its very words defines a term of years of uncertain rather than certain duration, because it expressly provides for the term to cease before June 24, 2063, if the lease (otherwise than by death or bankruptcy) ceases to be vested in a member of the association. He points out that having regard to rules 12 and 15 of the association's rules, as they subsisted at the grant of the lease, there were a number of contingencies in which the lessee could thereafter cease to be a member of the association. In these circumstances, he submits that Mr. Langan cannot say that he has a "tenancy granted for a term of years certain exceeding 21 years," that Mr. Langan thus fails at this first hurdle, and that it is unnecessary to consider the remaining words of the subsection.

H This submission, though attractive in its simplicity, is not in my judgment well founded. No doubt, if the phrase "for a term of years certain exceeding 21 years" stood alone in the subsection, there would be much to be said for the view that a tenancy could not qualify unless the term must of necessity last for more than 21 years. In my opinion, however, one cannot properly attempt to construe and apply this phrase in isolation from the second limb of the definition (beginning with the words "whether or not . . .") which immediately follows and qualifies it. In my opinion, it is obvious that the purpose which the legislature intended to achieve by the addition of the second limb was to make it clear that a term which would *otherwise* qualify as a "term of years certain exceeding 21 years"

shall not fail to qualify *merely* because the tenancy is or may become terminable before the end of that term in the manner mentioned. Thus, in my opinion, the legislature in section 3 (1) was attributing to the phrase "term of years certain" a sense quite different from the sense in which it was used in section 205 (1) (xxvii) of the Law of Property Act 1925. A

In the present case, Mr. Langan points out that, but for the provision in the habendum to the lease which brings the term to an end if it ceases to be vested in a member of the association (otherwise than by death or bankruptcy), the term would indisputably be a term of years certain exceeding 21 years enduring until June 24, 2063. He submits that the only effect of the last-mentioned provision is to render the tenancy "terminable before the end of that term . . . otherwise," within the meaning of the subsection. In these circumstances he submits that, having regard to the second limb of the subsection, this provision does not cause his term to fail to qualify as a "term of years certain exceeding 21 years." B C

In my judgment this submission is well founded. Mr. Byng sought to counter it, first, by submitting that the word "terminable" in section 3 (1) of the Act of 1967 means no more than "capable of being terminated by the act of one or more of the parties to the lease or their successors in title." In this context he invoked one of the alternative definitions of the word "terminable" to be found in the *Shorter Oxford English Dictionary*: "Capable of being or liable to be terminated . . ." D

He cited *Orman Brothers Ltd. v. Greenbaum* [1954] 1 W.L.R. 1520 in which Devlin J. had to construe the word "terminated" in section 24 (1) of the Landlord and Tenant Act 1954 (which provides that a tenancy to which Part II of that Act applies "shall not come to an end unless terminated in accordance with the provisions of this Part of this Act") and construed it, at p. 1522, as referring to the instrument or act which was the terminating factor and not to the effluxion of time. That was, however, a decision on the particular wording of a subsection which, as Devlin J. pointed out, at p. 1522, appeared to draw a distinction between a tenancy "coming to an end" and a tenancy being "terminated." I therefore find the decision of little assistance in the present case. Nor do I derive much assistance from the dictionary definition of the word "terminable." The same dictionary shows that the word "terminate" is capable of bearing a transitive or intransitive meaning, according to the context. The word "terminable" in my opinion can likewise bear a transitive or intransitive meaning (or both meanings at once) according to the context. It is interesting to note that the word "determination" clearly bears both a transitive and an intransitive sense in section 205 (1) (xxvii) of the Law of Property Act 1925. E F G

For these reasons, I cannot accept that the word "terminable" in section 3 (1), when read in isolation, *prima facie* bears the exclusively transitive sense attributed to it by Mr. Byng. To discover its proper meaning in its context, one has in my opinion to study the immediately succeeding words of the subsection. Mr. Byng proceeded to submit that, in these succeeding words, the phrase "or otherwise" must be construed *eiusdem generis* with re-entry and forfeiture and is not apt to include the mere happening of an event (as opposed to the act of an interested party) upon which the lease is limited to determine. He submitted that the common characteristic possessed by re-entry and forfeiture, which constitutes them a "genus," is that each involves an act by one or more of the parties to the relevant lease or their respective successors in title, which has the effect of ending the lease. H

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A I was initially attracted by this submission but am not in the end convinced by it. If re-entry and forfeiture can properly be said to constitute a "genus" at all, then that genus can, in my opinion, only comprise acts of *the landlord* which bring the lease to an end; acts of the tenant which have this effect are of an essentially different category. It is, however, difficult to think of acts of the landlord which could bring the lease to an end without involving a re-entry or forfeiture. In these circumstances,

B it seems to me that the words "or otherwise" must have been intended to refer to acts or events *other than* acts by the landlord, which would have the effect of bringing the lease to an end before the expiration of the maximum stated duration of the term. Accordingly the words "or otherwise" are in my opinion apt to include, and do include, the happening of any event upon which the lease is limited to determine before such

C expiration.

This conclusion is I think fortified when one considers the probable intentions of the legislature. Let it be supposed that the habendum to the lease in the present case had been drafted so as to express the term as one enduring until June 24, 2063 (simpliciter), but the lease had then contained a covenant by the lessee to the effect that the benefit of the lease should at all times remain vested in a member of the association, and had given the

D lessors an express right of re-entry if this covenant were broken. On these hypothetical facts, the rights of the lessee against the lessors (statute apart) would for practical purposes have been the same as they are now; yet I would have thought it clear almost beyond argument that the tenancy would have constituted a "long tenancy" within the relevant statutory definition. It hardly seems likely to have been the intention of the legisla-

E ture that the substantive rights of the tenant should be drastically affected by drafting points of this nature.

Anomalies of this kind are avoided if one attributes to the word "terminable" in the context of section 3 (1) both a transitive and intransitive sense, which I think it is well capable of bearing, and to the word "otherwise" a sense wide enough to include the happening of an event upon which the lease is limited to determine before the expiration of the

F maximum stated duration of its term, which again I think the word is well capable of bearing.

If, as I think, this is the correct meaning to attribute to the succeeding words which qualify the phrase "term of years certain exceeding 21 years," it may fairly be asked: what is the force of the word "certain" in that phrase? On this footing, is not the word "certain" otiose? I accept that

G this construction of the succeeding words does involve attributing to the phrase something other than its natural meaning, which is I conceive a fixed term that must of necessity last longer than 21 years. Nevertheless I think that the draftsman of the subsection has made plain his intention that the phrase should bear a somewhat artificial sense, extended beyond its natural meaning, just as the draftsman of section 205 (1) (xxvii) of the Act of 1925 made clear his intention that the phrase "term of years

H absolute" might include a tenancy which was neither a "term of years" or "absolute," according to the ordinary meaning of words, (for example, a monthly tenancy liable to forfeiture on non-payment of rent). In my judgment, the word "certain" need not be regarded as otiose, even if the definition of a "long tenancy" in section 3 (1) of the Act of 1967 is capable of including a lease such as that in the present case. For the word serves to make it plain that a tenancy will not fall within this definition unless a *fixed maximum duration of the term* has been specified. It thus

makes it clear that a tenancy from year to year is not included within the definition, even though it is well capable of lasting for more than 21 years and is a "term of years absolute," within the definition of that phrase already cited. Furthermore, the word "certain" makes it clear that, in calculating the length of the term for which a tenancy has been granted, for the purposes of section 3 (1) an option to take a tenancy for a further term is to be disregarded; subsection (4) contains special provisions covering tenancies granted with a covenant or obligation for renewal. The word "certain" thus does still serve a purpose. A B

Mr. Byng referred to *Roberts v. Church Commissioners for England* [1972] 1 Q.B. 278 where Russell L.J. suggested a test for determining whether a tenant can bring himself within the statutory definition, at p. 284:

"to fulfil the definition a tenant must at some point of time be, or have been, in a position to say that, subject to options to determine, rights of re-entry and so forth, he is entitled to remain tenant for the next 21 years . . ." C

Mr. Langan is, in my opinion, in a position to say that, subject to a premature termination of the term occurring through his ceasing to be a member of the association or purporting to assign it to a person who is not a member or through other events entitling the lessors to forfeit the lease, he is entitled to remain tenant for more than the next 21 years. This, in my judgment, suffices to bring his tenancy within section 3 (1). D

For these reasons I think that the judge reached the correct conclusion on question 2 (a) raised by the summons and I would dismiss this appeal. E

OLIVER L.J. This appeal raises a short but interesting point on the construction of section 3 (1) of the Leasehold Reform Act 1967, an Act which is described in its long title as one "to enable tenants of houses held on long leases at low rents to acquire the freehold or an extended lease." Section 1 (1) confers the right to acquire the freehold or an extended lease upon a tenant of a leasehold house which he occupies as his residence where, inter alia, "his tenancy is a long tenancy at a low rent." "Long tenancy" is defined by section 3 (1) as: F

"a tenancy granted for a term of years certain exceeding 21 years, whether or not the tenancy is (or may become) terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise . . ." G

The three critical words of this definition in the context of the instant case are "certain," "terminable" and "otherwise."

I need not repeat the facts which have already been set out in the judgment of Slade L.J. As he there mentions, the habendum of the relevant lease is, so far as material:

" . . . to hold the premises from November 17, 1969, until June 24, 2063, or until this lease shall cease (otherwise than by death or bankruptcy) to be vested in a member or the association (whichever shall be the earlier) . . ." H

There is a covenant in the lease prohibiting assignment to anyone other than a member of the association and the document includes the usual proviso for re-entry on breach of covenant. The only other relevant document for present purpose consists of the rules of the association in

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- A force at the date of the grant of the lease. Rule 10 requires a member on being notified by the committee of the association within one month to enter into an agreement in respect of a house and rule 11 enables a member before being required to enter into such agreement to withdraw from the association on giving three months' notice. The circumstances in which a member may cease to be a member are dealt with in rule 12 and are (i) failing to enter into an agreement when required under rule 10; (ii) failing to subscribe and pay for loan stock in accordance with rule 18; (iii) withdrawal under rule 11; (iv) expulsion under rule 15; (v) determination of the agreement entered into under rule 10; (vi) death; and (vii) cessation of membership of a joint member. The provisions of rule 18 require loan stock to be taken up before entering into an agreement and the non-assignment clause in the lease provides for assignment of any loan stock vested in the assigning member to the assignee member. Rule 15 is concerned with expulsion, which is effected by resolution in general meeting and effectively is limited to expulsion for conduct detrimental to the interests of the association.

- D Relating these rules to the habendum, effectively the only circumstances in which the term can come to an end prematurely are expulsion and, possibly, purported assignment to a non-member. Death and bankruptcy are expressly excluded as relevant and cessation of membership by determination of agreement involves the lease having been brought to an end in any event, it being an agreement within the meaning of the rules. The other grounds for cessation of membership in rule 12 are grounds which, relating as they do to events leading up to the grant of a lease, must have ceased to be applicable once the lease has been granted.

- E Mr. Byng's primary submission on behalf of the plaintiff is that a term of X years or so long as the lease remains vested in a member of the association whichever is the shorter is not a term of years "certain" within the meaning of section 3 (1) of the Act. He points out that in section 205 (1) (xxvii) of the Law of Property Act 1925, which defines a term of years absolute, a distinction is drawn between a term of years "certain" and a term of years "liable to determination by notice," etc.
- F But, as Mr. Langan points out, that subsection is concerned with the definition of what is a term of years absolute (i.e., a legal estate under the Act). Mr. Byng has drawn our attention to the following passage from the judgment of Russell L.J. in *Roberts v. Church Commissioners for England* [1972] 1 Q.B. 278, 284:

- G "In the course of the argument I ventured to suggest a test, which is that to fulfil the definition a tenant must at some point of time be, or have been, in a position to say that, subject to options to determine, rights of re-entry and so forth, he is entitled to remain tenant for the next 21 years, whether at law or in equity."

- H Speaking for myself, however, I do not derive much guidance from this in the very different context of the instant case, for it begs the question that has to be decided here in the qualification "subject to options to determine, rights of re-entry and so forth." In effect, as it seems to me, the lease creates a term of years determinable on failure of a condition, namely, that it shall remain vested in a member of the association, and Mr. Byng's construction would, as it seems to me, lead to the conclusion not merely that there was no term certain but that the lease did not even create a legal estate: see *Lace v. Chantler* [1944] K.B. 368.

Mr. Byng's argument, if valid at all, must in any event rest on the

proposition that a term of years determinable before the expiration of the time for which it is limited is "certain" within the meaning of the subsection only if its termination can be brought about in certain limited ways, which he broadly defines as "acts of the parties." Thus, the argument runs, "terminable" is used in the sense not of "liable to come to an end" but in the sense of "liable to be terminated" and the section goes on to exemplify ways in which this may occur—notice, re-entry or forfeiture. A

Now it is true that these methods of termination are all acts which are in the control of one or other party to the lease and from this Mr. Byng seeks to deduce two consequences, which are in fact interrelated. The first is the construction mentioned above which he attributes to the word "terminable" and the second, which really follows from the first, is that the word "otherwise" falls to be construed ejusdem generis with what has gone before—the genus being, as he contends, an act of one or other party to the lease and not an event limited by the lease itself as one upon which the term will determine. I find myself unimpressed by either of these points. "Terminable," as it seems to me, is a word which is equally applicable to a liability to be determined as to a liability to terminate or come to an end. Nor do I find it easy to ascribe any identifiable genus to notice, re-entry or forfeiture. If, indeed, one has to look for an act of a party to the lease, one in fact finds it, as Mr. Langan has pointed out. An assignment to a non-member can only be at the instance of the tenant himself, and expulsion can be effected only by the association. Mr. Byng meets the latter point by suggesting the possibility of the association assigning the leasehold reversion and thus ceasing to be the landlord. I am unimpressed by this. "The association" is defined by the lease as including the successors in title not to "the landlord" but to the association and the clear contemplation, as it seems to me, is that the reversion is to remain vested in some body that is a housing association and that the sub-underlease will remain vested in that body. B C D E

Despite Mr. Byng's clear and able argument, I remain unconvinced that the judge came to the wrong conclusion. For the reasons given above and for those stated in the judgment of Slade L.J., I agree that the appeal should be dismissed. F

*Appeal dismissed.
Leave to appeal refused.*

Solicitors: *Peake & Co.*

C. N.

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A

[HOUSE OF LORDS]

AMIN RASHEED SHIPPING CORPORATION . . . APPELLANTS

AND

KUWAIT INSURANCE CO. RESPONDENTS

B

1983 May 16, 17, 19;
July 7Lord Diplock, Lord Wilberforce, Lord Roskill,
Lord Brandon of Oakbrook and Lord Brightman

Conflict of Laws—Contract—Proper law—Lloyd's standard form of marine policy—Policy not specifying governing law—Policy issued and claims payable in Kuwait—Whether English law proper law of contract—Whether jurisdiction to grant leave to serve notice of writ out of jurisdiction—Relative juridical advantages of trial in Kuwait or London—Judge's exercise of discretion—R.S.C., Ord. 11, rr. 1 (1) (f) (iii), 4 (2)

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The plaintiffs, a Liberian corporation, whose business was carried on from Dubai, owned a small cargo vessel which they insured against war and marine risks under a policy issued by the defendants, a Kuwaiti insurance company. The form of the policy was based upon the Lloyd's standard form of marine policy with modifications but gave Kuwait as the place of issue and provided for claims to be payable there. There was no provision in the policy as to the law which was to govern the contract. The vessel was detained by Saudi Arabian authorities and the master and crew were imprisoned for some months apparently in connection with a claim, denied by the plaintiffs, that the vessel had been engaged in an attempt to smuggle oil. The plaintiffs claimed for the total constructive loss of the vessel under the Institute War and Strike Clauses which formed part of the policy. Bingham J. set aside leave which had been granted to the plaintiffs under R.S.C., Ord. 11, r. 1 (1) (f) (iii)¹ on their ex parte application to issue a writ and serve notice of it on the defendants in Kuwait. The judge held that Kuwaiti law was the proper law of the contract and, accordingly, there was no jurisdiction to serve notice of the writ out of the jurisdiction; and further that if, contrary to his view, the plaintiffs' claim fell within R.S.C., Ord. 11, he would exercise his discretion against upholding service. The plaintiffs appealed. The Court of Appeal (by a majority) dismissed the appeal.

On appeal by the plaintiffs:—

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Held, dismissing the appeal, (1) that the proper law of the contract was English law since (*per* Lord Diplock, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman) the provisions of the policy taken as a whole by necessary implication led to the inevitable conclusion that it was the parties' intention that their mutual rights and obligations under it should be determined in accordance with the English law of marine insurance (*post*, pp. 247B–C, 249C–D, 250A–C, 256H–257c), (*per* Lord Wilberforce) objectively determined the contract had its closest and most real connection with English law (*post*, pp. 253D–F, 255F, G–256B).

(2) That the court's discretion under R.S.C., Ord. 11, r. 1, should be exercised in the same way as that stated by the judge at first instance, namely, in favour of the defendants, for the plaintiffs had not discharged the onus laid upon them under Ord. 11, r. 4 (2), that the case was a proper one for

¹ R.S.C., Ord. 11, r. 1 (1) (f) (iii): see *post*, p. 244D.
R. 4 (2): see *post*, p. 244E.

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service out of the jurisdiction (post, pp. 252E-F, H—253A, 256B-C, F-G, H—257C). **A**

Per Lord Diplock, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman. (i) By the “proper law” of a contract is meant the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigation before them (post, p. 246G-H). **B**

Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft [1937] A.C. 500, H.L.(E.) and *Bonython v. Commonwealth of Australia* [1951] A.C. 201, P.C. considered.

(ii) It would be wholly wrong for the English courts to embark upon the task of making a comparison of the relative efficiency of the civil law and common law procedures for the determination of disputed facts (post, pp. 252A-B, 256H—257C). **C**

Per Lord Wilberforce. In considering the question of discretion the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. The English courts should not embark upon a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another (post, p. 256E). **D**

Decision of the Court of Appeal [1983] 1 W.L.R. 228; [1983] 1 All E.R. 873 affirmed.

The following cases are referred to in their Lordships' opinions:

Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, C.A. **E**

Bonython v. Commonwealth of Australia [1951] A.C. 201, P.C.

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572; [1970] 3 W.L.R. 389; [1970] 3 All E.R. 71, H.L.(E.).

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.).

Helbert Wagg & Co. Ltd., In re Claim by [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129. **F**

Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft [1937] A.C. 500; [1937] 2 All E.R. 164, H.L.(E.).

Torni, The [1932] P. 78, C.A.

Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277; [1939] 1 All E.R. 513, P.C.

Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1969] 1 W.L.R. 377; [1969] 2 All E.R. 210, C.A.; [1970] A.C. 583; [1970] 2 W.L.R. 728; [1970] 1 All E.R. 796, H.L.(E.). **G**

The following additional cases were cited in argument:

Aktieselskab August Freuchen v. Steen Hansen (1919) 1 Ll.L.Rep. 393.

Armadora Occidental S.A. v. Horace Mann Insurance Co. [1977] 1 W.L.R. 520; [1977] 1 All E.R. 347. **H**

Attorney-General of New Zealand v. Ortiz [1983] 2 W.L.R. 809; [1983] 2 All E.R. 93, H.L.(E.).

B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788; [1976] 3 All E.R. 879.

Coast Lines Ltd. v. Hudig & Veder Chartering N.V. [1972] 2 Q.B. 34; [1972] 2 W.L.R. 280; [1972] 1 All E.R. 451, H.L.(E.).

Evans v. Bartlam [1937] A.C. 473; [1937] 2 All E.R. 646, H.L.(E.).

3 W.L.R. Amin Rasheed Corpn. v. Kuwait Insurance (H.L.(E.))

- A** *Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 39; [1973] 1 All E.R. 992, Kerr J. and C.A.
Greer v. Poole (1880) 5 Q.B.D. 272.
Industrie, The [1894] P. 58, C.A.
MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.).
Rossano v. Manufacturers' Life Assurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214.
- B** *Trendtex Trading Corporation v. Credit Suisse* [1980] Q.B. 629; [1980] 3 W.L.R. 367; [1980] 3 All E.R. 721, C.A.
United City Merchants (Investments) Ltd. v. Royal Bank of Canada [1983] 1 A.C. 168; [1982] 2 W.L.R. 1039; [1982] 2 All E.R. 720, H.L.(E.).

C APPEAL from the Court of Appeal.

This was an appeal by the appellants, Amin Rasheed Shipping Corporation, from the judgment dated December 15, 1982, of the Court of Appeal (May and Robert Goff L.J.J., Sir John Donaldson M.R. dissenting) affirming the judgment dated March 4, 1982, of Bingham J. which ordered that the order dated May 22, 1981, of Robert Goff J., granting leave to the appellants to issue a writ for service out of the jurisdiction and to serve notice of the writ upon the respondents, the Kuwait Insurance Co., in Kuwait, the writ of summons issued pursuant thereto, the service of the notice thereof and all subsequent proceedings be set aside.

- D** By their writ the appellants, a Liberian shipping company trading in Dubai, claimed for the constructive total loss of their vessel *Al Wahab* under a contract of marine insurance dated April 29, 1979, and issued in Kuwait by the respondents, an insurance company incorporated in and carrying on business in Kuwait. The claim arose as a result of the detention of the *Al Wahab* by the Saudi Arabian authority on February 28, 1980, at the port of Rasal Khafji.
- E** The facts are stated in the opinion of Lord Diplock.

- F** *Colin Ross-Munro Q.C.* and *Barbara Dohmann* for the appellants.
Adrian Hamilton Q.C. and *Roger John Thomas* for the respondents.

Their Lordships took time for consideration.

- G** LORD DIPLOCK. My Lords, the plaintiff/appellant ("the assured") is a shipping company incorporated in Liberia, but having its head office and carrying on its business in Dubai. It is the owner of a cargo vessel of the landing craft type, the *Al Wahab* ("the vessel") which, at the relevant time, traded in Arabian Gulf waters only. In these proceedings, the assured seeks to litigate in the English commercial court its claim against the defendants/respondents ("the insurers") for a constructive total loss of the vessel which was insured under a hull and machinery policy of insurance against marine and war risks ("the policy") that had been issued in Kuwait by the insurers who have their head office there and branch offices elsewhere in the Gulf, including Dubai, but have no office or representative in England.
- H** The policy was on the insurers' standard printed form of hull policy. It was in the English language only. The wording followed meticulously (with minor and in my view immaterial omissions of express references to London) that of the Lloyd's S.G. policy scheduled to the Marine Insurance

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Act 1906, but adapted by typewritten insertions for use as a time, instead of a voyage, policy, and excluding references to "goods and merchandise." It incorporated in the body of the policy the usual F.C. & S. clause from what at that time was the Standard English Marine Policy; but, by a typewritten insertion, was expressed to be "Subject to Institute War and Strikes Clauses Hulls dated 1.10.70 as attached"; and a print of those clauses without any additions or amendments was attached to the policy. The policy was expressed to be issued in Kuwait on April 28, 1979, and claims (if any) expressed to be payable in Kuwait.

In order to achieve its object of pursuing its claim against the insurers in the English court, rather than a Kuwaiti court, the assured had two obstacles to overcome:

First, it had to bring the case within R.S.C., Ord. 11, r. 1 (1), in order to obtain leave to serve a writ on the insurers out of the jurisdiction. Although the assured had originally asserted that the contract of insurance had been made on its behalf by an agent trading in England, this failed on the facts; and in this House the only provision of rule 1 (1) that was relied upon by the assured was that contained in subparagraph (f) (iii) of which the relevant wording is:

"if the action begun by the writ is brought against a defendant not domiciled or ordinarily resident in Scotland to enforce . . . a contract . . . being . . . a contract which . . . (iii) is by its terms, or by implication, governed by English law; . . ."

I will call this first obstacle the jurisdiction point.

The second obstacle is that the assured must satisfy the requirements of rule 4 (2) which provides:

"No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

I will call this second obstacle the discretion point.

Leave to issue and serve the writ on the insurers in Kuwait was initially granted ex parte by Robert Goff J. A summons by the insurers to set aside this ex parte order came before Bingham J. on March 4, 1982. He held against the assured on the jurisdiction point, but in case on appeal he should be held to be wrong on that, he also gave full consideration to the discretion point and held against the assured on that point too. He accordingly ordered the issue and service of the writ to be set aside.

On appeal to the Court of Appeal (Sir John Donaldson M.R., May and Robert Goff L.JJ.), the Master of the Rolls held in favour of the assured on both the jurisdiction point and the discretion point. May L.J. found in favour of the assured on the jurisdiction point, but against it on the discretion point. Robert Goff L.J. found against the assured on the jurisdiction point but (regrettably as I think) refrained from expressing any opinion on the discretion point, despite the fact that his two brethren were divided on it. So we are left without any majority ratio decidendi in the Court of Appeal.

In the result, although the assured failed all along the line, in the course of doing so, it gave rise to considerable diversity of judicial reasoning. Sir John Donaldson M.R. and May L.J. held that there was jurisdiction to grant leave to serve the writ out of jurisdiction; while Robert Goff L.J. and Bingham J. held that there was no such jurisdiction.

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- A** May L.J. and Bingham J. were of opinion that, given jurisdiction (which May L.J. thought there was), the discretion should be exercised against leave being granted; the Master of the Rolls took the opposite view that the discretion should be exercised in favour of granting leave, and Robert Goff L.J. expressed no opinion on the point.

- B** The jurisdiction point on which judicial opinion in the courts below was evenly divided is one which is of considerable importance in transnational commercial contracts, and the approach in modern times to the exercise of the discretion in cases falling within R.S.C., Ord. 11, r. 1 (1) (f), is also deserving of re-examination. So, in spite of the unanimity of the result in both courts below, leave to appeal from the decision of the Court of Appeal was given by that court.

C *The jurisdiction point*

- My Lords, the jurisdiction point is one that falls to be determined by English law and by English law alone. The relevant rules to be applied to its determination are the English rules of conflict of laws, not the conflict rules of any other country—which may or may not be the same as those of England. In particular, so far as the jurisdiction point itself is concerned,
- D** it is immaterial whether the courts of the only obvious rival forum, a Kuwaiti court, would take the same view as an English court as to what was the proper law of the policy. The relevance of this only arises if and when one reaches the discretion point.

- The applicable English conflict rules are those for determining what is the “proper law” of a contract, i.e., the law that governs the interpretation and the validity of the contract and the mode of performance and the consequences of breaches of the contract: *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.* [1971] A.C. 572, 603. To identify a particular system of law as being that in accordance with which the parties to it intended a contract to be interpreted, identifies that system of law as the “proper law” of the contract. The reason for this is plain; the purpose of entering into a contract being to create legal rights and obligations between the parties to it, interpretation of the contract involves determining what are the legal rights and obligations to which the words used in it give rise. This is not possible except by reference to the system of law by which the legal consequences that follow from the use of those words is to be ascertained. In *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277, 298, Lord Wright said in a passage cited by Upjohn J. in *In re Claim by Helbert Wagg & Co. Ltd.* [1956] Ch. 323, 341:
- E**
- F**
- G**

- “There were certain differences between [*The Torni* [1932] P. 78] and the present. One was that the bills of lading had a clause providing that they were ‘to be construed in accordance with English law’ not as in the present case ‘shall be governed by English law’. In their Lordships’ judgment that distinction is merely verbal and is too narrow to make a substantial difference. The construction of a contract by English law involves the application to its terms of the relevant English statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense the construing of the contract has the effect that the contract is to be governed by English law.”
- H**

My Lords, R.S.C., Ord. 11, r. 1 (1) (f) (iii), states as the test that is relevant to the jurisdiction point in the instant case that the policy “is by its terms, or by implication, governed by English law.” English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained. As Lord Atkin put it in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500, 529:

“The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.”

Lord Atkin goes on to refer to particular facts or conditions that led to a *prima facie* inference as to the intention of the parties to apply a particular system of law. He gives as examples the *lex loci contractus* or *lex loci solutionis*, and concludes:

“But all these rules but serve to give *prima facie* indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such.”

There is no conflict between this and Lord Simonds’s pithy definition of the “proper law” of the contract to be found in *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219 which is so often quoted, i.e., “the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.” It may be worth while pointing out that the “or” in this quotation is disjunctive, as is apparent from the fact that Lord Simonds goes on immediately to speak of “the consideration of the *latter question*.” If it is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail and the *latter question* as to the system of law with which, in the view of the court, the transaction to which the contract relates would, but for such intention of the parties have had the closest and most real connection, does not arise.

One final comment upon what under English conflict rules is meant by the “proper law” of a contract may be appropriate. It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any *renvoi*, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them. For example, if a contract made in England were expressed to be governed by French law, the English court would apply French substantive law to it notwithstanding that a French court applying its own conflict rules might accept a *renvoi* to English law as the *lex loci contractus* if the matter were litigated before it. Conversely, assuming that under English

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A conflict rules English law is the proper law of the contract the fact that the courts of a country which under English conflict rules would be regarded as having jurisdiction over a dispute arising under the contract (in casu Kuwait) would under its own conflict rules have recourse to English law as determinative of the rights and obligations of the parties, would not make the proper law of the contract any the less English law because it was the law that a Kuwaiti court also would apply.

B I can state briefly what Lord Atkin refers to as the relevant surrounding circumstances, at the time the policy was issued before I come to deal with its actual terms; since although the policy contains no express provision choosing English law as the proper law of the contract, nevertheless its provisions taken as a whole, in my opinion, by necessary implication point ineluctably to the conclusion that the intention of the parties was that their mutual rights and obligations under it should be determined in accordance with the English law of marine insurance.

C The policy was the second renewal of similar policies on the vessel of which the first was issued on April 29, 1977. The assured by 1977 carried out the insurance of its ships through the London office of an English company that was a member of the Rasheed Group. As brokers for this purpose it used J. H. Minet & Co. Ltd. ("Minets") who also acted as re-insurance brokers for the insurers. Premiums were paid to Minets in London, policies were issued by the insurers in Kuwait and sent on by them to Minets who passed them on in London to the English company. Claims, though expressed by the policies to be payable in Kuwait were in practice settled in running accounts in sterling in London between Minets and the insurers and between Minets and the assured.

E I mention, in passing, that in these days of modern methods of communication where international contracts are so frequently negotiated by telex, whether what turns out to be the final offer is accepted in the country where one telex is situated or in the country where the other telex is installed is often a mere matter of chance. In the result the lex loci contractus has lost much of the significance in determining what is the proper law of contract that it had close on 50 years ago when Lord Atkin referred to it in the passage that I have cited. As respects lex loci solutionis the closeness of the connection of the contract with this varies with the nature of the contract. A contract of insurance is performed by the payment of money, the premiums by the assured, claims by the insurers, and, in the case of marine insurance, very often in what is used as an international rather than a national currency. In the instant case, the course of business between the insurers and the assured established before the policy now sought to be sued upon was entered into, ignoring, as it did, the provision in the previous policies that claims were payable in Kuwait, shows how little weight the parties themselves attached to the lex loci solutionis.

H The crucial surrounding circumstance, however, is that it was common ground between the expert witnesses on Kuwaiti law that at the time the policy was entered into there was no indigenous law of marine insurance in Kuwait. Kuwait is a country in which the practice since 1961, when it began to develop as a thriving financial and commercial centre, has been to follow the example of the civil law countries and to embody the law dealing with commercial matters, at any rate, in written codes. In Kuwait there had been in existence since 1961 a Commercial Code dealing

generally with commercial contracts but not specifically with contracts of marine insurance. The contract of marine insurance is highly idiosyncratic; it involves juristic concepts that are peculiar to itself such as sue and labour, subrogation, abandonment and constructive total loss; to give but a few examples. The general law of contract is able to throw but little light upon the rights and obligations under a policy of marine insurance in the multifarious contingencies that may occur while the contract is in force. The lacuna in the Kuwaiti commercial law has since been filled in 1980 by the promulgation for the first time of a code of marine insurance law. This code does not simply adopt the English law of marine insurance; there are significant differences. However, it did not come into operation until August 15, 1980, and it is without retrospective effect. It does not therefore apply to the policy which was entered into at a time before there was any indigenous law of marine insurance in Kuwait.

I add here, in parenthesis, that this does not mean that before the Marine Insurance Code was promulgated Kuwaiti courts were disabled from trying cases involving contracts of marine insurance, any more than the Commercial Court in England is disabled from trying a case involving a contract whose proper law is French law. A number of claims under marine insurance policies were in fact tried in Kuwaiti courts before the Kuwaiti code of marine insurance came into effect. The courts were able to undertake this task because the legal system of Kuwait includes a Code of Conflict of Laws. This incorporates article 59 which deals with determining the proper law of a contract. The article provides that in the case of a trans-national contract it

“shall, from the standpoint of the substantive conditions governing it and the effects ensuing from its conclusion, be subject to the law of the state . . . where the contract is concluded . . . unless the contracting parties agree to the application of another law or *circumstances suggest that another law is the one contemplated for application.*”

This article expressly recognises the duty of the Kuwaiti courts to give effect to the substantive law of some state other than Kuwait even where the contract is concluded in Kuwait if circumstances suggest that the law of that other state was the one contemplated for application; and, as will be seen when I come to the discretion point, a relevant circumstance in the case of contracts of marine insurance entered into in Kuwait before the promulgation of the Kuwaiti Marine Insurance Code was the non-existence in Kuwait of any indigenous marine insurance law.

Turning now to the terms of the policy itself, the adoption of the obsolete language of the Lloyd's S.G. policy as scheduled to the Marine Insurance Act 1906 makes it impossible to discover what are the legal incidents of the mutual rights and obligations accepted by the insurers and the assured as having been brought into existence by the contract, unless recourse is had not only to the rules for construction of the policy contained in the first schedule, but also to many of the substantive provisions of the Act which is (accurately) described in its long title as: “An Act to codify the law relating to marine insurance.” To give some examples: the policy is a valued policy; the legal consequences of this in various circumstances are prescribed by sections 27, 32, 67 and 68. The policy contained two type-written insertions “Warranted Lloyd's class to be maintained throughout the policy period” and “Warranted trading in Arabian Gulf waters only”; the legal consequences of the use of these expressions

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- A in a policy of insurance is laid down in sections 33 to 35. On the other hand, the printed words include the so-called memorandum: "N.B. The ship and freight are warranted free from average under three pounds per cent. unless general, or the ship be stranded, sunk or burnt," where "warranted" is used in a different sense; to ascertain the legal effect of the expression in this context recourse must be had to sections 64 to 66 and 76. The legal effect of the sue and labour clause included in the
- B policy is laid down in section 78. These are but a few examples of the more esoteric provisions of the policy of which the legal effect is undiscoverable except by reference to the Marine Insurance Act 1906; but the whole of the provisions of the statute are directed to determining what are the mutual rights and obligations of parties to a contract of marine insurance, whether the clauses of the contract are in the obsolete language of
- C the Lloyd's S.G. policy (which, with the F.C. & S. clause added, is referred to in the Institute War and Strikes Clauses Hull-Time, as "the Standard Form of English Marine Policy"), or whether they are in the up-to-date language of the Institute War and Strike Clauses that were attached to the policy. Except by reference to the English statute and to the judicial exegesis of the code that it enacts it is not possible to interpret the policy or to determine what those mutual legal rights and obligations are. So,
- D applying, as one must in deciding the jurisdiction point, English rules of conflict of laws, the proper law of the contract embodied in the policy is English law.

- How then did it come about that two such experienced commercial judges as Robert Goff L.J. and Bingham J. came to the conclusion that the contract embodied in the policy was *not* governed by English law?
- E There was evidence, and even in the absence of evidence your Lordships could I think take judicial notice of the fact, that the Standard Form of English Marine Policy together with the appropriate Institute Clauses attached, was widely used on insurance markets in many countries of the world, other than those countries of the Commonwealth that have enacted or inherited statutes of their own in the same terms as the Marine Insurance Act 1906. The widespread use of the form in countries that have
- F not inherited or adopted the English common law led both Bingham J. and Robert Goff L.J. to conclude that the Standard Form of English Marine Policy and the Institute Clauses had become internationalised; the "lingua franca" and the "common currency" of international insurance were the metaphors that Bingham J. used to describe it; while Robert Goff L.J. [1983] 1 W.L.R. 228, 249, identified what he described as the
- G basic fallacy in the argument of counsel for the assured as being:

- "that, although the historical origin of the policy may be English and although English law and practice may provide a useful source of persuasive authority on the construction of the policy wherever it may be used, nevertheless the use of a form which has become an international form of contract provides of itself little connection with
- H English law for the purpose of ascertaining the proper law of the contract."

My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for

failure to perform any of those obligations; and this must be so however A
widespread geographically the use of a contract employing a particular form
of words to express the obligations assumed by the parties may be. To
speak of English law and practice providing a useful source of *persuasive*
authority on the construction of the policy wherever it may be used, begs
the whole question: why is recourse to English law needed at all? The
necessity to do so is common ground between the experts on Kuwaiti law B
on either side; it is because in the absence of an indigenous law of marine
insurance in Kuwait English law was the only system of private law by
reference to which it was possible for a Kuwaiti court to give a sensible
and precise meaning to the language that the parties had chosen to use in
the policy. As the authorities that I have cited earlier show, under English
conflict rules, which are those your Lordships must apply in determining
the jurisdiction point, that makes English law the proper law of the contract. C

In agreement with Sir John Donaldson M.R. and May L.J. I would
accordingly decide the jurisdiction point in favour of the assured.

The discretion point

My Lords, the jurisdiction exercised by an English court over a foreign D
corporation which has no place of business in this country, as a result of
granting leave under R.S.C., Ord. 11, r. 1 (1) (f) for service out of the juris-
diction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is
one which, under general English conflict rules, an English court would not
recognise as possessed by any foreign court in the absence of some treaty
providing for such recognition. Comity thus dictates that the judicial
discretion to grant leave under this paragraph of R.S.C., Ord. 11, r. 1 (1) E
should be exercised with circumspection in cases where there exists an alter-
native forum, viz. the courts of the foreign country where the proposed
defendant does carry on business, and whose jurisdiction would be recog-
nised under English conflict rules. Such a forum in the instant case was
afforded by the courts of Kuwait.

In order to decide whether a Kuwaiti court, as well as having jurisdic- F
tion, is also a forum *conveniens* for the dispute, one must start by seeing
what are likely to be the issues between the parties in the proposed action.
The assured's claim is for a constructive total loss of the vessel in circum-
stances briefly narrated by Bingham J. [1982] 1 W.L.R. 961, 964:

“On February 28, 1980 the vessel entered Ras Al Khafji, a small
port in Saudi Arabia, just south of Kuwait. The master and crew
were seized by the Saudi Arabian authorities and imprisoned. The
crew were released in August 1980 and the master in April 1981. G
The vessel remained where it was with no crew on board, apparently
confiscated. It appears, although the evidence is scant and the Saudi
Arabian decision as translated in evidence before me is somewhat
opaque, that the master was thought to be using the vessel to try and
smuggle diesel oil from Saudi Arabia to the United Arab Emirates. H
This accusation is strongly denied by [the assured] and the truth
of it is likely to be a central issue in the action. Neither [the assured]
nor, it would seem [the insurers], feel it prudent to visit Saudi
Arabia to inspect the vessel or investigate the matter. [The assured]
gave notice of abandonment of the vessel to [the insurers] on October
31, 1980, and again on April 28, 1981. On each occasion [the

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A insurers] rejected the notice but agreed to treat the case as if a writ had been issued on that date.”

B The central issue in the litigation, as the judge points out, would appear to be one of fact: was the vessel engaged in smuggling when she was seized by the Saudi Arabian authorities? If she was, the loss was excluded by the exception in clause 4 (1) (e) of the Institute War and Strikes Clauses attached to the policy: “arrest, restraint or detainment . . . by reason of infringement of any customs regulations.” Whether she was or not is a question of fact, which involves Saudi Arabian law. The principal witnesses as to what the vessel was doing, and as to whether what happened after it was seized amounted to a constructive total loss, would be those who were the master and crew of the vessel at the time of her seizure.

C They are Indian and Bangladesh nationals and upon release by the Saudi Arabian authorities they were repatriated to their native countries where, it appears, they now are. Other principal witnesses would be the Saudi Arabians who seized and detained the vessel and Saudi Arabian officials; they are in Saudi Arabia. Kuwait being on international air routes between Europe and India and the Far East is readily accessible to those potential witnesses and to the only potential witnesses who are said by

D the assured to be in England: the persons between whom it is said an oral charter of the vessel had been entered into which she was performing at the time of the seizure.

Bingham J. was of opinion that the factual question could be determined as well in Kuwait as in England, possibly better, and with no clear overall balance of convenience. His own view that the proper exercise of

E his discretion would be to refuse leave to serve the writ out of the jurisdiction, even if the proper law of the policy were English law, was influenced largely by the fact that the jurisdiction sought to be invoked by the assured is an exorbitant jurisdiction, and that he had “been given no reason to doubt that a Kuwaiti judge would set himself thoroughly and justly to determine the truth in this case.” ([1982] 1 W.L.R. 961, 971)

F To this I myself would add that a Kuwaiti judge would be likely to have greater familiarity even than the Commercial Court in England with the sort of thing that goes on in purely local trading in the Arabian Gulf, to which the vessel was by express warranty confined.

Although the issues would appear to be primarily issues of fact, questions of law will also be involved relating to notice of abandonment and constructive total loss which are governed by sections 60 to 63 of the

G Marine Insurance Act 1906. But, as already mentioned, it is common ground between the expert witnesses on Kuwaiti law that Kuwaiti judges in deciding those questions would, under the Kuwait Code of Conflict of Laws, apply English law as the proper law of any policy of marine insurance entered into in Kuwait before August 15, 1980, if it were in the terms of the Standard Form of English Marine Policy with Institute War and Strike Clauses attached. Like Bingham J., I see no reason why a

H Kuwaiti court should find any difficulty in applying the relevant English law to the facts once they had been found.

My Lords, it was urged upon this House, as it had been urged upon the courts below, that since Kuwait is one of those countries whose courts adopt the practice and procedure that is followed in countries whose legal systems are derived from the civil law and not from the English common law, the ability of a Kuwaiti court to decide matters of disputed fact is

markedly inferior to that of the Commercial Court in England. None of the judges in the courts below accepted this invitation to embark on the invidious task of making a comparison of the relative efficiency of the civil law and common law procedures for the determination of disputed facts. In my opinion, it would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world. So a natural prejudice in favour of a procedure with which English lawyers are familiar is not a consideration to which any weight ought to be given in determining whether a Kuwaiti court or the Commercial Court in England is the forum conveniens for the present litigation.

Nor, with respect, can I accept the suggestion of Sir John Donaldson M.R. that, for the purposes of the application by national courts of the doctrine of comity between one national court and another, the Commercial Court in London is far more than a national or domestic court; it is an "international commercial court" and that Bingham J. erred in regarding it otherwise. True it is that either directly through a choice of forum clause in commercial contracts or indirectly through an English arbitration clause, the Commercial Court in London is much resorted to by foreign nationals for resolution of disputes; and true it is that its judges have acquired unrivalled expertise in such matters, including marine insurance where that insurance is governed by English law. The latter fact no doubt accounts for the popularity of the court with foreign litigants, but their submission to its jurisdiction in the case of contracts which contain such clauses is voluntary and not, as in the instant case, sought to be forced upon an unwilling defendant in the exercise by an English court of what can be classified only as an exorbitant jurisdiction which it does not recognise as possessed by foreign courts.

My Lords, the onus under R.S.C., Ord. 11, r. 4 (2) of making it "sufficient to appear to the court that the case is a proper one for service out of the jurisdiction under this order" lies upon the would-be plaintiff. Refusal to grant leave in a case falling within rule 1 (1) (f) does not deprive him of the opportunity of obtaining justice, because ex hypothesi there exists an alternative forum, the courts of the country where the proposed defendant has its place of business where the contract was made, which would be recognised by the English courts as having jurisdiction over the matter in dispute and whose judgment would be enforceable in England.

The exorbitance of the jurisdiction sought to be invoked where reliance is based exclusively upon rule 1 (1) (f) (iii) is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience. In the instant case, the assured failed to satisfy Bingham J. that any of these factors in favour of granting leave to compel the insurers to submit to the exorbitant jurisdiction of the English court were of sufficient moment to satisfy the onus. May L.J., applying the principles laid down by this House in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, saw no grounds for interfering with the way in which Bingham J. had said that he would exercise his discretion, but May L.J. added that if he had

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A thought that he himself had an independent discretion he too would have exercised it in the same way.

I too see no reason for differing from Bingham J. on the discretion point; while, for reasons I have given, I think that Sir John Donaldson M.R. was wrong in supposing that Bingham J. erred in failing to regard the Commercial Court in London as an international commercial court and not simply a national court of England. I would therefore dismiss the appeal.

LORD WILBERFORCE. My Lords, the question in this appeal is whether service of a writ upon the respondents outside the jurisdiction of the English courts should be set aside. The provision in the Rules of the Supreme Court which is relied upon as justifying such service is that contained in R.S.C., Ord. 11, r. 1 (1) (f) (iii), which requires, in the case of an action being brought to enforce a contract, that the contract: "is by its terms, or by implication, governed by English law." The contract in question is a policy of marine insurance, dated April 28, 1979, between the appellants and the respondents, and the first question is, therefore, whether this contract comes within the quoted words. If it is held so to do, so that the court has jurisdiction to order service of the writ in Kuwait, a second question arises whether it should do so in the circumstances of the case.

It has been generally accepted, in my opinion rightly, that the formula used in paragraph (f) (iii) above is equivalent to a requirement that the proper law of the contract should be English law. This involves treating the words "by implication" as covering both the situation whether the parties' mutual intention can be inferred and the situation where, no such inference being possible, it is necessary to seek the system of law with which the contract has its closest and most real connection. Although these situations merge into each other, I regard this case as falling rather within the latter words since I can find no basis for inferring, as between the parties to this contract, an intention that the contract should be governed either by English law or by the law of Kuwait. (I should add here that, as was indicated during the hearing, we cannot, consistently with recent authority, have regard to conduct of the parties subsequent to the making of the contract—here the original policy of 1977.) The court's task must be to have regard objectively to the various factors pointing one way or the other and to estimate, as best it can, where the preponderance lies.

The search is for the "proper law": the law which governs the contract and the parties' obligations under it; the law which determines (normally) its validity and legality, its construction and effect, and the conditions of its discharge. It is clear that, as regards this contract, there are only two choices, English law and the law of Kuwait. It is worth considering at the outset what these alternative involve.

The Lloyd's S.G. form of policy, which the policy in this case is with insignificant departures, its obsolete and, in parts, unintelligible language, is one which has been used for centuries, almost without change. The Marine Insurance Act 1906, a codification Act, passed after 12 years of gestation, which schedules the Lloyd's S.G. policy as a permissible form of policy, also provides in the Schedule a number of definitions. These definitions may be regarded as a form of glossary based on established law, and the substantive provisions in the Act (binding by statutory force only if the proper law is English), as evidence of the established and

customary law of marine insurance. I think that we can accept that if Kuwaiti law were regarded as the proper law, it would resort to the definitions and would have regard to commercial custom as (inter alia) manifested by the Act. The expert evidence, in my opinion, establishes so much in relation to the relevant law of Kuwait prior to 1980 when Kuwait introduced its own insurance legislation. Thus, whether English or Kuwaiti law is the proper law, the terms of the contract would be given the meaning ascribed to them by English statute, custom, and decisions.

There is nothing unusual in a situation where, under the proper law of a contract, resort is had to some other system of law for purposes of interpretation. In that case, that other system becomes a source of the law upon which the proper law may draw. Such is frequently the case where a given system of law has not yet developed rules and principles in relation to an activity which has become current, or where another system has from experience built up a coherent and tested structure—as, for example, in banking, insurance or admiralty law, or where countries exist with a common legal heritage such as the common law or the French legal system. In such a case, the proper law is not applying a “conflicts” rule (there may, in fact, be no foreign element in the case) but merely importing a foreign product for domestic use.

There is evidence before us that in relation to insurance, and in particular to cases where Lloyd’s S.G. policies are used, courts in Europe do this, and that the courts in Kuwait would act in a similar way, resorting, as to a source of their own domestic law, to English law directly or indirectly via Turkish law.

So returning to the choice before us, it is between the proper law being English law, or the proper law being Kuwaiti law, drawing in part at least on English interpretations. This analysis, if correct, thus early in the discussion calls in question the validity of one line of argument used to support the appellants’ case (that the governing law is English law). That argument is simply (I am tempted to say simplistically) that since this contract is in English language and form and embodies many technical expressions which can only be explained by resort to English law, that shows that the proper law, the law governing the contract, must be English law. There are three reasons why this cannot be correct:

(1) As a matter of reasoning it inverts the process which has to be followed. Instead of arguing from the proper law to that which governs interpretation it does the reverse. The form of the contract may indeed be a factor to be considered in the search for the proper law—it is so here, and an important one, but one to be considered with other factors.

(2) It is inconsistent with authority including that of this House. In *Whitworth Street Estates (Manchester) Ltd. v. Miller* [1970] A.C. 583 the question for decision was whether the proper law was that of England or of Scotland. The contract was on an English R.I.B.A. form which had “many connections with English law” (Lord Hodson, p. 606). It had, in fact, been built up and amended from time to time as the result of English decisions. The decision, by a scarcely discernible majority, was that the proper law was English, but this decision was arrived at by a careful weighing of factors, including the nature and origin of the form. There can be little doubt that on either view, whichever the proper law was held to be, the contract would have fallen to be interpreted according to English law, but this circumstance alone was not regarded as decisive. Similarly, in *Compagnie Tunisienne de Navigation S.A. v. Compagnie*

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- A** *d'Armement Maritime S.A.* [1971] A.C. 572, the use of an English form of charter was regarded as a factor to be considered, and the decision was that the proper law was French. Reliance was placed on some observations of Lord Wright in the Privy Council case of *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277, 298. The passage is quoted in part by my noble and learned friend, Lord Diplock. But, as I understand him, Lord Wright was concerned only with the difference in terminology
- B** between that case and *The Torni* [1932] P. 78. I do not read his observations as equating the law governing construction with the proper law: if they were so intended, I could not, with respect, agree with them.

- (3) The simple proposition that because a form of contract has to be interpreted in accordance with English rules, or even decisions, the proper law must be English law would have very unfortunate consequences. It
- C** is well known, and not disputed, that this Lloyd's S.G. policy is widely used, not only in the British Commonwealth, or countries under British influence, but elsewhere, including countries in Europe. It is regularly used in the Middle East and in the Arabian Gulf. It is a strong thing to say that, in the absence of an express choice of law clause, the proper law of all such policies is to be regarded by an English court as English.

- D** The wide use made of this form of policy calls, on the contrary, for a careful examination in each case of the question what proper law is appropriate, the English law form or derivation of the form being an (important) factor. I do not believe, with respect, that this argument, which both Bingham J. and Robert Goff L.J. regarded as important, can be disposed of by describing it as contending for an internationalised, or floating, contract, unattached to any system of law—to do so does not do
- E** it justice. The argument is that the Lloyd's S.G. form of policy is taken into a great number of legal systems, sometimes by statute, as in Australia, sometimes as a matter of commercial practice, as in Belgium or Germany, or in the Arabian Gulf, and that in such cases, though their legal systems may, and on the evidence do, resort to English law in order to interpret its terms, the contract may be regarded as an Australian, Belgian, German, etc. contract. What has to be done is to look carefully at all those factors
- F** normally regarded as relevant when the proper law is being searched for, including of course the nature of the policy itself, and to form a judgment as to the system of law with which that policy in the circumstances has the closest and most real connection.

- In my opinion, therefore, the classic process of weighing the factors must be followed, with all the difficulties inherent in the process. They are
- G** well and clearly listed in the judgment of Sir John Donaldson M.R. I agree with him that the majority of the ingredients said to connect the policy with English law are irrelevant or lacking in weight—these include payment of premiums in sterling in London and the use of J. H. Minet & Co. Ltd., London brokers. The significant factors remain: (1) the use of this form of policy expressed in the English language and requiring interpretation according to English rules and practice; (2) the nationality of the parties,
- H** the defendants being incorporated and carrying on business in Kuwait and the plaintiffs being Liberian and resident in Dubai (i.e. neither in England nor in Kuwait); (3) the use of English sterling as the money of account; (4) the issue of the policy in Kuwait—this I regard as of little weight; (5) provision in claims to be paid in Kuwait. This, too, is of minor consequence in view of the practice, established at the time of contracting, of settling claims in London. I think also, for myself, that it is not without

Lord Wilberforce *Amin Rasheed Corpn. v. Kuwait Insurance (H.L.(E.))* [1983]

importance that the policy contains no choice of law clause. With a policy in a form so essentially English, the absence of such a factor leaves the form and language, as a pointer towards English law, without what one would consider as its natural counterweight. I agree that omission of the Lombard Street or Royal Exchange or London clause is insignificant, but I regard the incorporation of the Institute Clauses, with express reference to English law provisions, as important. With no great confidence, and reluctantly differing as to the ultimate conclusion from Bingham J. and Robert Goff L.J., whose reasoning in principle I approve and follow, I have reached the conclusion that English law is the proper law of this particular contract. A B

That makes it necessary to decide whether, even so, service of this writ outside the jurisdiction should be allowed to stand. R.S.C., Ord. 11, r. 1 merely states that, given one of the stated conditions, such service is permissible, and it is still necessary for the plaintiff (in this case the appellant) to make it "sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order" (r. 4 (2)). The rule does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different: compare the observations of Stephenson L.J. in *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119, 129. The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. It is not appropriate, in my opinion, to embark upon a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another (cf. *The El Amria* [1981] 2 Lloyd's Rep. 119, 126, *per* Brandon L.J.). In this case, Bingham J. having first decided there was no jurisdiction to order service in Kuwait, then proceeded, after a review of the factors, to express the opinion that, if there was jurisdiction, he would not consider that it should be exercised. This in my opinion was a substantive decision on the point, viz. an alternative ground of decision of the case before him, not a mere obiter dictum. It is, of course, appealable and was considered, without definitive result, by the Court of Appeal. Having weighed the factors involved and having the benefit of the analysis of them by my noble and learned friend, Lord Diplock, I have come to the conclusion that his decision on this point was right. C D E F G

For this reason I would dismiss the appeal.

LORD ROSKILL. My Lords, I do not find it surprising that this case should have given rise to such a marked difference of judicial opinion and I confess that for a considerable part of the hearing of this appeal I was disposed to accept the view on the jurisdiction point which appealed both to Robert Goff L.J. and to Bingham J., in substance for the reasons given in their respective judgments. But on further consideration and having had the advantage of reading in draft the speech of my noble and learned friend Lord Diplock, I have ultimately reached the same conclusion as he. H

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A On the discretion point I have no doubt that Bingham J. reached the correct conclusion, as did May L.J. With all respect to Sir John Donaldson M.R. I cannot accept his view that the Commercial Court is far more than a national or domestic court. It is not, even though much of the work which is undertaken by that court is international in character. It was this view which I think led him to reach the contrary conclusion on the discretion point. For the reasons given by my noble and learned friend **B** on the discretion point also, I would reject the appellants' arguments and dismiss this appeal.

C LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with both his reasoning and his conclusions and would dismiss the appeal accordingly.

D LORD BRIGHTMAN. My Lords, I also am in agreement with my noble and learned friend, Lord Diplock, both on the question of the proper law of the policy and on the question of how the discretion conferred by R.S.C., Ord. 11, r. 4 (2) should be exercised, and would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Constant & Constant; Ince & Co.*

J. A. G.

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[1983]

A

[HOUSE OF LORDS]

In re AMIN

[On appeal from REGINA v. ENTRY CLEARANCE OFFICER, BOMBAY,
Ex parte AMIN]

B

1983 April 25, 26, 27;
 July 7

Lord Fraser of Tullybelton,
 Lord Keith of Kinkel, Lord Scarman,
 Lord Brandon of Oakbrook and Lord Brightman

*Immigration—Commonwealth immigrant—Refusal of admission—
 Special voucher—Refusal by entry clearance officer to entertain
 application for special voucher—Whether applicant entitled to
 appeal—Whether special voucher “entry clearance”—Whether
 special voucher scheme unlawful sex discrimination—Immigra-
 tion Act 1971 (c. 77), ss. 13 (2), 19 (1) (a) (ii), 33 (1) ¹—Sex
 Discrimination Act 1975 (c. 65), ss. 1 (1) (a), 29 (1) (2), 85 (1) ²
 —Statement of Immigration Rules for Control on Entry:
 Commonwealth Citizens (1973) (H.C. 79), para. 38 ³*

C

*Discrimination, Sex—Immigration—Special voucher scheme—
 Assumption that husband normally head of household—
 Whether unlawful discrimination—Whether statute applying
 to mere grant of permission to use facilities—Whether
 applicable only to acts similar to acts capable of being done
 by private persons—Sex Discrimination Act 1975, ss. 1 (1) (a),
 29 (1) (2), 85 (1)*

D

In 1976 the applicant, a United Kingdom passport holder
 resident in Bombay, applied to an entry clearance officer for
 a special voucher to enable her to settle in the United King-
 dom. The officer refused to entertain her application on the
 ground that, not being a head of household, she was not
 eligible to apply for a special voucher. She was granted leave
 to apply to the Divisional Court for judicial review of the
 officer's decision and sought an order of mandamus requiring
 him to entertain her application for a voucher. The Divisional
 Court refused her application. She appealed to the Court of
 Appeal, contending that, on refusal of a special voucher, she
 ought to have been granted a right of an appeal to an adjud-
 icator under section 13 (2) of the Immigration Act 1971 and
 that she had been discriminated against under the Sex Dis-
 crimination Act 1975. The Court of Appeal held that she
 had no right of appeal to the adjudicator under section 13 (2)
 of the Act of 1971 and dismissed her appeal.

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F

On her appeal by leave of the House of Lords:—

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Held, dismissing the appeal (Lord Scarman and Lord
 Brandon of Oakbrook dissenting), (1) that, on the true con-
 struction of section 33 (1) of the Immigration Act 1971 and
 of the Statement of Immigration Rules for Control on Entry:
 Commonwealth Citizens (1973), in particular paragraph 38, a
 special voucher, which was not evidence of eligibility for entry
 into the United Kingdom nor to be taken as such under the
 rules but (*per* Lord Fraser of Tullybelton and Lord Keith of

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¹ Immigration Act 1971, s. 13 (2): see post, p. 261G.

S. 19 (1) (a) (ii): see post, p. 263G–H.

S. 33 (1): see post, p. 262H.

² Sex Discrimination Act 1975, s. 1 (1) (a): see post, pp. 266H–267A.

S. 29 (1) (2): see post, p. 268B–D.

S. 85 (1): see post, p. 269D.

³ Statement of Immigration Rules for Control on Entry: Commonwealth Citizens (H.C. 79), para. 38: see post, p. 264E–F.

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A Kinkel) was itself authority for entry, superseding the need for eligibility, (*per* Lord Brightman) was a certificate that signified that the holder had produced in advance the evidence that he would otherwise have had to produce at the point of entry, was not an entry clearance as an “other document” within section 33 (1) and refusal of it was not appealable under section 13 (2) (post, pp. 265D, 266A–B, 269H–270A, 281H–282A, C–D).

B (2) That although the special voucher scheme was in its essence discriminatory against women, since it assumed that, where a household consisted of or included a married couple, the husband would normally be the head of it, sex discrimination was only unlawful if it occurred within a field in which it was prohibited by the Sex Discrimination Act 1975; that the grant of special vouchers did not come within the general words of section 29 (1) since, on its true construction, section 29 applied to the direct provision of facilities or services, not to the mere grant of permission to use facilities, and, by virtue of section 85 (1), was to be construed as applying only to acts that were at least similar to acts that could be done by private persons; and that, accordingly, since the entry clearance officer was not providing a service for would-be immigrants but only performing his duty of controlling them, the refusal of a special voucher was not unlawful discrimination within the Act of 1975 (post, pp. 267D–F, H, 268F, 269C, E, G, H–270A, 282D–E).

D *Reg. v. Immigration Appeal Tribunal, Ex parte Kassam* [1980] 1 W.L.R. 1037, C.A. approved.

Dictum of Templeman L.J. in *Savjani v. Inland Revenue Commissioners* [1981] Q.B. 458, 467, C.A. applied.

Per Lord Fraser of Tullybelton and Lord Keith of Kinkel.

E (i) There is no basis on which any appellate body or person could properly adjudicate on an appeal against a refusal of a special voucher, the grant of which is a matter of administrative discretion. The exercise of that discretion, though unrestricted, would be subject to judicial review on the principles in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 228 (post, pp. 263A–B, C–D, 269H–270A).

F (ii) Section 19 (1) (a) (ii) of the Act of 1971 does not have the effect of making an appeal admissible in a case where the decision or action depends entirely on the unrestricted discretion of an administrative officer (post, pp. 263H, 269H–270A).

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 considered.

Decision of the Court of Appeal affirmed.

The following cases are referred to in their Lordships' opinions:

G *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, H.L.(E.).

Home Office v. Commission for Racial Equality [1982] Q.B. 385; [1981] 2 W.L.R. 703; [1981] 1 All E.R. 1042.

H *Race Relations Board v. Applin* [1975] A.C. 259; [1974] 2 W.L.R. 541; [1974] 2 All E.R. 73, H.L.(E.).

Reg. v. Immigration Appeal Tribunal, Ex parte Kassam [1980] 1 W.L.R. 1037; [1980] 2 All E.R. 330, C.A.

Savjani v. Inland Revenue Commissioners [1981] Q.B. 458; [1981] 2 W.L.R. 636; [1981] 1 All E.R. 1121, C.A.

The following additional cases were cited in argument:

Reg. v. Bhagwan [1972] A.C. 60; [1970] 3 W.L.R. 501; [1970] 3 All E.R. 97, H.L.(E.).

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Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar [1976] Q.B. 606; [1975] 3 W.L.R. 322; [1975] 3 All E.R. 497, C.A. A

Suthendran v. Immigration Appeal Tribunal [1977] A.C. 359; [1976] 3 W.L.R. 725; [1976] 3 All E.R. 611, H.L.(E.).

APPEAL from the Court of Appeal.

Pursuant to leave given on January 13, 1978, the applicant, Bhadrabala Arvindbhai Amin, applied for judicial review by way of an order of mandamus directed to the entry clearance officer, Bombay, to entertain her application for an entry clearance document, namely a special quota voucher. B

The grounds upon which the relief was sought were, inter alia: (1) that the entry clearance officer had erred in law in holding that the applicant was not eligible to apply for a special quota voucher without having regard to section 33 (1) of the Immigration Act 1971 and paragraph 38 of the Statement of Immigration Rules for Control on Entry: Commonwealth Citizens (1973) (H.C. 79); (2) that, having taken a decision that the applicant was not entitled to a special voucher, the entry clearance officer should have given the applicant a statutory right of appeal under section 13 (2) of the Immigration Act 1971 by serving the appropriate notice under regulations 3 and 4 of the Immigration Appeals (Notices) Regulations 1972; and (3) that the applicant had been discriminated against under sections 1 (1) (a) and 51 of the Sex Discrimination Act 1975. C
D

The application was first heard by a court of two judges (Bridge L.J. and Caulfield J.) on January 29, 1980. The members of the court were unable to agree and, accordingly, the application was argued again before three judges (Lord Lane C.J., Griffiths and Webster J.J.) [1980] 1 W.L.R. 1530 on April 30, 1980. The court dismissed the application. E

The applicant appealed, on the grounds that the Divisional Court had been wrong in law in holding that a special quota voucher did not come within the statutory definition of "entry clearance" as defined under section 33 (1) of the Act of 1971 and in not taking into account that under paragraph 38 of H.C. 79 the applicant, being a British subject, citizen of the United Kingdom and Colonies, qualified for admission to the United Kingdom under the Immigration Rules; that on the true interpretation of entry clearance and on refusal of a special quota voucher she ought to have been granted a right of an appeal to an adjudicator under section 13 (2) of the Act of 1971; and that she had been discriminated against under sections 1 (1) (a) and 51 of the Act of 1975 and reserved the right to argue that matter, the point not having been argued before the Divisional Court. F
G

The Court of Appeal (Ormrod and Dunn L.JJ. and Waterhouse J.) (unreported) June 5, 1981, dismissed the appeal. The judgment of Ormrod L.J., with which Dunn L.J. and Waterhouse J. agreed, was as follows:

"This is an appeal by the applicant against a decision of the Divisional Court of the Queen's Bench Division given on April 30, 1980, and contained in a judgment by Lord Lane C.J., with whom the other two members of the court, namely Griffiths J. and Webster J., agreed. H

"We have listened with interest to Mr. Nathan's submissions in this court which reproduced in substance the submission which he

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A made to the Divisional Court and, while taking the points that he has made, I think it only necessary to say this, that the argument which he seeks to put forward, namely that under the Immigration Act, section 13 (2), the applicant has a right of appeal against the refusal to grant her what is called a "special voucher" is answered shortly. There is no conceivable means by which any form of appellate body could adjudicate on that issue because whether or not a

B special voucher is granted appears to be—and there are no rules about it—wholly a matter of practice and discretion. All I can say is that I agree with the judgment of Lord Lane C.J. and would dismiss this appeal."

The court refused the applicant leave to appeal to the House of Lords. On October 12, 1981, the Appeal Committee of the House of Lords

C (Lord Diplock, Lord Keith of Kinkel and Lord Brandon of Oakbrook) allowed a petition by the applicant for leave to appeal.

The applicant appealed.

The facts are set out in their Lordships' opinions.

D *Sir Charles Fletcher-Cooke Q.C.* and *K. S. Nathan* for the applicant.
Simon D. Brown and *David Latham* for the entry clearance officer.

Their Lordships took time for consideration.

July 7. LORD FRASER OF TULLYBELTON. My Lords, this appeal raises two questions, one under the Immigration Act 1971 and the other under

E the Sex Discrimination Act 1975. The question under the Act of 1971 concerns the status of what are called "special vouchers," sometimes also called "special quota vouchers," which are issued in certain circumstances to persons who are citizens of the United Kingdom and Colonies, and holders of a United Kingdom passport. The appellant is a citizen of the United Kingdom and Colonies who holds a United Kingdom passport.

F She is a woman of Asian origin. The appeal was presented upon the footing that she had applied for a special voucher and that her application had been refused. That is not a strictly accurate description of what occurred, but, for reasons that will appear later, I propose to assume that it is correct. The appellant now claims to be entitled to appeal to an adjudicator against the refusal of a special voucher. Her claim is founded on section 13 (2) of the Act of 1971 which provides:

G '(2) Subject to the provisions of this Part of this Act, a person who, on an application duly made, is refused a certificate of patriality or an entry clearance may appeal to an adjudicator against the refusal.'

The appellant contends that a special voucher is an entry clearance within the meaning of that subsection. Her contention is denied by the respondent. In order to explain the rival contentions, it is necessary to

H refer briefly to the origin of special vouchers. Before 1968 holders of British passports were, generally speaking, free to enter and settle in the United Kingdom without restriction. From about 1965 onwards the governments of certain East African states, formerly British colonies, adopted a policy of excluding persons who were not citizens of their state from trading or taking employment there. The consequence was that persons who did not hold local citizenship of the East African state in which they were living were virtually obliged to leave it. Many of them came to the United

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Kingdom, as they were then entitled to do, but the influx became difficult to absorb. The Commonwealth Immigrants Act 1968 therefore extended immigration control, which had previously applied only to persons not holding British passports, to apply also to citizens of the United Kingdom and Colonies holding British passports unless they had certain prescribed connections with the United Kingdom. Difficulties then arose because many holders of British passports, particularly Asians living in East Africa, found themselves obliged to leave the countries where they had been living and with nowhere else to go because they were not allowed into the United Kingdom. To ease their position, the British Government in 1968 introduced the special voucher scheme, whereby vouchers are issued to heads of households, who are holders of British passports, and who are under pressure to leave their countries of residence. The scheme has no express statutory basis and no rules have been published defining the conditions on which special vouchers will be issued. The reason is that the scheme is intended to be flexible and is operated by the exercise of administrative discretion, according to the needs of particular individuals and to the circumstances prevailing in their country of residence at the time. It is subject to an overall ceiling of 5,000 vouchers per annum. The ceiling applies to the number of heads of families, but the number of persons actually admitted to the United Kingdom as a result of the scheme is much larger than that as dependants, including children up to 25 years old provided they are unmarried and dependent on the voucher holder, are allowed to accompany the head of the family to the United Kingdom if they have entry clearance.

Special vouchers were at first issued at the discretion of the British High Commissioners in East Africa, but some are now issued at the discretion of entry clearance officers in India, including the entry clearance officer at Bombay who is the respondent to this appeal.

In 1973 the appellant's father applied for a special voucher. He was a citizen of the United Kingdom and Colonies and held a British passport but he was living in Tanzania. He was granted a special voucher for himself, and entry clearance was also given to his wife and four unmarried children. At that date the appellant was already married to an Indian national and was living with him in India. Her father therefore did not include her in his application, although he was still supporting her financially. In 1977 the appellant, who was still living in India, applied for a special voucher on her own account. Her application was refused on the ground that she was not the head of a family. She then initiated the present proceedings for judicial review directed to the (British) entry clearance officer at Bombay. Her application for judicial review was refused by the Divisional Court (Lord Lane C.J., Griffiths and Webster J.J.) and on appeal by the Court of Appeal (Ormrod and Dunn L.J.J. and Waterhouse J.).

The whole question in this part of the case is whether a special voucher is an entry clearance in the sense of section 13 (2) of the Act of 1971. "Entry clearance" is defined in section 33 (1) of the Act:

" 'entry clearance' means a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence of a person's eligibility, though not patial, for entry into the United Kingdom (but does not include a work permit); . . . "

Clearly a special voucher is not a visa nor an entry certificate but the appellant contends that it is an "other document" of the type described

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of Tullybelton

A in that definition. I agree with both the courts below that it is not. I reach that opinion for two reasons.

First, as Ormrod L.J. said in the Court of Appeal (ante, p. 261A-B), there is no basis on which any appellate body or person could properly adjudicate upon an appeal against refusal of a special voucher. An applicant has no right to be granted a special voucher and he could not show that an entry clearance officer had erred in law by refusing his application.

B The grant of refusal of a special voucher is a matter of administrative discretion, depending upon the circumstances of the individual applicant, and, as it is subject to an overall ceiling, it may involve weighing the needs of one applicant against those of others who are in competition with him. In my opinion, accordingly, a right of appeal would be unworkable in practice, and I would only be disposed to decide that it had been conferred by the

C Act of 1971 if the Act contained an unambiguous provision to that effect. The only part of the Act said to have that effect is the definition of entry clearance in section 33 (1) which I have just quoted and to which I shall return later.

Before I consider that definition, I should mention that counsel for the respondent conceded (rightly in my opinion) that, although the discretion of the administrative officer responsible for issuing special vouchers is unrestricted, its exercise is always subject to judicial review on the principles which were stated by Lord Greene M.R. in the well known case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 228. But that concession does not in any way imply that there is a right of appeal on the merits against an administrative decision. Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. No abuse of authority or unfair treatment such as would call for judicial review is alleged here where the appellant's case rests simply on an assertion of a legal right of appeal.

E Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. The difference was explained in this House recently in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 and I need not repeat what was said there. Section 19 of the Act of 1971 directs adjudicators as to their duties when hearing appeals (see for example section 19 (3)) but it throws no light on the question of whether there is a right of appeal such as the appellant now asserts. Its only

G possible relevance to the present question is the reference to discretion in section 19 (1) which provides inter alia :

“an adjudicator on an appeal to him under this Part of this Act—
(a) shall allow the appeal if he considers—. . . (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently; . . .”

H

The adjudicator's power under section 19 (1) (a) (ii) applies to cases where matters of discretion arise in the course of an appeal which is otherwise admissible, but it does not in my opinion have the effect of making an appeal admissible in a case such as the present which depends entirely upon the unrestricted discretion of an administrative officer.

For these reasons I consider it highly unlikely that refusal of a special

voucher is intended to be subject to the right of appeal under section 13 (1) of the Act. A

I return now to the definition of entry clearance in section 33 (1) of the Act of 1971. It includes a reference to an "other document" which fulfils a double qualification, viz., one which (1) "in accordance with the immigration rules" (2) "is to be taken as evidence of a person's eligibility . . . for entry into the United Kingdom." "Immigration rules" are defined in section 33 (1) to mean "the rules for the time being laid down as mentioned in section 3 (2) above." Section 3 (2) provides: B

"(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the *practice* to be followed in the *administration* of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . ." (Emphasis added.) C

The rules accordingly have Parliamentary approval but they are not contained in statutory instruments and they do not have the force of law. The rules which applied to the appellant's case are set out in the Statement of Immigration Rules for Control on Entry: Commonwealth Citizens ordered by the House of Commons to be printed on January 25, 1973, and published as H.C. 79 (hereinafter referred to as "H.C. 79"). It is also necessary to have regard to the corresponding Statement of Immigration Rules for Control on Entry: EEC and Other Non-Commonwealth Nationals ordered by the House of Commons to be printed on January 25, 1973, and published as H.C. 81 ("H.C. 81"). The only mention of a "special voucher" in H.C. 79 is in paragraph 38 which provides: D

"Where the passenger is a citizen of the United Kingdom and Colonies holding a United Kingdom passport, and presents a special voucher issued to him by a British Government representative overseas (or an entry certificate in lieu), he is to be admitted for settlement, as are his dependants if they have obtained entry certificates for that purpose and satisfy the requirements of paragraph 39; but such a passenger who comes for settlement without a special voucher or entry certificate is to be refused leave to enter." E

If that paragraph stood alone it might well be considered to be ambiguous on the question of whether a special voucher was an entry clearance or not. The paragraph is quite consistent with the respondent's contention that the whole point of a special voucher is to authorise the admission to the United Kingdom of persons who are *not*, under the rules, "eligible" for entry into the United Kingdom, and that it is not evidence of eligibility. The difference is not merely verbal. It is substantial in this respect: a document which is evidence (but not "conclusive evidence") of eligibility for entry (or of any other external fact) will be ineffective if other evidence shows that the eligibility (or other external fact) does not exist, whereas the effectiveness of a special voucher does not depend upon the existence of any fact external to itself. It is in itself authority for admission. On the other hand, a special voucher is not absolutely conclusive authority for admission because, as counsel for the respondent conceded, the holder of a special voucher may still be refused leave to enter under paragraphs 59 to 63 of H.C. 79, that is to say on medical grounds, or because he has a criminal record or is subject to a deportation order, or because his exclusion is conducive to the public good. F G H

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A But paragraph 38 has to be read in the context of the other rules and of the definition of entry clearance in section 33 (1). According to the definition entry clearance means three things. First there is a visa. This is a form of entry clearance which is required by non-Commonwealth immigrants, and in terms of paragraph 10 of H.C. 81 it is "to be taken as evidence of the holder's eligibility for entry to the United Kingdom . . ." It therefore falls exactly within the definition in section 33 (1). Secondly there is an entry certificate, which corresponds, in the case of a Commonwealth citizen, to a visa for others. Paragraph 12 of H.C. 79 provides that entry certificates

B "are to be taken as evidence of the holder's eligibility for entry to the United Kingdom, and accordingly accepted as 'entry clearances' within the meaning of the Act [of 1971]."

C It also falls exactly within the definition in section 33 (1). Thirdly there is an "other document" which complies with the definition. An example of such an other document is a "Home Office letter of consent" which is referred to in paragraph 10 of H.C. 81 and which is also to be "taken as evidence" etc. It also falls exactly within section 33 (1).

But there is no provision in the rules that a special voucher is to be "taken as evidence of a person's eligibility for entry to the United Kingdom." It therefore does not literally comply with the definition in section 33 (1), unlike all the other documents which I have mentioned, which do. In my opinion the proper conclusion is that a special voucher is not evidence of eligibility, but is itself authority for entry, and supersedes the necessity for eligibility. The words which occur in brackets in paragraph 38 of H.C. 79 ("or an entry certificate in lieu") do not in my opinion indicate that a special voucher and an entry certificate are to be treated as equivalent. On the contrary, they recognise that the two things are different. The reason for the words having been inserted is that, as Lord Lane C.J. mentioned in the Divisional Court [1980] 1 W.L.R. 1530, 1533, in some cases what is really a special voucher has been wrongly called an entry certificate. That can easily happen because, as we were informed by counsel for the respondent, there is no document called a special voucher.

E When a special voucher is granted all that happens is that the words "special voucher" are written or stamped in the passport of the holder to whom the voucher has been granted, and occasionally the words "entry certificate" are written in error. In this very case we have seen a photographic copy of the appellant's father's passport which is stamped "entry certificate" and which also bears the words "special voucher" written in ink underneath. Apparently the words "entry certificate" have been stamped in error and should have been deleted.

G The difference between a special voucher and the documents which fall within the definition of entry clearance in section 33 (1) of the Act of 1971 is emphasised by paragraph 10 of H.C. 79 and the corresponding paragraph 8 of H.C. 81. Paragraph 10 of H.C. 79 provides:

H "A Commonwealth citizen who wishes to ascertain in advance whether he is *eligible for admission* to the United Kingdom can apply to the appropriate British representative in the country in which he is living for the issue of an entry certificate. This procedure is of particular value when the claim to admission depends on *proof of facts* entailing inquiries in this country or overseas." (Emphasis added.)

That paragraph, and the corresponding paragraph 8 of H.C. 81, show that eligibility for admission and therefore entitlement to the issue of an entry

certificate may depend on proof of external facts. But neither that, nor any other paragraph, suggests that advance application might usefully be made for a special voucher. The reason, I think, is that the issue of a special voucher does not depend upon proof of facts establishing eligibility but on an exercise of administrative discretion. A

The result of this consideration of the definition in section 33 (1) and of the rules is to satisfy me that a special voucher is truly something special, outside the ordinary rules, and that it does not fall within the definition of an entry clearance. It follows that it is not appealable under section 13 (2) of the Act of 1971. That conclusion confirms the opinion I had formed against the appealability of refusal, on the ground that an effective appeal would be impracticable. B

Before leaving this part of the case I should refer briefly to the relief that is sought by the appellant. The proceedings were begun after the appellant had applied on April 19, 1976, to the deputy British High Commissioner, Bombay for "the necessary forms for an entry certificate voucher that entitles for permanent settlement in the United Kingdom." In that letter she said that she had a husband and one child. She received a reply from the entry clearance officer in Bombay dated May 3, 1976, which after acknowledging her letter proceeded: C

" 'Special quota vouchers' are normally issued to United Kingdom passport holders who are heads of households. I understand that, in your case, the head of household is a citizen of India. I therefore regret to inform you that you are not eligible to apply for a special quota voucher." D

Further correspondence followed and eventually the present proceedings were raised, the relief sought being stated thus: E

" An order of mandamus directed to the entry clearance officer, British High Commission, Bombay to entertain the applicant's application for an entry clearance document namely a 'special quota voucher.' "

That relief evidently rests upon the assumption that the entry clearance officer has refused to entertain the appellant's application for a special quota voucher, and not that he had considered the application and refused it. It was only in the notice of appeal from the Divisional Court to the Court of Appeal that there appears for the first time, as ground 3 of the appeal, the contention that F

" upon refusal of a special quota voucher [the appellant] ought to have been granted a right of an appeal to an adjudicator under section 13 (2) of the Immigration Act 1971." G

The Court of Appeal rejected her appeal because, as Ormrod L.J. explained in the only reasoned opinion, they considered that she had no right of appeal. Before your Lordships' House this part of the case was argued on the basis that the appellant's application for a special voucher had been refused and that she was now asserting a right of appeal under section 13 (2). I have therefore dealt with the case on that basis. H

The second part of the appeal arises under the Act of 1975. That Act is divided into eight Parts. Part I defines the discrimination to which the Act applies. Section 1 (1) provides:

" A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—(a) on the

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A ground of her sex he treats her less favourably than he treats or would treat a man . . .”

Section 5, which is also in Part I of the Act, provides:

B “(1) In this Act—(a) references to discrimination refer to any discrimination falling within sections 1 to 4; and (b) references to sex discrimination refer to any discrimination falling within section 1 or 2, and related expressions shall be construed accordingly.”

C In my opinion the entry clearance officer who dealt with the appellant’s application for a special voucher did discriminate against the appellant on the grounds of her sex. He had to do so because the special voucher scheme is in its nature discriminatory against women. The evidence in the case includes an affidavit from a principal in the Immigration and Nationality Department of the Home Office. Paragraph 4 of the affidavit is in these terms:

D “4. There is no discrimination on the ground of sex. A woman holding a United Kingdom passport is eligible for consideration for the grant of a special voucher if she is widowed or single and a head of household or if she is married and obliged to take on all the responsibilities of the head of household owing to her husband’s long term medical disability. In 1977 over 24 per cent. of the special voucher holders arriving in the United Kingdom were women.”

E The assertion in the first sentence of that paragraph that there is no discrimination on the ground of sex is in my opinion shown by the later part of the paragraph to be erroneous. The special voucher scheme proceeds upon the assumption that in a household which consists of, or includes, a married couple the husband is normally the head of household. Only in exceptional circumstances, where the husband suffers from long term medical disability, is the wife regarded as the head of household. That may be perfectly reasonable, in accordance with the general understanding in the United Kingdom and elsewhere, but it seems to me plainly discriminatory against women. Test it in this way. If the applicant for a special voucher had been, not the appellant in this case, but a brother of hers, who had married an Indian woman and gone to live in India, he would have been treated as head of his household (assuming that he was not disabled) and, as such, entitled to apply for a special voucher. I see no answer to the argument that he would have been treated in that respect more favourably than the appellant, and that the only reason for his more favourable treatment would have been his sex. I do not accept the suggestion that, for the purposes of the special voucher scheme, headship of a household is a fact which is independent of sex. That might be correct if inquiry were made in each case into such matters as whether the husband or the wife is the financial provider of the household or whether he or she makes the most important decisions; but such inquiries would be impracticable. The practice therefore is that the husband is assumed to be the head of household in a normal case. Accordingly I consider that there was sex discrimination in this case.

H But not all sex discrimination is unlawful. Part I of the Act merely defines discrimination and it contains no provision for making it unlawful. Discrimination is only unlawful if it occurs in one of the fields in which it is prohibited by Parts II, III or IV of the Act. The decision of the Court of Appeal to that effect in *Reg. v. Immigration Appeal Tribunal*,

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Ex parte Kassam [1980] 1 W.L.R. 1037 was in my opinion correct, and I reject the argument by the appellant's counsel that that case was wrongly decided. The alternative contention by counsel for the appellant, if *Kassam* was rightly decided, was that the discrimination involved in the special voucher scheme was rendered unlawful because it fell within the provisions of section 29 which is in Part III of the Act. Section 29 provides:

“(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services—(a) by refusing or deliberately omitting to provide her with any of them, or (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section. (2) The following are examples of the facilities and services mentioned in subsection (1)—(a) access to and use of any place which members of the public or a section of the public are permitted to enter; (b) accommodation in a hotel, boarding house or other similar establishment; (c) facilities by way of banking or insurance or for grants, loans, credit or finance; (d) facilities for education; (e) facilities for entertainment, recreation or refreshment; (f) facilities for transport or travel; (g) the services of any profession or trade, or any local or other public authority.”

It was said that the granting of special vouchers for entry into the United Kingdom was provision of facilities or services to a section of the public, and that the wide general words of subsection (1) of section 29 were not cut down by the examples given in subsection (2) which are only “examples” and are not an exhaustive list of the circumstances in which the section applies. Reliance was also placed on paragraph (g) of section 29 (2) which expressly refers to services of a public authority and which has been held to apply to the Inland Revenue: see *Savjani v. Inland Revenue Commissioners* [1981] Q.B. 458.

My Lords, I accept that the examples in section 29 (2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of subsection (1). Section 29 as a whole seems to me to apply to the direct provision of facilities or services, and not to the mere grant of permission to use facilities. That is in accordance with the words of subsection (1), and it is reinforced by some of the examples in subsection (2). Example (a) is “access to *and use of* any place” and the words that I have emphasised indicate that the paragraph contemplates actual provision of facilities which the person will use. Example (d) refers, in my view, to the actual provision of schools and other facilities for education, but not to the mere grant of an entry certificate or a special voucher to enable a student to enter the United Kingdom in order to study here. Example (g) seems to me to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities. So in *Savjani*, Templeman L.J. took the view that the Inland Revenue performed two separate functions—first a duty of collecting revenue and secondly a service of providing taxpayers with information. He said, at p. 467:

“As [counsel] on behalf of the revenue submitted, the board and the inspector are performing duties—those duties laid upon them

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A by the Act which I have mentioned—but, in my judgment, it does not necessarily follow that the board and the inspector are not voluntarily, or in order to carry out their duty, also performing services for the taxpayer. The duty is to collect the right amount of revenue; but, in my judgment, there is a service to the taxpayer provided by the board and the inspector by the provision, dissemination and implementation of regulations which will enable the taxpayer to know that he is entitled to a deduction or a repayment, which will [enable] him to know how he is to satisfy the inspector or the board if he is so entitled, and which will enable him to obtain the actual deduction or repayment which Parliament said he is to have.”

C In so far as that passage states the ground of the Court of Appeal's decision in that case I agree with it. If Lord Denning M.R., at pp. 465–466, intended to base his decision on wider grounds, I would respectfully disagree with him. In the present case the entry clearance officer in Bombay was in my opinion not providing a service for would-be immigrants; rather he was performing his duty of controlling them.

D Counsel for the appellant sought to draw support for his contention from section 85 (1) of the Act of 1975 which provides:

“This Act applies—(a) to an act done by or for purposes of a Minister of the Crown or government department, or (b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office, as it applies to an act done by a private person.”

E That section puts an act done on behalf of the Crown on a par with an act done by a private person, and it does not in terms restrict the comparison to an act of *the same kind* done by a private person. But in my opinion it applies only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person. It does not mean that the Act is to apply to any act of any kind done on behalf of the Crown by a person holding statutory office. There must be acts (which include deliberate omissions—see section 82 (1)), done in the course of formulating or carrying out government policy, which are quite different in kind from any act that would ever be done by a private person, and to which the Act does not apply. I would respectfully agree with the observations on the corresponding provision of the Race Relations Act 1976 made by Woolf J. in *Home Office v. Commission for Racial Equality* [1982] Q.B. 385, 395B–C. Part V of the Act of 1975 makes exceptions for certain acts including acts done for the purpose of national security (section 52) and for acts which are “necessary” in order to comply with certain statutory requirements: section 51. These exceptions will no doubt be effective to protect acts which are of a kind that would otherwise be unlawful under the Act. But they do not in my view obviate the necessity for construing section 29 as applying only to acts which are at least similar to acts that could be done by private persons.

H For these reasons I would dismiss the appeal on both grounds. The appellant must pay the respondent's costs of the appeal.

LORD KEITH OF KINKEL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Fraser of Tullybelton, and that to be delivered by my noble and learned friend,

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Lord Brightman. I agree with the reasoning and conclusions expressed by both of them upon the issue concerned with the nature and effect of a special voucher, and also with the opinion of my noble and learned friend, Lord Fraser of Tullybelton, regarding the issue which arises under the Sex Discrimination Act 1975. Accordingly I too would dismiss the appeal. A

LORD SCARMAN. My Lords, the appeal raises two difficult points of statutory construction. In logical order, though not in the order in which the appellant's counsel argued her case, the first is a point as to the true construction of the Immigration Act 1971 and the second a point as to the true construction of the Sex Discrimination Act 1975. Appellant's counsel took the course of arguing the second point first for the excellent reason that unless they can show that they have at least an arguable case of unlawful discrimination against the appellant on the ground of her sex there is nothing but a hollow victory in establishing (if they can) that the appellant has a right of appeal under the Immigration Act. Indeed, there is a third issue which, though not argued at length in the appeal, may not be ignored. If the appellant succeeds on her two points of construction, has she established a case for the court's intervention? B

As I understand the substance of her ill-formulated written application and accompanying statement, the appellant seeks judicial review of the refusal by the entry clearance officer, Bombay to entertain her application for a voucher enabling her to enter the United Kingdom for settlement. She seeks a declaration that she is entitled to appeal to an adjudicator against his refusal and an order directing him to take the necessary steps (by service of the appropriate notice under the Immigration Appeals (Notices) Regulations 1972 (S.I. 1972 No. 1683)) to enable her to exercise her right of appeal. If this be the correct view, as I believe it to be, of the true nature of her case, the three issues to which I have already briefly referred fall to be considered by the House. All three issues arise under the law as it was prior to the 1983 change in the immigration rules and to the enactment of the British Nationality Act 1981. The relevant immigration rules are those of 1973, H.C. 79 for Commonwealth citizens and H.C. 81 for others. The issues are concerned with the special voucher scheme under which certain United Kingdom passport holders who are neither patrial nor otherwise eligible for entry into the United Kingdom may be admitted into the country for settlement. C

The appellant applied in Bombay for the grant of a special voucher so that she might enter the United Kingdom for settlement. The entry clearance officer by letter dated May 3, 1976, refused her application on the ground that, being a woman married to a citizen of India, she was not eligible to be considered for the grant of a voucher. She applied to the Divisional Court for review of his decision but her application was dismissed. The Court of Appeal upheld the decision of the Divisional Court. D

The three questions which are raised by her in these proceedings may be formulated as follows: E

(1) whether a special voucher under the scheme is an "entry clearance" as defined in section 33 (1) of the Act of 1971: if it is, it follows that the appellant has a right of appeal to an adjudicator against the entry clearance officer's decision under section 13 (2) of the Act, and she succeeds on her Immigration Act point; F

(2) whether the restriction of the scheme to heads of household and G

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A their dependants is by its discrimination between men and women in the meaning it gives to "head of household" unlawful as being in breach of the Act of 1975: the point turns on the interpretation of section 29 of the Act;

(3) whether, even if the appellant establishes error in law on the part of the entry clearance officer, the court ought to exercise its discretion to grant her relief: and, if it should, the nature of that relief.

B Before considering these questions it is necessary to state the facts and to describe the scheme. The appellant holds a United Kingdom passport. She was until the passage into law of the Act of 1981 a citizen of the United Kingdom and Colonies. She was born in East Africa, a member of an Asian family settled there. The family were citizens of the United Kingdom and Colonies. They hold United Kingdom passports, and, prior to the enactment of the Commonwealth Immigrants Act 1968, they enjoyed the right of unrestricted entry into the United Kingdom. The effect of that Act was to deprive them of their right of entry and to subject them to immigration control if they, or any of them, should seek to enter the United Kingdom. Today they are, by reason of the Act of 1981, British overseas citizens.

D It was recognised by the British Government that the Act of 1968 imposed very great distress on certain United Kingdom passport holders resident in East Africa, who were under pressure to quit their countries of residence but had nowhere to go. The special voucher scheme was devised as an administrative expedient to relieve that distress while retaining control over the numbers of those anxious to migrate to the United Kingdom.

E A voucher under the scheme confers no legal right of abode such as the patrial possesses under section 1 (1) of the Act of 1971 but does qualify the holder for admission to settle under the immigration rules: paragraph 38, H.C. 79. A voucher holder remains in the class specified by section 1 (2) of the Act as one who "may live, work, and settle in the United Kingdom by permission," and is subject to immigration control. The scheme is on a quota basis, which entails that an applicant F may be eligible for a voucher and yet not be granted one. It has no express statutory basis but, if challenged, could be defended (at least since the enactment of the Act of 1971) as an exercise by the Secretary of State of his power and duty to establish the practice to be followed for regulating the entry into and stay in the United Kingdom of persons required by the immigration laws to have leave to enter: section 3 (2) G of the Act of 1971.

The scheme is described in the evidence before the House in these terms:

H "The scheme allows heads of the households and their families into this country for settlement on an annual quota basis notwithstanding the fact that they may be otherwise ineligible for entry under the immigration rules. The great majority of the special vouchers have always been allocated in East Africa, where United Kingdom passport holders have experienced the greatest difficulties."

A woman holding a United Kingdom passport is eligible for consideration for the grant of a special voucher

"if she is widowed or single and a head of household, or if she is married and obliged to take on all the responsibilities of the head of household owing to her husband's long term medical disability."

A woman married to a husband who is not suffering from a long term medical disability cannot under the scheme be a head of household. Unless the husband can show he is eligible for a voucher, she is not eligible to enter the country: her eligibility depends on whether her husband can as head of the household obtain a special voucher. A

To return to the history, the appellant went with her mother and other children of the family to India in 1964. Her father, who continued to support them, remained in East Africa. The appellant married a farmer in India. In 1973 her father applied for a special voucher for himself as head of household and for entry certificates for his wife and two sons to accompany him as his dependants. He did not include his daughter, the appellant, in his application because she was married. The application was successful and on May 7, 1975, he, his wife and two sons were admitted into the United Kingdom for settlement. On April 19, 1976, the appellant applied for a special voucher for herself with the result already mentioned. She described herself as a housewife married to a farmer in India and as the mother of one child. B
C

The Immigration Act point

The point is a short one. If a special voucher is an entry clearance, the appellant had a right of appeal against the refusal by the entry clearance officer to treat her as eligible for consideration for a grant of a voucher: for section 13 (2) of the Act provides that a person who is refused an entry clearance may appeal to an adjudicator. D

“Entry clearance” is defined in section 33 (1):

“For the purposes of this Act, except in so far as the context otherwise requires— . . . ‘entry clearance’ means a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence of a person’s eligibility, though not **patrial**, for entry into the United Kingdom (but does not include a work permit); . . .” E

Entry clearances are issued by British representatives overseas. Their purpose is to enable Commonwealth citizens and others to ascertain in advance whether they are eligible for admission to the United Kingdom: paragraphs 10 to 13, H.C. 79, and paragraphs 8 to 13, H.C. 81. In some cases, e.g., dependants of a head of household entering under a special voucher in the which case an entry certificate must be obtained (paragraph 38, H.C. 79) and “visa-nationals” who must produce a current visa (paragraph 8, H.C. 81), an entry clearance must be produced at the port of entry and, if it is not, the immigration officer is to refuse leave to enter. In these cases a visa or entry certificate, each of which is an entry clearance, is as much a condition for the grant of leave to enter as is a special voucher in cases where one is required. F
G

I confess that I do not understand how the words of the statutory definition of entry clearance can be restricted so as to exclude a special voucher. H

An entry clearance is exactly what a voucher is. It is a document which, in accordance with the immigration rules, i.e. paragraph 38, H.C. 79, is to be taken as evidence of the eligibility for entry into the United Kingdom of a person who is not a patrial, i.e. of a person who does not have the right of abode nor the freedom to come and go into the United Kingdom but is subject to immigration control. The voucher is a permission granted under an administrative scheme regulating the

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A entry into and stay in the United Kingdom of a certain class of persons who are required under the Act to have leave to enter. A voucher does not, and in my judgment cannot, confer a right of entry but only an eligibility. The basic structure of the Act with its separation of patrials who have the right of entry and abode from all others who require leave to enter denies the possibility of any view of a special voucher other than as a document evidencing a person's eligibility for entry. And, if

B it be necessary to look for confirmation of this view, it may be found in Part VI of H.C. 79, which confers power upon an immigration officer in certain circumstances to refuse leave to those who qualify for admission under the rules (this includes special voucher holders entering under paragraph 38 of the rules).

C The case for the respondent is that a voucher is not evidence of eligibility but is itself a document of title. In the words of Lord Lane C.J. giving the judgment of the Divisional Court [1980] 1 W.L.R. 1530, 1534: "It is a document which dispenses with the necessity of such evidence," i.e., evidence of eligibility. The fallacy in this reasoning is in holding that it is not evidence of eligibility merely because no further evidence than its presentation to the immigration officer is required. The document is itself sufficient evidence: that is why no further evidence is

D needed. The true question is whether it is evidence of title or of permission to enter. We are, therefore, driven back to a consideration of the Immigration Act's basic structure, under which, as I have endeavoured to show, the holder of a voucher has not a right but only a permission or leave to enter.

E A further argument was advanced against this view of a special voucher. It was said that there is no basis on which any appellate body or person can properly adjudicate upon an appeal against refusal of a voucher. Grant or refusal is a matter of administrative discretion, the exercise of which is in no way guided by the immigration rules. An adjudicator, it is said, would have no guidance in the exercise of the appellate power conferred upon him by section 19 (1) of the Immigration Act. As Ormrod L.J. put it in the Court of Appeal, ante, p. 261A-B:

F "There is no conceivable means by which any form of appellate body could adjudicate on [the] issue because whether or not a special voucher is granted appears to be—and there are no rules about it—wholly a matter of practice and discretion."

G Of course, if an issue is unappealable, it is not difficult to infer that no right of appeal exists. And I would agree that an adjudicator on an appeal against the refusal of a special voucher cannot investigate the exercise of the discretion by the entry clearance officer so as to substitute his discretion for that of the officer. This is because the immigration rules, though they require an immigration officer to give leave to enter for settlement to the holder of a voucher unless there are "Part VI" grounds for refusing leave, do not themselves offer any guidance as to

H eligibility for the grant of a voucher. The adjudicator does not have the material to enable him to exercise the power which he does have under section 19 to substitute his discretion for that of the immigration authority.

But this is not decisive. The powers of an adjudicator upon an appeal are to be found in section 19 of the Act. They are not limited to a review of discretion. The section provides, inter alia, that an adjudicator shall allow the appeal if he considers that the decision under appeal "was not in accordance with the law or with any immigration rules applicable

to the case": section 19 (1) (a) (i). If, therefore, it is clear upon the record that the entry clearance officer erred in law, the adjudicator can, and indeed must, intervene to allow the appeal. And this is exactly what the appellant alleges in this case. She says that it is clear from the entry clearance officer's letter refusing to treat her as eligible for a voucher that he proceeded upon the basis that it was lawful for the scheme to discriminate against married women: and her submission is that upon the true construction of the Sex Discrimination Act the scheme's discrimination against married women is unlawful. It is a point of law arising on material all of which is, or can easily be made, available to an adjudicator, as indeed it has been made available to the courts below and to the House in these proceedings. The point which the appellant wishes to raise on appeal is, therefore, justiciable and appealable. A B

For these reasons, therefore, I would hold that the appellant did have a right of appeal against the decision of the entry clearance officer. It is accepted that he did not comply with the Regulations of 1972. The appellant has, therefore, made out a case which at least raises the question whether the court's discretion ought to be exercised in favour of judicial review. If she has no case under the Sex Discrimination Act, it would be pointless to make an order in her favour: for the appeal would be bound to fail. But, if she has a good, or even an arguable, case of unlawful discrimination against her on the ground of her sex, a very different situation will arise for consideration. C D

The Sex Discrimination Act point

Part I of the Act describes the discrimination to which the Act applies. So far as material to this appeal, section 1 (1) provides: E

"A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man . . ."

I do not doubt that the effect of the restrictive meaning given under the special voucher scheme to a head of household is to discriminate against a woman in the way described by the subsection. Merely because she is a woman, a wife is treated under the scheme less favourably than a husband. Had one of her brothers married in India, he would have remained a United Kingdom passport holder eligible as a head of household for consideration for the grant of a voucher. But his married sister is not, because she is a woman. F G

However, not every discrimination against a woman is unlawful. Part II of the Act specifies the discrimination which is unlawful in the employment field. Part III specifies the discrimination which is unlawful in other fields—education, and in the provision of goods, facilities, services, and premises. Part IV particularises other actions and practices which are made unlawful by the Act. Part V makes a number of general exceptions in respect of actions or practices which would otherwise constitute unlawful discrimination under the Act. H

It has been held, correctly in my judgment, by the Court of Appeal in *Reg. v. Immigration Appeal Tribunal, Ex parte Kassam* [1980] 1 W.L.R. 1037 that Parts II to IV of the Act are exhaustive of the circumstances in which sex discrimination is unlawful. The appellant, therefore, has to bring her case within a field of activity covered by the Act. She seeks to

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A do so by relying on section 29, which is to be found in Part III of the Act. [His Lordship set out subsections (1) and (2) of section 29 and continued:] It is her submission that by the special voucher scheme the Secretary of State provides a facility to a section of the public, namely those United Kingdom passport holders who are neither patrial nor otherwise eligible to enter the country. The facility provided is, it is said, access for voucher holders to the United Kingdom for settlement.

B United Kingdom passport holders, however attenuated their rights may have become in recent years, are a section of the public: their slender link with the United Kingdom must at least be strong enough to entitle them to be so regarded. I agree with the view expressed in *Kassam's* case, at p. 1042G, that immigrants applying for leave to enter the country are a section of the public.

C Entry into the United Kingdom for study, a visit, or settlement is certainly a facility which many value and seek to obtain. And it is one which the Secretary of State has it in his power under the Immigration Act to provide: section 3 (2) of that Act. The special voucher scheme which he has introduced does provide to some this very valuable facility, namely the opportunity to settle in this country. It is a facility offered within Great Britain, albeit to persons outside: the exception in section 36 of the Sex Discrimination Act does not apply.

D Upon the literal meaning of the language of section 29 (1), I would, therefore, construe the subsection as covering the facility provided by the Secretary of State.

It is, however, said that the kind of facilities within the meaning of the subsection are essentially "market-place activities" or activities akin to the provision of goods and services, but not to the grant of leave to enter under the Immigration Act. Reliance is placed upon section 29 (2) as an indication that this was the legislative intention of the section and upon the decision of the Court of Appeal which interpreted the section in this way in *Kassam's* case.

E In *Kassam's* case, Stephenson L.J. found the submission, which is now made to the House in this case, namely that in giving leave to immigrants to enter the country and to remain here the Secretary of State provides a facility to a section of the public, so plausible that he was tempted to accede to it: p. 1042E. I agree with him so far. I have yielded to the temptation, if that is a fair description of selecting a sensible interpretation of a statutory provision. He, however, did not. He appears to have accepted the submission that section 29 was concerned with "market-place activities." If he did not restrict the section to the full extent of that submission, he certainly took the view, which was also expressed by Ackner L.J. and concurred in by Sir David Cairns, that the section applies only to facilities which are akin to the provision of goods and services. Ackner L.J., at p. 1044, held that "facilities" because of its juxtaposition to goods and services must not be given a wholly unrestricted meaning

F but must be so confined.

G I reject this reasoning. I derive no assistance from subsection (2) in construing subsection (1) of section 29. I can find no trace of this House accepting any such assistance when in *Race Relations Board v. Applin* [1975] A.C. 259 (the "foster-parent" case) this House had to consider the directly comparable provision in section 2 (1) and (2) of the Race Relations Act 1968. Section 29 (2) does no more than give examples of facilities and services. It is certainly not intended to be exhaustive. If

H

some of its examples are “market-place activities” or facilities akin to the provision of goods and services, others are not: I refer, in particular, to examples (a), (d), and (g). And, if the subsection cannot, as I think it cannot, be relied on as a guide to the construction of subsection (1), one is left only with Ackner L.J.’s point as to the juxtaposition of goods, facilities and services in subsection (1). A

This is too slight an indication to stand up to the undoubted intention of Parliament that the Act is to bind the Crown. Section 85 (1) provides: B

“This Act applies—(a) to an act done by or for purposes of a Minister of the Crown or government department, or (b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office, as it applies to an act done by a private person.”

An attempt was made in reliance upon the concluding three words of the subsection to argue that in its application to the Crown the Act is limited to the sort of acts which could be done by a private person, e.g. “market-place activities” or the provision of facilities akin to the provision of goods and services. I do not so read the subsection. It means, in my judgment, no more and no less than that the Act applies to the public acts of Ministers, government departments and other statutory bodies on behalf of the Crown as it applies to acts of private persons. It would be inconceivable that the generality of subsection (1) (a) and (b) could be restricted by words which in drawing a distinction between two classes of act are intended to show that the distinction is immaterial. I cannot accept that so short a tail can wag so large a dog. C

Section 52 also is consistent with the view that the Act has a wide cover in respect of acts of the Crown. It is designed to ensure that nothing in Parts II to IV of the Act (which include section 29) shall render unlawful an act done for the purpose of safeguarding national security. D

Accordingly I think that on this point *Reg. v. Immigration Appeal Tribunal, Ex parte Kassam* [1980] 1 W.L.R. 1037 was wrongly decided. In my view, the granting of leave to enter the country by provision of a special voucher or otherwise is the provision of a facility to a section of the public. Indeed, I have no doubt that some see it as a very valuable facility. It is certainly much sought after. Section 29 (1) is wide enough, therefore, to cover the special voucher scheme which, in my judgment, is properly described as offering a facility to some members of the public, i.e. United Kingdom passport holders, who seek access to this country for the purpose of settlement but have no lawful means of entering other than by leave. E

In the course of argument, your Lordships’ attention was drawn to the Court of Appeal’s decision in *Savjani v. Inland Revenue Commissioners* [1981] Q.B. 458 in which it was held that by putting the plaintiff because of his ethnic origin to a higher standard of proof of his entitlement to a tax relief than is normally required of a claimant the revenue had unlawfully discriminated against him in the provision of services to the public within the meaning of section 20 (1) (b) of the Race Relations Act 1976. The decision was, I am satisfied, correct and is certainly consistent with the approach which I would hold that the courts should adopt to section 29 (1) of the Sex Discrimination Act. But it was a different case on its facts from this case in that the revenue did provide, however informally, an advisory service to taxpayers seeking guidance on their problems. F

For these reasons I would hold that the special voucher scheme in so far as it discriminates between wives and husbands is unlawful under G

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- A sections 1 and 29 (1) of the Sex Discrimination Act. Even if there should be doubt, I would certainly say that the appellant has an arguable case which she could reasonably take to appeal before an adjudicator, namely that the entry clearance officer had erred in law in refusing to treat her as eligible for a special voucher. The third issue remains. I can take it very shortly. So much time has elapsed, so many fresh circumstances may have arisen since the refusal of her application in May 1976 that I would not
- B order mandamus to go to the entry clearance officer. But the appellant is entitled to a declaration that his refusal to entertain her application for the reason which he gave was contrary to law. This would enable her, if so advised, to submit a further application. If she should again be met by a refusal, she has her right of appeal: and, if she succeeds on appeal, the adjudicator has power under section 19 (3) of the Immigration Act to give
- C directions or make recommendations to the Secretary of State.

Accordingly, I would allow the appeal.

- LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scarman. I agree with his conclusions on each of the two questions of law raised by this appeal, and with the reasons on which he has based
- D those conclusions. It follows that I too would allow the appeal.

LORD BRIGHTMAN. My Lords, I approach this case by endeavouring to ascertain the scheme of the Immigration Act 1971 and the rules made thereunder.

- Part I of the Act is concerned with the regulation of entry into the
- E United Kingdom, and stay after entry. Section 2 confers a right of abode on certain citizens of the United Kingdom and Colonies, and others. Such persons are described as "patrial." They have complete freedom to come and go. Under section 3 (1) persons who are not patrial are precluded from entering the United Kingdom unless given leave to do so in accordance with the Act. Subsection (2) requires the Secretary of State to lay before
- F Parliament statements of the rules laid down by him as to

"the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . ."

- The content of these rules (which are called in the Act "the Immigration Rules") appears to be in the discretion of the Secretary of State. Though
- G laid before Parliament, the Immigration Rules are not subject to any annulment procedure. If, however, a statement of the rules is disapproved by either House within a time limit, the Secretary of State is under a duty to make such changes thereto as appear to him to be required in the circumstances. Under subsection (9), a person seeking to enter the United Kingdom and claiming to be patrial is, in certain circumstances, required to prove the fact by means of a certificate of patriality under the
- H Immigration Rules.

Under section 4, the power to give or refuse leave to enter the United Kingdom is to be exercised by immigration officers, while the power to give leave to remain in the United Kingdom is to be exercised by the Secretary of State.

Part II of the Act is concerned with appeals. Section 13 (1) provides that a person who is refused leave to enter the United Kingdom may appeal to an adjudicator (a) against the decision that he requires leave,

or (b) against the refusal of leave. Under subsection (2) a person who is refused (a) a certificate of patriality, or (b) an entry clearance, may appeal to an adjudicator against the refusal. This is the first use of the expression "entry clearance." Under the interpretation section (section 33), except in so far as the context otherwise requires, an "entry clearance" means

"a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence of a person's eligibility, though not patial, for entry into the United Kingdom (but does not include a work permit); . . ."

The expression "entry certificate" is not, I think, again used in the Act.

In January 1973 the Secretary of State laid before Parliament a Statement of Immigration Rules for Control on Entry: Commonwealth Citizens, (H.C. 79) pursuant to section 3 (2) of the Act. This statement was an amended version of earlier Immigration Rules. A corresponding statement was made at the same time relating to E.E.C. and other non-Commonwealth nationals (H.C. 81). These were the rules in force at the relevant time. They were later amended, and subsequently amalgamated into a single statement which was laid before Parliament in February 1983. The current version of the Rules is not relevant to this appeal.

The Commonwealth Immigration Rules apply to a Commonwealth citizen or British protected person who is required by the Act to have leave to enter (except a crew member of a ship, aircraft, or hovercraft). He is called in the Rules a "passenger." The Rules, as required by section 3 (2) of the Act, regulate both entry and stay.

Paragraphs 10 to 13, headed "Entry clearances," contain an introduction to the system of entry clearances. Under paragraph 10, a Commonwealth citizen who wishes to ascertain in advance whether he is "eligible for admission" to the United Kingdom is advised to apply to the appropriate British representative abroad, for the issue of an "entry certificate." Paragraph 11 provides that a person seeking admission as a wife, child, or other dependant, of a person settled in the United Kingdom, or of a person admitted for employment, or as the husband or fiancé of such a person, must hold a current entry certificate issued for that purpose. Paragraph 12 provides that entry certificates

"are to be taken as evidence of the holder's eligibility for entry to the United Kingdom, and accordingly accepted as 'entry clearances' within the meaning of the Act."

Paragraph 12 also provides that a person who holds a duly issued current "entry clearance" is not to be refused leave to enter save in special circumstances such as concealment of material facts.

To sum up the position so far, except where otherwise provided by the rules a Commonwealth citizen, who is required by the Act to have leave to enter, has a choice. He may present himself to an immigration officer at the point of entry, establish that he is eligible under the Rules for entry into the United Kingdom, and seek leave to enter accordingly; alternatively, he may apply, in advance, for an "entry certificate" which, if granted, will be prima facie evidence of his eligibility for entry; but in some instances it is expressed to be mandatory to apply in advance for an "entry certificate." Paragraph 11 is an example. An entry clearance is, by definition, a document which, in accordance with the immigration rules, is to be taken as "evidence of eligibility" for entry into the United Kingdom. One species of entry clearance is an "entry certificate." Under the comparable State-

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A ment of Immigration Rules for Control on Entry: E.E.C. and Other Non-Commonwealth Nationals there are two other species of entry clearances, the visa and the Home Office letter of consent—see paragraphs 8, 9 and 10; these again “are to be taken as evidence of the holder’s eligibility for entry to the United Kingdom”; see paragraph 10 of the non-Commonwealth rules.

B The code of eligibility for Commonwealth citizens is set out in Parts II, III and IV of the Commonwealth Immigration Rules. Part II defines eligibility for entry of a person who seeks entry as a temporary visitor; or for private medical treatment; or as a student; or as an “au pair.” It is apparent, particularly from paragraphs 18 to 21, that such a person may either take the risk of satisfying the immigration officer at the point of entry, or he may apply in advance for an entry certificate. These paragraphs refer, in fact, to an “entry clearance,” which is perfectly accurate, but the form which the entry clearance will take, if sought in advance, will (presumably) be an “entry certificate.”

C Part III of the Immigration Rules defines the eligibility for entry of a person who seeks entry for employment; or as a businessman; or as a person of independent means; or as a self-employed person; or as the wife or young child of any such person so admitted. A person so seeking to enter the United Kingdom may present himself at the point of entry with no prior clearance and seek to satisfy the immigration officer of his eligibility, or he may provide himself with an entry clearance in advance. This emerges clearly in paragraph 35 (Person of independent means) and paragraph 36 (Self-employed persons). It is implied in other paragraphs.

D Part IV of the rules contains a code of eligibility for persons who come to the United Kingdom for settlement. It starts with paragraph 38. This is the paragraph, and the only paragraph, which refers to “special vouchers” and it contains the problem with which your Lordships are faced. The remaining paragraphs of Part IV are straightforward. It is, I think, easier to understand paragraph 38 if one goes first to the later paragraphs. They all deal with the eligibility for entry into the United Kingdom for settlement of persons who are dependent on, or associated with, persons already settled or about to be settled. Paragraphs 39 to 46 deal with the admission for settlement of dependants of persons already in the United Kingdom, or being admitted. Under these paragraphs it must be shown that the person already settled, or about to be settled, in the United Kingdom is able and willing to support and accommodate his dependants without recourse to public funds, except in the case of a wife or young child of a Commonwealth citizen who is patrilial, or was settled in the United Kingdom on the coming into force of the Act. Paragraph 40 provides that a person seeking admission as a dependant under Part IV must “hold a current entry clearance granted to him for that purpose”; compare paragraph 11 to exactly the same effect. In other words, such a dependant must prove his eligibility in advance of presenting himself to the immigration officer at point of entry. Paragraphs 41 and 42 deal with the eligibility of a wife, or woman living in permanent association with, a person already settled or about to settle in the United Kingdom. Paragraphs 43 and 44 deal with the eligibility of young children whose parent, or parents, are settled or about to settle. Paragraph 45 defines the eligibility of parents and grandparents of a person settled in the United Kingdom. Paragraph 46 defines the eligibility of a distressed relative of a brother, sister, aunt or uncle of a person settled in the United Kingdom. In each of these cases

the paragraph is expressed to be subject to paragraph 40, so that the person seeking entry must provide himself or herself in advance with an "entry clearance" as evidence of eligibility. Paragraphs 47 to 50 define the eligibility of a husband, fiancé or fiancée of a person already settled in the United Kingdom, and similarly require that the person seeking entry shall hold a current entry clearance issued for that purpose. Paragraphs 51 to 53 define the eligibility for entry into the United Kingdom for settlement of a person who has lived here before. These last paragraphs envisage that the application will be dealt with at point of entry by an immigration officer, but presumably the passenger can, if he chooses, apply for an entry clearance in advance in the form of an entry certificate.

I return now to paragraph 38. It relates to the case of a person who is a citizen of the United Kingdom and Colonies and holds a United Kingdom passport. The event supposed is that the passenger presents a special voucher issued to him by a British Government representative overseas (or an entry certificate in lieu). In that event the passenger is to be admitted for settlement. The paragraph continues with the words,

"as are his dependants if they have obtained entry certificates for that purpose and satisfy the requirements of paragraph 39; but such a passenger who comes for settlement without a special voucher or entry certificate is to be refused leave to enter."

So the passenger seeking to be admitted for settlement must either present a special voucher, or, if he is a dependant (or the like), an entry clearance, which will presumably be in the form of an entry certificate. I attach no significance to the reference to an "entry certificate in lieu of" of a special voucher, nor did counsel in their addresses to this House.

It emerges from the form of the rules that an entry certificate is a travel document which is issued to an intending passenger for the purpose of providing him with *prima facie* evidence that he is eligible for entry into the United Kingdom, because he satisfies the rules which apply to a visitor, student, au pair, worker for employment, businessman, person of independent means, self-employed person, or dependant or the like. All such persons, if they do not wish or under the rules are not allowed to prove their eligibility at the point of entry, must prove that they come within the rules by obtaining an entry clearance in the form of an entry certificate.

I turn to the "special voucher." Its nature is not explained in the immigration rules. Unquestionably it is not the same as an entry certificate. It is not expressed to be a document provided to a passenger in advance of his journey as *prima facie* evidence that he comes within any rule contained in the immigration rules. The evidence before your Lordships as to the nature of the special voucher is contained in the affidavit of Mr. Wingfield of the Home Office, and may be summarised as follows:

"The special voucher scheme was introduced following the Commonwealth Immigrants Act 1968 . . . Special vouchers . . . are primarily intended for people who are subject to pressure in their countries of residence and who have nowhere else to go. The scheme allows heads of households and their families into this country for settlement on an annual quota basis notwithstanding the fact that they may be otherwise ineligible for entry under the immigration rules."

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A I think that the words "and their families" should be qualified to this extent; it is clear beyond argument from paragraphs 38, 40, and 41 et seq. of the immigration rules that a family is admitted, not because the members have been presented with special vouchers, but because they are in possession of current entry clearances (entry certificates) granted for that purpose, which they can obtain as dependants of a person "who is on the same occasion given indefinite leave to enter": see paragraphs **B** 39 and 40.

I turn now to reconsider the definition of "entry clearance" in section 33 of the Act, and the inclusion of that expression in section 13 (2) dealing with the right of appeal. Whatever may be the technical form of the appellant's application, the real issue as it has developed is whether a special voucher is an entry clearance within the meaning of the Act so that its refusal is subject to the appeal procedure in section 13.

C Subsection (1) of section 13 gives a right of appeal to a person against a decision that he requires leave to enter or against the refusal of leave to enter. Subsection (2) gives a right of appeal to a person who is refused a certificate of patriality (under subsection (9) of section 3) or is refused an entry clearance. The second limb of subsection (1) is to be contrasted with the second limb of subsection (2). Subsection (1) is dealing with a refusal of leave to enter at the point of entry, and subsection (2) is dealing with the refusal of an entry clearance in advance of entry. Only the second limb of subsection (2) is in point in this appeal.

D An entry clearance is a defined expression. It does not mean any document which lets the holder past the immigration officer. It is confined to

E "a . . . document which, in accordance with the immigration rules [i.e. by definition, the rules laid down under section 3], is to be taken as evidence of a person's eligibility, though not patial, for entry into the United Kingdom."

For example, a document proving the eligibility of a dependant under any of paragraphs 39 to 46; or proving the eligibility of a student under paragraphs 18 to 20; or proving the eligibility of a person coming for employment under paragraph 29; or proving the eligibility of a businessman under paragraphs 32 and 33; or proving the eligibility of a person of independent means under paragraph 35; or proving the eligibility of a self-employed person under paragraph 36. All those persons, if intending entrants, may apply for an entry clearance which they can produce to the immigration officer as evidence that they fall within the rules.

G A special voucher is entirely different. Its purpose is not to provide prima facie evidence that the holder is eligible under the rules. That is the purpose of an entry certificate, in the case of a Commonwealth passenger, and of a visa or Home Office letter, in the case of a non-Commonwealth passenger. There is no rule compliance with which is evidenced by a special voucher. No immigration rule has been promulgated under section 3 (2) which defines eligibility for the grant of a special voucher. Its issue is not a matter of eligibility and its object is not to provide evidence of compliance with any rules. There is a temptation to regard an entry clearance as a document which clears the holder for entry into the United Kingdom. I think that it has a narrower meaning. It is a certificate (in neutral terms) which signifies to an immigration officer that the holder has produced, in advance, to the British represen-

Lord Brightman **Reg. v. Entry Clearance Officer, Ex p. Amin (H.L.(E.))** **[1983]**

tative at the passenger's place of residence the evidence which otherwise he would have to produce to the immigration officer at the point of entry in order to satisfy the officer that he should be given leave to enter. The expression "entry clearance" in the Act comes into use mainly in connection with appeals, and it is altogether sensible that the appellate procedure should be confined to cases where there are defined rules of entry. A

The view which I have sought to express is no more than an extended version of the reasoning in the judgment of Lord Lane C.J., which was accepted by the other two members of the Divisional Court, and also by the three members of the court on appeal. It is a view which initially I did not espouse because I thought it too narrow. But on reflection, I think that the opposite view fails to give weight to the words "which, in accordance with the immigration rules, is to be taken as evidence of a person's eligibility, though not patial, for entry . . ." The Immigration Rules abound with instances where an entry clearance is requisite or desirable as evidence of the fulfilment of conditions. If the appellant's argument is correct, the words I have quoted in parenthesis might as well be replaced by the words "which permits entry . . ." B
C

In the result, although the appellant is entitled to apply for an entry certificate, and to appeal if her application is refused, she has no right to appeal against the refusal of a special voucher which is not an "entry clearance" within the specialised meaning of that expression in section 33. D

The conclusion on this first issue reached by the majority of your Lordships is sufficient to dispose of the matter. I desire, however, to add that I am in agreement with the views expressed by my noble and learned friend, Lord Fraser of Tullybelton, on the application of the Sex Discrimination Act 1975. E

I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Suchak & Kanji, Wembley; Treasury Solicitor.*

M. G. F

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3 W.L.R.

A [COURT OF APPEAL]

BLACKSHAW v. LORD AND ANOTHER

[1979 B. No. 5225]

B 1982 Dec. 13, 14, 15, 16, 17; Stephenson, Dunn and Fox L.JJ.
1983 Feb. 17

Libel and Slander—Privilege—Qualified—Reporter eliciting information from government department press officer—Inevitable inference of fact drawn from information—Publication of inference in newspaper—Whether matter “issued . . . by or on behalf of . . . government department”—Whether privilege extending to fair information on matter of public interest—Defamation Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 66), s. 7 (1) (3) (4), Sch., Pt. II, para. 12

C On July 23, 1979, in proceedings held in public but not attended by the press, the Public Accounts Committee of the House of Commons heard evidence that credit interest relief grants payable to British industries under a Department of Energy scheme had been approved by the department's Offshore Supplies Office staff in breach of guidelines laid down by the department and that an Under Secretary in Glasgow had been reprimanded. Some of the evidence before the committee on that occasion was disclosed at a press conference held on September 12 and the committee chairman stated that an unnamed senior department official in Scotland had been reprimanded. Later, on the same day, the first defendant, a journalist who had attended the conference, telephoned one of the department's press officers to elicit the name of the official concerned. The following day an article headed “Incompetence at ministry cost £52 million” was published in the second defendants' newspaper. After stating that a number of senior civil servants had been reprimanded following the committee's investigations, the article named the plaintiff as the official in charge of the Offshore Supplies Office at the material time and stated that he had resigned from the civil service. Four days after publication of the article, the committee were told that they had been misinformed on July 23, and that no Under Secretary had been reprimanded. The plaintiff commenced proceedings against the defendants alleging that part of the article was libellous in that it bore the meaning that by reason of the plaintiff's incompetence and inefficiency as the official in charge of the Offshore Supplies Office, £52 million of public money had been lost or improperly paid and that in consequence the plaintiff had been reprimanded and forced to resign. The defendants denied that the article was defamatory of the plaintiff and pleaded, *inter alia*, that the article was a fair and accurate report or summary of matter issued for the information of the public by or on behalf of a government department and was therefore privileged by virtue of section 7 of and paragraph 12 of Part II of the Schedule to the Defamation Act 1952¹; and that the defendants had a legitimate duty or interest to publish the words complained of and the newspapers' readers had a corresponding interest therein; and that the article was accordingly privileged at common law.

H At the trial of the action before a judge and jury, while there was no dispute as to the information given to the first

¹ Defamation Act 1952, s. 7: see post, p. 298E-F.
Sch., Pt. II, para. 12: see post, p. 298G-H.

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defendant at the press conference, the contents of his subsequent telephone conversation with the department's press officer were in issue. The first defendant gave evidence that the press officer had told him that the Under Secretary involved must have been the plaintiff and produced a contemporaneous note of the conversation which contained the words: "Must be Blackshaw." The press officer denied naming the plaintiff but admitted that the first defendant would inevitably have come to the conclusion that the relevant Under Secretary was the plaintiff from the information supplied to him. On the question of statutory privilege, the judge, assuming for the purpose of his ruling that the article was a fair and accurate report or summary of information given to the first defendant by the press officer, ruled that information disclosed by the press officer as a government department official acting in the course of his employment, to the first defendant as a member of the press, was privileged under paragraph 12 of the Schedule to the Act of 1952. On the question of common law privilege, the judge ruled that if the facts were that the first defendant, on his interrogation of the press officer, concluded that there had been maladministration of the grants; that a substantial sum of money was involved; that the person responsible for administering the scheme was the plaintiff; and that it had been conveyed to him that the Under Secretary referred to by the Public Accounts Committee must have been the plaintiff, then the public would want to know those facts and the newspaper would have a duty to bring them to the attention of the public and, accordingly, the article was privileged at common law. The jury found that the words complained of were defamatory of the plaintiff and did not constitute a fair and accurate report or summary of what the press officer told the first defendant and they awarded the plaintiff £45,000 aggravated damages.

On the defendants' appeal on the ground, *inter alia*, that as a result of the judge's rulings on privilege, no issue remained for the jury to determine; and on the plaintiff's notice seeking to uphold the verdict and judgment on the additional ground that no qualified privilege attached to the article by statute or at common law:—

Held, dismissing the appeal, (1) that there was material which entitled the judge to leave to the jury the question whether the words complained of constituted a fair and accurate report or summary of what was said by the press officer to the first defendant and there was evidence upon which the jury were entitled to find that they were not (post, pp. 295G, 296H—297B, 307B, 314G—H).

(2) That, although the damages awarded were high, it was the function of the jury to assess the damages and the court could only reduce the award if it could be shown that the damages were so high that no reasonable jury could have awarded them or unless the jury were misled or took into account matters that they should not have considered; and that, in circumstances where the defendants' conduct aggravated rather than mitigated against the damage and the jury had reached their decision after a clear and helpful direction by the judge, it could not be said that no reasonable jury could have awarded the sum of £45,000 (post, pp. 302C—F, 303A, 304H—305A, 306B, H—307B, 313C—D, H—314A, 316G—H, 317H—318A).

Per curiam. (i) Common law privilege applies where defamatory information is published in pursuance of a legal, social or moral duty to persons having a corresponding duty or interest to receive it, but does not cover "fair information on a matter of public interest" where there is no duty to publish (post, pp. 300H—301C, 302A—B, 307H—308A, 310A—C, 315C—D).

3 W.L.R.

Blackshaw v. Lord (C.A.)

- A** *Adam v. Ward* (1915) 31 T.L.R. 299, C.A.; [1917] A.C. 309, H.L.(E.) followed.
- Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535 considered.
- London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607 approved.
- (ii) Statutory privilege under paragraph 12 of Part II of the Schedule to the Defamation Act 1952 relates to statements of a genuinely official nature formally issued for the information of the public, and does not cover information for which a government department or other body does not accept responsibility (post, pp. 298H—299E, 312B–C, E–G, 314H).
- B** Dicta of Jordan C.J. in *Campbell v. Associated Newspapers Ltd.* (1948) 48 N.S.W.S.R. 301, 303 applied.
- Per Dunn L.J.* It is the greatest pity that none of the recommendations in the Report of the Committee on Defamation (1975) has been implemented by legislation. In particular, the amendments to the Schedule to the Defamation Act 1952 contained in Appendix XI of the Report would serve to clarify an obscure and technical branch of the law (post, p. 314B–C).
- C** Verdict of jury and judgment of Caulfield J. entered thereon affirmed.
- D** The following cases are referred to in the judgments:
- Adam v. Ward* (1915) 31 T.L.R. 299, C.A.; [1917] A.C. 309, H.L.(E.).
- Boston v. W. S. Bagshaw & Sons* [1966] 1 W.L.R. 1126; [1966] 2 All E.R. 906, C.A.
- Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.(E.).
- Campbell v. Associated Newspapers Ltd.* (1948) 48 N.S.W.S.R. 301.
- E** *Chapman v. Ellesmere* [1932] 2 K.B. 431, C.A.
- Cox v. Feeney* (1863) 4 F. & F. 13.
- Croke v. Wiseman* [1982] 1 W.L.R. 71; [1981] 3 All E.R. 852, C.A.
- Dunford Publicity Studios Ltd. v. News Media Ownership Ltd.* [1971] N.Z.L.R. 961.
- Gillard v. Goldsmith* (unreported), January 19, 1981; Court of Appeal (Civil Division) Transcript No. 0014 of 1981, C.A.
- F** *Gilpin v. Fowler* (1854) 9 Exch. 615.
- Hayward v. Thompson* [1982] Q.B. 47; [1981] 3 W.L.R. 470; [1981] 3 All E.R. 450, C.A.
- Jones v. Brough* (unreported), July 10, 1981, Glidewell J.
- Lewis v. Daily Telegraph Ltd.* [1963] 1 Q.B. 340; [1962] 3 W.L.R. 50; [1962] 2 All E.R. 698, C.A.; [1964] A.C. 234; [1963] 2 W.L.R. 1063; [1963] 2 All E.R. 151, H.L.(E.).
- G** *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607; [1968] 1 All E.R. 1075; [1969] 2 Q.B. 375; [1969] 2 W.L.R. 409; [1969] 2 All E.R. 193, C.A.
- McCarey v. Associated Newspapers Ltd. (No. 2)* [1965] 2 Q.B. 86; [1965] 2 W.L.R. 45; [1964] 3 All E.R. 947, C.A.
- Perera v. Peiris* [1949] A.C. 1, P.C.
- H** *Praed v. Graham* (1890) 24 Q.B.D. 53.
- Purcell v. Sowler* (1877) L.R. 2 C.P. 215, C.A.
- Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535; [1960] 3 W.L.R. 352; [1960] 2 All E.R. 789.
- Yousoupoff v. Metro-Goldwyn-Mayer Pictures Ltd.* (1934) 50 T.L.R. 581.

No additional cases were cited in argument.

APPEAL

By a writ dated October 26, 1979, the plaintiff, Alan Blackshaw, claimed damages for libel written by the first defendant, Rodney Lord, a journalist, and published by the second defendants, the Daily Telegraph Ltd., on p. 1 of the issue of the "Daily Telegraph" newspaper for September 13, 1979. On February 26, 1981, after the trial of the action before Caulfield J. and a jury, judgment was entered for the plaintiff in the sum of £45,000.

By a notice of appeal dated May 5, 1981, the defendants appealed against the jury's verdict and the judgment entered thereon on the grounds, *inter alia*, (1) that the judge ruled that upon certain stated hypothetical assumptions of fact, the defendants had a strict duty to publish the words complained of and accordingly a common law privilege attached thereto, but he wrongly refused to enter judgment for the defendants although on the evidence the facts accorded with the hypothetical assumptions; (2) that the judge wrongly rejected the defendants' submission that, upon his ruling that the occasion of publication was one of qualified privilege at common law, the privilege attached whether the defendants obtained the information that the person referred to in the Public Accounts Committee of the House of Commons was the plaintiff from the press officer or from some other person or source, and accordingly the judge was wrong in refusing to enter judgment for the defendants, there being no issue to go to the jury; (3) that upon the evidence the article complained of was a fair and accurate report or summary of statements made to the journalist by the press officer and the Public Accounts Committee chairman and accordingly the judge was wrong, in the light of his ruling as to the existence of a statutory privilege, to refuse to enter judgment for the defendants and/or the jury's verdict was unreasonable.

By a respondent's notice dated May 15, 1981, the plaintiff gave notice of his intention of contending on the appeal that the verdict and judgment should be affirmed on the additional grounds that (1) spontaneous remarks uttered by the Department of Energy spokesman in a telephone conversation with the journalist did not constitute "any notice or other matter issued for the information of the public by or on behalf of any government department" within the meaning of paragraph 12 of Part II of the Schedule to the Defamation Act 1952, nor did the words complained of constitute a fair and accurate "report or summary" of any such matter, for the purpose of the paragraph; and (2) the defendants' article was not subject to qualified privilege at common law whether in relation to that part of it which purported to report the press officer's comments or at all.

The facts are stated in the judgment of Stephenson L.J.

Peter Bowsher Q.C. and *James Price* for the defendants.
David Eady for the plaintiff.

Cur. adv. vult.

February 17, 1983. The following judgments were read.

STEPHENSON L.J. This is an appeal by the defendants, the Daily Telegraph Ltd. and their economics correspondent, Mr. Lord, against a verdict of a jury and judgment entered thereon by Caulfield J. on

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A February 26, 1981, for £45,000 damages for a libel on the plaintiff, Mr. Blackshaw.

The libel complained of is contained in the heading and the first four paragraphs of an article written by Mr. Lord, the first defendant, and published by the second defendants in the first edition of the "Daily Telegraph" for September 13, 1979. The whole article reads:

B " 'INCOMPETENCE' AT MINISTRY COST £52M.

" by Rodney Lord, Economics Correspondent

" A Government Department has paid North Sea oil companies £52 million in grants which they should not have received. The money is unlikely to be repaid.

C " Investigations by the Exchequer and Audit Department and the Public Accounts Committee of the House of Commons have led to a number of senior civil servants being reprimanded.

" Mr. Alan Blackshaw, the official in charge of Offshore Supplies Office when the payments were being made, resigned from the civil service last month.

D " Mr. Joel Barnett, Labour M.P. for Heywood and Royston and chairman of the Public Accounts Committee yesterday described the events as ' a story of inefficiency, incompetence, inadequate staff and inadequate supervision.'

" But he emphasised that there had been no fraud.

" In so far unpublished evidence to the committee Sir Jack Rampton, Permanent Secretary of the Energy Department, admitted that there had been ' a number of irregularities.'

E " He added: ' By that I mean on the one hand mistakes and, on the other, decisions to depart from the guidelines which were agreed with the Treasury and published for the benefit of industry without the necessary consultation ' within the Department or with the Treasury as was necessary in certain cases.

F " ' That is a fact and I'm not attempting to argue with that at all.'

" LATE APPLICATIONS

G " The money paid consisted of grants under a scheme to provide interest relief on goods and services supplied for North Sea operations by British companies. Under the scheme introduced in 1973 companies are entitled to grants of 3 per cent. a year on 80 per cent. of the value of qualifying contracts.

" Until last November there was a time limit of three months to apply for interest rate relief. But relief was paid on applications which fell outside the period.

" The £52 million constitutes about a third of the total relief of £150-160 million.

H " The scheme is to be terminated at the end of the present financial year.

" Sir Jack in his evidence said that an Under Secretary and a number of assistant secretaries had been reprimanded. Their promotion prospects are understood to have been affected."

The plaintiff does not complain of the last paragraph or of anything but the first four paragraphs. They are alleged to mean that by reason

of the plaintiff's incompetence and inefficiency as the official in charge of the Offshore Supplies Office £52 million of public money had been lost or improperly paid and in consequence the plaintiff had been reprimanded and compelled to resign from the civil service. A

The defendants denied that those paragraphs were defamatory, and alternatively alleged that they were privileged in as many as three different ways. The jury found in answer to the first question put to them by the judge that the words complained of were defamatory of the plaintiff and from that finding there is no appeal. The second question they were asked was: B

“Are the words complained of in the context of the ‘Daily Telegraph’ article as a whole a fair and accurate report or summary of what was said by Mr. Martyn Smith, the Department of Energy Press Officer, to Mr. Rodney Lord, the ‘Daily Telegraph’ journalist?” C

They answered that “No,” and in answer to the third question, “What sum do you all propose as damages?” they gave the answer: “£45,000.”

The second question follows a ruling of the judge which is the subject of criticism by the plaintiff in a respondent's notice contending that the verdict and judgment should be affirmed on additional grounds. The defendants contend that the judge should not have left the question to the jury and the jury should not have answered it as they did. The judge should have entered judgment for the defendants because after his ruling on qualified privilege there was, in the absence of any plea of malice, no issue to go to the jury. To explain the rulings and the contentions of the parties on the issues of privilege to which the unusual facts of the case gave rise, it is necessary to state those facts in some detail. D

The plaintiff had a distinguished scholastic career and distinguished service in the Royal Marines before he entered the Home Civil Service in 1956, in which he served until August 10, 1979. During those years he wrote and published a standard handbook on mountaineering and worked at another on skiing, two activities in which he is a recognised expert. In 1974 he was promoted at the early age of 41 to the rank of Under Secretary in the newly created Department of Energy and was posted to Glasgow as Deputy Director General of the Offshore Supplies Office set up there when that office was moved from London. In 1977 he succeeded another Under Secretary as Director General and occupied that responsible position until November 1978, when he was transferred to London to be Head of the Coal Division in the Department of Energy. But he found living in Scotland and working in London expensive and tiring; he wanted to devote more time to complete his book on skiing and other works. So he resigned, as has been said, in August 1979 for a career as business consultant and author, and was presented with a silver tankard on behalf of the Department by the Permanent Under Secretary of State for the Department, Sir Jack Rampton, to whom he had given notice of his resignation a month earlier. E F G

The Offshore Supplies Office had the task of assisting British industry in developing oil and gas resources in the North Sea. To that end the Department of Energy arranged a scheme for granting interest relief. I take this account of it from the opening paragraphs of the Third Report from the Committee of Public Accounts, Session 1979–80, ordered by the House of Commons to be printed on November 26, 1979: H

“1. In 1973 the Treasury approved arrangements made by the Department of Energy for giving financial assistance under section 8

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A of the Industry Act 1972 in the form of interest relief grants to reduce the cost to companies developing oil and gas resources on the U.K. continental shelf of credit obtained to finance the supply of United Kingdom goods and services. These supplies do not qualify for Export Credits Guarantee Department assistance and the interest relief grant scheme was intended to compensate in some measure for the preferential export credit rates available to overseas suppliers.

B Under the arrangements the Department pay grants at three per cent. per annum on not more than 80 per cent. of the value of qualifying contracts for fixed offshore installations, equipment, goods or services of not less than £100,000. Applicants must have obtained credit to finance their contracts through specified banks and the Department issue the grants as periodic payments for up to eight years, allowing three years for drawing loans and five years for their repayment. Applicants are subject to corporation tax on the grants they receive.

C

D “2. In 1974 the Department issued a Guide for Industry setting out the detailed rules and procedures approved by the Treasury for submission of claims and calculation of grants. The Guide formed the written operating instructions which staff in the Department's Offshore Supplies Office were required to follow when considering applications for grants under the interest relief grants scheme. It provided for the initial application to cover a period not exceeding 12 months, and subsequent applications periods of six or 12 months, and allowed three months from the end of each period for the submission of claims.”

E The committee, under the chairmanship of Mr. Joel Barnett, M.P., heard evidence in public on July 23, 1979, and again on October 31, 1979. Paragraph 3 of the report shows that the committee were investigating after a report by the Comptroller and Auditor General. That paragraph reads:

F “A test examination by the Comptroller and Auditor General's staff of claims and supporting documents relating to grants paid up to June 1978 showed that a number of payments had been approved which differed from those allowable on a strict interpretation of the Guide. The Department accepted that there had been six cases involving the rules for reckoning the amount of borrowing qualifying for grant and resulting in overpayments totalling £1,912,000, a further six cases where grants totalling £640,000 had been paid in respect of claims rendered after expiry of the three months' period allowed for submission, and other cases of failure to convert foreign currency borrowing to sterling in the manner specified in the Guide. In some cases excessive grant payments had been caused by clerical error in calculations but in other cases there had been conscious departures from the terms of the Guide.”

G

H On July 23 the chairman asked Sir Jack Rampton this question:

“118. There seems to have been a rather disturbing failure of public expenditure control as far as one can see, which no doubt you will have been looking into very carefully. What weaknesses have you identified, and who were responsible for those weaknesses?”

In a long answer Sir Jack explained that there had been irregularities including:

“decisions to depart from the guidelines which were agreed with the Treasury . . . without the necessary consultation within the Department or with the Treasury . . .” A

He gave as reasons the unforeseen complexity of the scheme; the lack of continuity—when the Department of Energy was split off from the Department of Trade and Industry; the move of the Offshore Supplies Office from London to Glasgow with consequent taking of decisions by the operating staff without reference to senior officers and without sufficient supervision of the operating staff; an unlucky failure of internal audits to reveal the irregularities. He concluded his answer by saying: B

“The decisions—and they will be detailed here—which were taken by those running the scheme, and which resulted in decisions which were not in line with the guidelines, were not, in my view, stupid decisions. They were sensible decisions, apart from a limited number of mistakes. They were sensible decisions which might, in my view, have led to adjustments and changes in the scheme at an earlier stage had they been pursued in the proper way. After all, in a scheme of this kind, one has reason to expect that there would be modifications of guidelines in the light of experience which, because of the events that I have just been talking about, did not, of course, happen.” C D

At p. 8 of the report is to be found in the examination of Sir Jack Rampton the following question and answer:

“172. Has there been any talk of disciplinary action against the people responsible?—All the people involved have been reprimanded. Of course, it will stand to their account for the future. A number of the people concerned were immediately transferred elsewhere and clearly this will be a serious disadvantage for them in future years.” E

At p. 17 of this report are printed the following questions addressed to Sir Jack Rampton and his answers to them:

“225. What is the most senior level of civil servant who has been reprimanded?—It goes to Under Secretary.* F

“226. That would be the Under Secretary based in Glasgow?—Yes.*

“227. So that in the opinion of the Department there is no blame to be attached to anyone based in London?—No, I did not say that. Within that, yes, assistant secretaries as well.

“228. But not enough blame to justify a reprimand? It is the people in Glasgow who have been held responsible?—No, I was talking about all the people involved, whether they were in London or not, or in Glasgow. That concerns people in London, too. G

“229. But the most senior level would be somebody at Glasgow who has been reprimanded?—That is right.” H

The asterisks call attention to a footnote in these terms:

“The witness subsequently submitted the following note to the chairman of the committee: ‘On checking the proof of the evidence given on July 23, I am afraid I find with the greatest regret that I misinformed the Public Accounts Committee in my reference to the reprimand of an Under Secretary of the Offshore Supplies Office in Glasgow (paras. 225–226 of the draft evidence). In fact no Under

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- A Secretary has been reprimanded and I ask the committee to accept my most sincere apologies for this mistake.’”

The date of the note submitted to the chairman was September 17, 1979, four days after the publication of Mr. Lord's article in the "Daily Telegraph."

- B When the committee reported in November, they referred to the Treasury's agreement in 1978 to extend the period for making claims to interest relief grants from three months to six months and added:

- C "8. Nevertheless the Department accepted that there had been poor administration and lack of judgment by various officers but gave us assurances which we accept, that no question of dishonesty or collusion on the part of the Department's staff had been involved. We appreciate that where conscious decisions to depart from the time-limits or other aspects of the Guide were involved, the staff who took them thought that they were acting in accordance with the intentions and policy objectives of the scheme. This is borne out by the subsequent Treasury decision to extend the time-limit. But the fact remains that clear guidelines governing the disbursement of substantial sums of public money, which had been carefully worked out by the Department and approved in detail by the Treasury, were not followed. We agree with the Accounting Officer that there has been poor administration and lack of judgment by those responsible for the execution and supervision of this scheme."
- D

In paragraph 15 the committee made these comments:

- E "15. We wish to emphasise our great concern and amazement that during our investigations grossly inaccurate and misleading evidence was given by those who must be presumed to be fully and accurately briefed beforehand. For example, in July the Department's initial answers implied that about a dozen persons involved in operating the scheme had been reprimanded, including an Under Secretary. We were told by letter in September that an Under Secretary had not been reprimanded and later that two officers only had been reprimanded. Again in July, after examination of less than half of the paid claims, the Department had estimated that the value of payments and commitments outside the Guide totalled £52 million. In October we were told that this figure had been overstated through an arithmetical error of no less than £11 million. We were also told in July that none of the eight sample cases examined by internal audit in 1976-77 had included irregularities, but in October the Department admitted that special re-examination had identified underlying irregularities in three of the eight cases."
- G

- H Now the proceedings of the committee on July 23 had not been attended by the press; but at noon on September 12 Mr. Barnett held a press conference in the House of Commons, which was attended by Mr. Lord and nine other journalists, and at that conference among other less newsworthy matters emerged, as a result of an intervention by a member of the committee, some of the recorded evidence which had been given to the committee by Sir Jack Rampton in July about interest relief grants, and a statement from the chairman that after that evidence had been given a senior official of the Department of Energy in Scotland had been dismissed.

Mr. Lord gave unchallenged evidence, refreshing his memory from notes which he made at the time, of what Mr. Barnett told the press at that interview. Referring to those notes his evidence was:

“It was said that the grants were being paid for interest relief when the grants should not have been being paid if the rules had been properly followed. ‘Test check showed tens of millions of pounds’—that was a check by the Comptroller and Auditor General which showed that tens of millions of pounds had been paid outside the proper rules. Joel Barnett then emphasised that there was no fraud involved, that it was a matter of inefficiency, incompetence, inadequate staff and inadequate supervision of those paying out the money. I think the ‘£9 million’ figure is a reference—I am not totally sure, but it may be a reference to the amount that had actually been paid out at that stage. ‘More written evidence has been requested,’ that is, more written evidence had been requested by the Public Accounts Committee from the Department of Energy and was in process of being supplied by the Department. And tens of millions of pounds had been committed but had not yet been actually paid over. The Public Accounts Committee believed that it was in their power to request the repayment of the money. And the final sentence is a reference, I suppose, to Sir Jack Rampton’s evidence when, at any rate, the members of the Public Accounts Committee suggested that one reason given for these irregular payments was that one part of the Offshore Supplies Office was in Glasgow—or one part of the Department was in Glasgow and one was in London. So there was not perhaps proper co-ordination between the two.”

Mr. Lord had been given the name of the secretary of the Public Accounts Committee, Mrs. Helen Irwin, as a source of additional information about the interest relief grants. He wrote down a number of questions for her including “How much money paid or to be paid?” and “Who was the official? Was he dismissed? Any others?” and the names of press officers and an assistant secretary at the Department of Energy, headed by Martyn Smith. Having failed to get in touch with Mrs. Irwin by telephone, he got a telephone call through to Mr. Martyn Smith in the press office of the Department that afternoon. It is what Mr. Smith told him in that conversation which he claims to have reported or summarised fairly and accurately in the article of which the plaintiff complains and for which the defendants claim privilege.

Mr. Lord gave the jury his version of this all-important conversation and so did Mr. Smith. There was no material difference in their two accounts except on one small, but in the opinion of the judge crucial point. Mr. Lord again had his contemporary notes to rely on; Mr. Smith had only his recollection, which he said was not detailed. Both accounts were concisely and correctly summed up by the judge to the jury.

Mr. Lord asked Mr. Smith questions including those he had written down. To “How much money paid or to be paid?” Mr. Smith answered that “£52 million out of £150–160 million was overpaid” because of the unauthorised practices. Asked about his evidence given to the committee, Mr. Smith read out from the print which he had of the evidence taken by the committee, question 118 and Sir Jack Rampton’s long answer which I have quoted in part from the committee’s report. He read out other passages from the evidence including questions and

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A answers 225, 226 and 227, which I have read. When he heard those answers, Mr. Lord asked who was the official who had been reprimanded. His evidence of what followed was:

“(A) And I think that then it transpired that Mr. Blackshaw was the official in charge of the Offshore Supplies Office for most of the relevant period, but that he had actually left the O.S.O. and gone to the Coal Division about a year before the evidence was taken.

B (Q) That is what Mr. Smith told you? (A) That is right. (Q) Then there is a reference in your note to *Who's Who*. How did that come up? (A) Mr. Smith told me that he had an entry in *Who's Who*. (Q) Would you turn over to page 21 of the bundle. You see the reference to mountaineering. What was that? (A) Mr. Smith told me that Mr. Blackshaw had written a Penguin book on mountaineering. (Q) And how did the conversation go on? (A) I asked, ‘Was he dismissed?’ which is the next question on my list of questions at page 18, and Martyn Smith said, as I have written down, ‘No one was dismissed as a result of this business’ and that Mr. Blackshaw left the civil service for personal reasons. But he said words to the effect that the person who was reprimanded must have been Mr. Blackshaw.

D “(Caulfield J.): That is an important point on which to finish today.”

The conversation ended with a few more questions in answer to one of which Mr. Smith told Mr. Lord that the plaintiff lived in Linlithgow, Scotland. Then Mr. Lord telephoned Mrs. Irwin again and asked her to confirm that Sir Jack Rampton had given evidence to the Public Accounts Committee. And she said (I quote from his evidence):

E “that he had and I think she said that written evidence had been given to the committee on various occasions and on July 23 Sir Jack had appeared to give oral evidence before the committee. I asked her whether it was true that someone had been dismissed from the civil service, as Mr. Joel Barnett, the chairman of the committee, had said, and she said that she couldn’t confirm that and that she couldn’t say anything that was on the record. But she did say that someone had left the civil service since, and that that person was the head of the Offshore Supplies Office.

F “(Q) Do those square brackets round that sentence have any significance? (A) They indicate that she had said that she couldn’t be quoted on that matter, that it was off the record. (Q) Yes, I see. Then how did the conversation continue? (A) Well, I asked her who the person was who had left the civil service. I think I said, ‘Was it Alan Blackshaw, the Under Secretary in Glasgow?’ and she confirmed that it was. I then asked her one or two details about the scheme and she elaborated slightly, saying that the interest relief grants were only payable to British companies, to U.K. companies.”

H The sentence in square brackets was as follows in Mr. Lord’s note: “[One bloke has left civil service since—boss of Offshore Supplies Office.]”

He then, at about 5.30 p.m., telephoned the plaintiff’s Linlithgow number, which he got from *Who's Who*, was told by the plaintiff’s wife that he was flying home, typed out some details about him from *Who's Who*, then went home himself and wrote and filed the story which appeared in the article of September 13. After another telephone call

to the plaintiff before he had reached home, Mr. Lord at last on a final call spoke at 11 p.m. to the plaintiff and asked him whether he had been reprimanded. The plaintiff said "No." A

"Mr. Blackshaw told me"—I quote again from Mr. Lord's evidence—"that he had left the Offshore Supplies Office in the normal way last summer. He said that the audit report prepared by the Comptroller and Auditor General on which the Public Accounts Committee's investigations were based had been during the autumn. He said that he had not been consulted about the report but that he had spoken, I think, about it, I think primarily to give details of the lines of communication in the department. I wanted to be absolutely certain that he had not been reprimanded and that I had got that right and that there was no connection between his departure from the civil service and the payments outside the rules. And he said that there was absolutely no connection whatsoever. He said, 'I came up to Scotland in 1974 with my family and I like it up here.' He explained that, in dealing with the North Sea, he had been away an average of 110 nights a year and he said, 'I decided it was a rational decision to concentrate on my mountaineering writing in these circumstances.'" B C D

Mr. Lord then telephoned the gist of this conversation to the "Daily Telegraph" newsroom and it was incorporated in all later editions of his article.

Now the only question which the judge could and did leave to the jury on the defendants' liability to pay the plaintiff something, apart from the question whether the article was defamatory, was whether it was a fair and accurate report or summary of what Mr. Smith had told Mr. Lord on the telephone, not of what Mrs. Irwin, or the plaintiff, had told him. The only challenge was to what Mr. Smith had said and whether Mr. Lord had fairly and accurately reported or summarised his conversation with Mr. Smith. The jury's attention was accordingly directed to Mr. Smith's version of that conversation and the respects in which it differed from Mr. Lord's. E F

Mr. Smith had a busy day on September 12, 1979. From the forenoon till 6 p.m. he had a great many telephone calls from journalists, all wanting to know who was the Under Secretary of the Department who had, according to Sir Jack Rampton's evidence, been reprimanded. Mr. Smith naturally could not remember which journalist had asked him which question or had been given which answer, but of one thing he was certain: he stuck rigidly to standard practice in all government departments at the time "that you do not name specific civil servants unless there are names given in evidence," and as none was given in evidence here he could not have named the plaintiff as the reprimanded Under Secretary. He admitted that he had named the plaintiff to Mr. Lord as one of those who had held the post of Under Secretary, but there were according to his evidence four such, and always two in Glasgow. Indeed, he does not seem to have disputed Mr. Lord's evidence that he had mentioned the plaintiff's name three times, telling Mr. Lord that he had left the Offshore Supplies Division a year before July 23 to go to a position of equal rank as Head of the Coal Division, and that he had left the civil service altogether a month before September 12 for personal reasons, namely to write about mountaineering. But he could not accept that he said to Mr. Lord that the reprimanded Under Secretary must be G H

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- A Blackshaw. He frankly admitted that it would be "an inevitable conclusion" by a process of elimination on the part of a reporter who consulted *Who's Who* or *Whitaker's Almanack* or the *Civil Service Year Book*, because he was under the mistaken impression that *Whitaker's Almanack* gave the plaintiff that rank and that he was the only man with the specific title of Under Secretary. But he had referred Mr. Lord and others to such works of reference in the course of performing his duty not to name any civil servant not named in the evidence about which they were inquiring. The "Must be Blackshaw" which Mr. Lord had put in his notes was therefore a record of what Mr. Lord inferred or concluded, not of what Mr. Smith had said. And that was perhaps confirmed by the absence of quotation marks round those three words, though in the immediately preceding notes Mr. Lord had put quotation marks round such words as "No one was dismissed as result of this business" and "for personal reasons." It was this difference about "Must be Blackshaw" which the judge told the jury was the main issue raised by the second question they had to answer—whether Mr. Lord's article was a fair and accurate report or summary of what Mr. Smith had told him.

- D There is no appeal from the jury's answer to the first question, whether the words complained of were defamatory of the plaintiff. The defendants do not now maintain that they were not defamatory. That was not always their attitude. At the trial Mr. Lord maintained that they were not defamatory. He told the jury he had simply reported neutral facts, including the plaintiff's resignation, and had nothing to apologise for. Hence the defendants had never apologised to the plaintiff and had been less than enthusiastic, as I shall point out later, in reporting the efforts of others to vindicate the plaintiff's reputation before trial. But the defendants still contend that the paragraphs complained of in the context of the whole article are a fair and accurate report or summary of what Mr. Smith said to Mr. Lord and they appeal against the jury's verdict on the second question. I have already stated that they have a prior contention, namely that the judge should not have left that question to the jury. But, if the jury's answer to it stands, it does not matter to the parties—or at least to the plaintiff—whether the jury should or should not have had to consider it, because the plaintiff is entitled to damages and the only remaining question is the third question, "How much?" It is of interest to the defendants, and it may be to the press generally, that the judge's rulings should be reversed or disapproved; but, if the defendants cannot succeed in upsetting the jury's verdict against the fairness and accuracy of Mr. Lord's report of his conversation with Mr. Smith, the plaintiff succeeds in getting judgment against them for the libel complained of.

- G In my judgment, there was material on the issue whether the report was fair and accurate which entitled the judge to leave the question to the jury and entitled the jury to find that it was not.

- H It is not altogether easy to keep the question whether the report was defamatory separate from the question whether it was fair and accurate, for Mr. Lord's denials that it was defamatory imply that it was fair because it was not defamatory and that if it was defamatory it was not fair. But there was more than that in favour of the jury's view. Mr. Eady for the plaintiff relied at the trial, as he did in this court, on what the judge called "gaps and silences" in the report, which were not fair and accurate. Mr. Lord referred to the plaintiff's resignation but left

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out that it was “for personal reasons,” though he admitted Mr. Smith had made that plain and he himself had written those words down in his notes in quotation marks. Mr. Lord quoted part of Sir Jack Rampton’s evidence, but he left out his evidence that “sensible decisions” were made by the civil servants who departed from the guidelines, although that part of his evidence was fully quoted in Mr. Lord’s notes. He left out all reference to the plaintiff’s transfer to Head of the Coal Division, though there was a reference in his notes to the plaintiff’s going to the Coal Division. Finally, there was the contradictory evidence of Mr. Lord and Mr. Smith on “Must be Blackshaw” with its bearing on the introduction into the article of the plaintiff’s name; an introduction made only in the “Daily Telegraph” and the “Daily Mail” in reporting the matter. On this question the judge told the jury:

“Now that article, in substance, apart from the quotation from Mr. Joel Barnett, is, according to Lord, a fair and accurate report of the information obtained from Smith. You will see that the main issue between Smith and Lord is on the words: ‘Must be Blackshaw.’ Was that a conclusion reached without authority and without foundation by Lord, or was it a conclusion conveyed to him by Mr. Smith? You might think, although that is a brief way of putting the issue, that that is really the issue between Smith and Rodney Lord.”

Of the article he said:

“[Mr. Lord] would not accept from Mr. Eady the interpretation put upon his article by Mr. Eady. He did have to accept, and you must consider it, that he did not include in his article that Mr. Blackshaw had resigned for personal reasons. Mind you, Mr. Blackshaw in his own evidence said even if that had been included it would not have cleared the article from his point of view. He did not include in his article, though it is included in his notes, that . . . sensible decisions were made by the civil servants involved who had departed from the guidelines. That does not appear from the article.”

Mr. Bowsher made much of Mr. Smith’s “inevitable conclusion” that the plaintiff was the reprimanded Under Secretary and Mr. Eady’s failure to get Mr. Smith to recede in re-examination from what he had said in cross-examination. Mr. Eady conceded that there might be cases in which what a press officer said without naming a culprit might be tantamount to identifying the culprit, and when there is only one holder of an office at all material times its holder would be identified without naming him and the press officer, not the reporter, would be responsible for whatever the reporter attributed to the holder. But that is not this case, though it may come near it. Here there was always one other Under Secretary than the plaintiff who might have been named as the culprit, and however probable the inference that the plaintiff was the man, it was not in fact a necessary inference. He only became more likely to be the man if his position was coupled with his resignation from it, and the jury were entitled to accept Mr. Smith’s evidence that that coupling was something he resolutely refused to make.

The jury were, in my opinion, entitled to conclude, as their answer to the second question shows they did, that in the telephone conversation Mr. Smith had not blamed the plaintiff and had indeed been studiously careful to avoid implicating him in the maladministration or in connecting his resignation with it, but that Mr. Lord in his article reporting the con-

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- A versation was blaming the plaintiff and had inserted his name and the reference to his resignation, and left out what was favourable to him, so as to give his readers the impression that the plaintiff, in the judge's words in directing the jury on the first question, "was got rid of because of incompetence arising out of the Offshore Supplies Office interest grant maladministration." We have not heard Mr. Smith and Mr. Lord in the witness box; but on reading the transcript of their evidence I see no
- B reason to suppose that the jury, who did see and hear them examined and cross-examined, came to a wrong conclusion about either of them, let alone an impossible conclusion. I would dismiss the defendants' appeal on liability on that ground.

- Mr. Bowsher complained of certain misdirections and non-directions in the judge's summing up, in particular (1) that he twice told the jury that
- C Mr. Lord's notes did not constitute evidence; (2) that he omitted to refer to the standard of proof; and (3) that he failed to correct certain misleading suggestions in Mr. Eady's closing speech. As to (1) the judge was admittedly wrong, as Mr. Bowsher had made the notes an exhibit after Mr. Lord had been cross-examined and re-examined upon them. But the judge in his summing up invited the jury to regard the notes as
- D "rather good" and referred to them more than once. As to (2) Mr. Eady referred to the correct standard of proof in addressing the jury, and I cannot agree with Mr. Bowsher that the jury may have decided the case on the higher standard made familiar to them in broadcasts on radio and television. As to (3) we have examined the forensic eloquence which led Mr. Eady at one point to confuse fair reporting with fair play generally, before he directed the minds of the jury correctly, for the second time, to answering the second question by comparing the article with the
- E evidence of what Mr. Smith said.

We have to remember that R.S.C., Ord 59, r. 11 (2) provides:

- "The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, . . . unless in the opinion of the Court of Appeal some
- F substantial wrong or miscarriage has been thereby occasioned."

- I shall consider another part of this rule in connection with the defendants' appeal on damages, but I hold that these alleged misdirections in the summing up have not occasioned any wrong or miscarriage and the verdicts of the jury in favour of the plaintiffs on the first two questions cannot be impugned on the ground of misdirection. Indeed, the misdirections come within those which Lord Denning M.R. dismissed in
- G *Gillard v. Goldsmith* (unreported), January 19, 1981; Court of Appeal (Civil Division) Transcript No. 14 of 1981, p. 14 (and see *Hayward v. Thompson* [1982] Q.B. 47, 63), as niceties of analysis not plainly leading to a substantial miscarriage or invalidating a jury's verdict.

- That is the end of the defence on liability and it might be thought enough to leave it there and undesirable to say more before going on to
- H consider the appeal against the quantum of damages. But Mr. Eady, for the plaintiff, has mounted a strong challenge to the judge's rulings in the defendants' favour and Mr. Bowsher agrees that there are important rulings on a subject on which there is a dearth of authority. He has submitted that it is important for the freedom of the press to uphold them. We have therefore heard interesting arguments upon them. I am of opinion that both rulings were wrong and, as I understand Dunn and Fox L.JJ. are of the same opinion, we should say so.

The judge gave three rulings on qualified privilege. First, he rejected **A**
a plea in paragraph 5 of the defence that:

“the article . . . was a fair and accurate report of proceedings in Parliament, namely the examination of witnesses by the Committee of Public Accounts on July 23, 1979, and accordingly the said article is privileged.”

He held that the defendants' article was not a report of parliamentary **B**
proceedings. The defendants' challenge to that ruling in their notice of appeal has not been pursued by Mr. Bowsher in this court.

Next he upheld a plea—or rather two pleas—in paragraph 6 of the defence that:

“the . . . article . . . was a fair and accurate report of material issued on behalf of a government department and/or on behalf of the members of a Parliamentary Committee and accordingly the . . . article is privileged by virtue of paragraph 12 of Part II of the Schedule to the Defamation Act 1952 and/or at common law.” **C**

The second plea of common law privilege was added to the first plea of statutory privilege by re-amendment of the amended defence on the first morning of the trial. It ran: **D**

“In the premises”—which included particulars added at the same time—“the defendants had a legitimate duty or interest to publish the words complained of and the readers of the ‘Daily Telegraph’ had a corresponding or common interest therein.”

Section 7 of the Defamation Act 1952 provides: **E**

“(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless the publication is proved to be made with malice. . . . (3) Nothing in this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit. **F**
(4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of section 4 of the Law of Libel Amendment Act 1888) immediately before the commencement of this Act.”

Part II of the Schedule to the Act lists a number of “Statements privileged subject to explanation or contradiction” under five heads, **G**
ending with paragraph 12, which provides:

“A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of state, local authority or chief officer of police.” **H**

To come therefore within the statutory protection of the privilege provided by paragraph 12, the defendants had to prove first that what Mr. Smith said to Mr. Lord was matter, other than a notice, issued for the information of the public by or on behalf of the Department of Energy. The judge ruled that it was. I am of the opinion that it was not.

The judge approached the words of the paragraph “in not a strictly literal sense but in a fairly liberal way,” to include information painfully

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- A extracted by journalists, like a tooth, from an official of a government department acting in the course of his employment, as well as formal statements released to the press by the government department. That seems to me to pay too little attention to the word "issued" and to the language's indication that the matter issued must be of the same kind as a notice. It would unduly restrict the words to confine them to written hand-outs, including photographs, sketches or other pictorial representations, which are given as examples in the revised version of paragraph 12 suggested in Appendix XI, p. 273 of the Report of the Committee on Defamation (1975) (Cmnd. 5909) (still unimplemented); but it is right to confine them to official notices and the like, such as, for example, the police message broadcast on television in *Boston v. W. S. Bagshaw & Sons* [1966] 1 W.L.R. 1126, the only reported case on the paragraph: "statements of a genuinely official nature formally issued for the information of the public," in the words accepted by Jordan C.J. considering a statutory provision in similar terms in *Campbell v. Associated Newspapers Ltd.* (1948) 48 N.S.W.S.R. 301, 303. It may be right to include in the paragraph's ambit the kind of answers to telephoned interrogatories which Mr. Lord, quite properly in the discharge of his duty to his newspaper, administered to Mr. Smith. To exclude them in every case might unduly restrict the freedom of the press and I did not understand Mr. Eady to submit the contrary. But information which is put out on the initiative of a government department falls more easily within the paragraph than information pulled out of the mouth of an unwilling officer of the department, and I accept Mr. Eady's argument that not every statement of fact made to a journalist by a press officer of a government department is privileged, and what is certainly outside the privilege is assumption, inference, speculation on the part of the journalist. That is not authorised; that is not official. If the assumption, inference, speculation were the press officer's, it would not be within the paragraph; Mr. Smith was not speaking on behalf of his department if he told Mr. Lord the reprimanded official was or must have been the plaintiff and the defendants' case both as pleaded and as put in evidence alleged no more than that Mr. Smith stated assumptions and/or it was inevitably to be inferred from what he said that the plaintiff was the man. A fortiori the reporter's own assumption, inference, speculation could not be attributed to the press officer's department. That would be to accord to investigative journalism the protection provided for reporting of official information. The question whether what Mr. Smith said was matter within the paragraph is closely connected with the question whether Mr. Lord's article was a report of it or a fair and accurate report of it. But in my judgment Mr. Lord's version of what Mr. Smith told him, put at its highest, did not bring it or his report of it in his article within the paragraph.

- Was the judge also wrong in ruling that the article might be a privileged publication at common law? This point the judge found more difficult, and I have not found it easy. He derived the principles to be applied from the judgment of Buckley L.J. in *Adam v. Ward* (1915) 31 T.L.R. 299, 304, as summarised by Cantley J. in *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607, 619. He then stated his conclusion in these words:

"if the facts be these—and I stress, if the facts be these because they are not yet found by the jury—that Mr. Lord on his interrogation of Mr. [Smith], who was an official at the Ministry of Energy, concluded that there had been maladministration in the civil service in

the administration of the grants and that a substantial sum of money was involved and, further, that the person who was responsible, I do not mean directly but right at the top of the whole administration, for administering the scheme was the plaintiff and it had been conveyed to Mr. Lord that it must be Alan Blackshaw who would be the person who was referred to in the Public Accounts Committee, that is a matter which, I think, it is beyond argument would be for the ordinary English person who would be interested in the workings of government, a matter which is so important, in my judgment, that it would be the duty of the press to bring it to the attention of the public, and any right-thinking person who wanted good administration in this country, and who was interested in the running of the country, would want to know those facts: not only want to know them, but he would be keen to know them, and, furthermore, a newspaper proprietor, in my judgment, of any proper standing—I mean, of integrity and of independence—would have a strict duty to bring those matters to the attention of the public. In those circumstances, though this ruling, I am told, is novel in the sense that there has not been any similar ruling, I would conclude, and do conclude, that the common law privilege would attach to this particular article.”

There is no doubt that “the general law of qualified privilege is available to newspapers . . . as much as to any other person”: Report of the Committee on Defamation (1975) (Cmnd. 5909), p. 55, para. 215 (f); *cf. Duncan & Neill, Defamation* (1978), p. 109, para. 14.29; and *Gayley on Libel and Slander*, 8th ed. (1981), p. 251, para. 591 and p. 277, para. 649. The common law privilege subsists and is not limited or abridged by the statute: section 7 (4) of the Defamation Act 1952, which I have read. But I approach with caution the application of common law privilege to an occasion, or more correctly a publication, which tries and fails to come within statutory privilege, and find no very clear guidance in such authorities as there are on the circumstances in which a newspaper report has the necessary qualifications for the protection of the common law. I make that approach bearing in mind Lord Denning M.R.’s observation in *Boston v. W. S. Bagshaw & Sons* [1966] 1 W.L.R. 1126, 1132 that the case of *Chapman v. Ellesmere* [1932] 2 K.B. 431 “made it very difficult for a newspaper to claim privilege,” and that sections 7 and 9 (2) of the Defamation Act 1952 gave a privilege to newspapers for many matters of public concern.

The principal authorities are *Cox v. Feeney* (1863) 4 F. & F. 13; *Purcell v. Sowler* (1877) L.R. 2 C.P. 215; *Adam v. Ward* (1915) 31 T.L.R. 299; [1917] A.C. 309, in the Court of Appeal and in the House of Lords; *Chapman v. Ellesmere* [1932] 2 K.B. 431; *Perera v. Peiris* [1949] A.C. 1; *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535; *Dunford Publicity Studios Ltd. v. News Media Ownership Ltd.* [1971] N.Z.L.R. 961 and the judgment of Cantley J. in *London Artists Ltd. v. Littler* [1969] 2 Q.B. 375 (appealed on another point).

The question here is, assuming Mr. Lord recorded Mr. Smith’s conversation with him fairly and accurately, did Mr. Lord (and his newspaper) publish his report of that conversation in pursuance of a duty, legal, social or moral, to persons who had a corresponding duty or interest to receive it? That, in my respectful opinion, correct summary of the relevant authorities is taken from the Report of the Committee on Defamation, para. 184 (a), repeated in *Duncan & Neill, Defamation*, para. 14.01.

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- A I cannot extract from any of those authorities any relaxation of the requirements incorporated in that question. No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he has exercised reasonable care. That needed statutory enactment which the Committee on Defamation refused to recommend: see paragraphs 211-215. "Fair information on a matter of public interest" is not enough without a duty to publish it and I do not understand Pearson J.'s ruling in *Webb v. Times Publishing Co.* [1960] 2 Q.B. 535 that a plea of a fair and accurate report of foreign judicial proceedings was not demurrable, was intended to convey that it was enough. Public interest and public benefit are necessary (cf. section 7 (3) of the Defamation Act 1952), but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.

- C The subject matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients, in this case the readers of the "Daily Telegraph." Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them (see, e.g., *Cox v. Feeney*, 4 F. & F. 13; *Perera v. Peiris* [1949] A.C. 1 and *Dunford Publicity Studios Ltd. v. News Media Ownership Ltd.* [1971] N.Z.L.R. 961), provided the public interest is wide enough: *Chapman v. Ellesmere* [1932] 2 K.B. 431. But where damaging allegations or charges have been made and are still under investigation (*Purcell v. Sowler*, L.R. 2 C.P. 215), or have been authoritatively refuted (*Adam v. Ward* [1917] A.C. 309), there can be no duty to report them to the public.

- E In this case, as Mr. Eady points out, there is, when Mr. Lord types his article, no allegation against the plaintiff which has been made good. He may have been reprimanded, he may have been dismissed, he may have been compelled to resign. Mr. Lord is in effect still investigating the nature and the truth of the allegations and is in no position to reach or state any conclusion when he thinks it his duty not, as he says, to state neutral facts but, as the jury has found, to dot the "i's" and cross the "t's" and give his defamatory conclusions to the public. He may have been under a duty to inform the public of the £52m. loss, but not to attribute blame to the plaintiff or to communicate information about his resignation, even if it was of public interest. The general topic of the waste of taxpayers' money was, Mr. Eady concedes, a matter in which the public, including the readers of the "Daily Telegraph's" first edition, had a legitimate interest and which the press were under a duty to publish; but they had no legitimate interest in Mr. Lord's particular inferences and guesses, or even in Mr. Smith's, and the defendants had certainly no duty to publish what Mr. Eady unkindly called "half-baked" rumours about the plaintiff
- H at that stage of Mr. Lord's investigations.

There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here.

So Mr. Lord took the risk of the defamatory matter, which he derived

from what he said were Mr. Smith's statements and assumptions, turning A
out untrue.

Again, the question whether Mr. Lord's article was a fair and accurate B
report of the information he got from Mr. Smith is not always easy to
separate from the question whether if it were fair and accurate it was the
subject of the qualified privilege at common law. But only one other
newspaper appears to have thought it its duty to publish the plaintiff's name
in a defamatory connection with the loss of millions of pounds sterling in
unauthorised interest relief grants, and I have come to the conclusion that,
even on Mr. Lord's version of what Mr. Smith had told him, its publication
was not privileged at common law.

What of the £45,000 damages to compensate the plaintiff for the hurt C
to his feelings and the injury to his reputation from being falsely accused
of being reprimanded and having to resign for being in charge of an office
which was so incompetently administered that millions of pounds sterling
in public money were wrongly granted to those who were not entitled
to them?

I confess that I regard the sum as very high and if it was an award D
of a judge I should be disposed to reduce it substantially. But it is an
award of a jury, and in spite of the recommendations of the Committee
on Defamation and the considerations which led them to make those
recommendations (Chapter 17 and in particular paragraph 516), juries still
have the function of assessing damages for defamation and this court has
no power, simply because it thinks their assessment wrong, to substitute
such sum as in its view should have been awarded, except with the consent
of all parties concerned (which has in this case been given): R.S.C.,
Ord. 59, r. 11 (4). We cannot reduce (or increase) the sum awarded by E
this jury unless it was one which no 12 reasonable jurors could have
awarded if they had properly directed their minds to the evidence and
been properly directed as to the relevant considerations and principles
by the judge.

In considering whether to allow an appeal against a jury's award of F
damages, this court applies an even stricter principle than to an appeal
against a judge's award; the note 59/10/11 at p. 945 of the *Supreme
Court Practice* 1982 is misleading in so far as it suggests the contrary, and
ought to be corrected.

As Lord Hailsham of St. Marylebone L.C. said in *Broome v. Cassell
& Co. Ltd.* [1972] A.C. 1027, 1073:

"In awarding 'aggravated' damages the natural indignation of the G
court at the injury inflicted on the plaintiff is a perfectly legitimate
motive in making a generous rather than a more moderate award to
provide an adequate solatium."

Though a defendant's conduct does not entitle a jury to punish him in H
addition to compensating the plaintiff, it does increase the injury and
widen the brackets which Lord Reid in the same case, at p. 1085, was able
to assume must exist

"between the sum which on an objective view could be regarded as
the least and the sum which could be regarded as the most to which
the plaintiff is entitled as compensation."

The extent of the subjective element in such injury as a libelled
plaintiff may suffer, where, as here, the defendants' conduct does not
mitigate but aggravates the damage, and the impossibility of ascertaining

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- A how wide and deep and long-lasting will be the damage to the libelled plaintiff's reputation, and the impossibility of converting either into money, have been so stressed by judges in that and other cases that counsel were unable to point to any case in the last 18 years since *McCarey v. Associated Newspapers Ltd.* [1965] 2 Q.B. 86, where this court had interfered with a jury's award of damages for defamation. We still have the power to reduce an excessive award, but can we ever exercise it, at any rate in the absence of any plain misdirection by the trial judge? Are there any circumstances in which the size of the sum awarded is by itself so clearly and ridiculously disproportionate to the injury, even when aggravated, that this court can exercise its apparently obsolescent power and order a new trial, as it did with the approval of the House of Lords in *Lewis v. Daily Telegraph Ltd.* [1963] 1 Q.B. 340; [1964] A.C. 234, in the hope that another jury may not award the same sum, as well they may: an objection pointed out, for example, by Scrutton L.J. in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd.* (1934) 50 T.L.R. 581, 585. Is this a case in which this court ought to take that risk?

- D Any defendant challenging a jury's award of damages for defamation has an uphill task, as Mr. Bowsher recognised, and there is not much in the judge's summing up of this case to help him up the hill to a reduction of these damages. The judge referred to the plaintiff's own evidence about his consternation and distress when he read the article, and to the vindications of his reputation that he had had from others but never from the defendants. He then gave the jury this direction:

- E "Your damages, you may think, will not be small. Newspapers cannot expect a small award if they defame a man who has an important position in the country and who has a high reputation. These matters you will take into account if you come to consider the question of damages.

- F "I hope that I have given you some guidance on damages. I do not have to—I am not permitted, indeed—to mention any figures to you. Juries are independent to reach their own conclusions as to what is proper compensation in a case such as this. But what you will consider when you come—if you come—to the question of damages is the injured and hurt feelings of the plaintiff, the damage to his reputation as measured by you. Your sum will probably reflect this principle: he has been libelled and our award will show that he was libelled, and that he should be vindicated. So there is an element of vindication in any award which you reach.

- G "But in assessing damages, you might like to say to yourselves: what is the wrong complained of? How serious is the wrong done? You might ask yourselves what other degrees of defamation could there be which would demand very high damages. Dishonesty has not been alleged by the plaintiff. Indeed, in the article published by the 'Daily Telegraph,' quoting from Mr. Smith's telephone call, Mr. Lord has included in his article that there was no question of any irregularity—nothing dishonest. So this man, Mr. Blackshaw, is not seeking to have himself vindicated because of any charge of dishonesty. If that had been the case, would it have brought a higher award than what you will bring in, assuming you award damages? The charge here, you may think, is a false charge of incompetence—that is, if the plaintiff succeeds. All defamations are hurtful but

you might consider in what league or division—using football terms A
—you would put this false charge of incompetence.

“You will know that the plaintiff does not have to prove that he B
has suffered any actual loss and he has not sought to prove, in this
action, that he has suffered any specific loss—in other words, proving
specific amounts. But remember that if you do award damages for
a libel which you say has been published, actual financial loss need
not be proved by the plaintiff because certainly some damage is
presumed.

“You will also consider the degree of dissemination of the alleged C
libel. You will consider the parts of the kingdom which certainly
received the first edition of the ‘Daily Telegraph.’ You will consider
what has happened since publication. There have been the press
notice of the Ministry and the mention in Parliament. You will also
consider the £4,000 ex gratia payment. But do not think of a figure
and then say to yourselves, ‘We will deduct £4,000.’ But if there
is some element of loss suffered only once by the plaintiff, which he
has already recovered, you would not think it right to include that
again in any award you make.

“You will also consider that he is claiming damages for a similar D
libel against the ‘Daily Mail.’ You do not need any words from me
to enable you to assess the ‘Daily Mail,’ but he is seeking damages
from the ‘Daily Mail’ in respect of a similar article.

“So I have to tell you—and I do tell you—that in considering
that evidence, namely that there has been and will be a claim against
the ‘Daily Mail,’ you should consider how far the damage suffered
by the plaintiff can reasonably be attributed solely to the libel which E
you are concerned with, namely the ‘Daily Telegraph,’ and how
much has been suffered by the plaintiff as regards the joint result of
the two libels. If you think that some part of the damage is the joint
result of the two libels, you should bear in mind that the plaintiff
ought not to be compensated twice for the same loss. You can deal
with this of course only, as a jury, on very broad lines. You can take
it that if another judge is trying the action between the plaintiff and
the ‘Daily Mail,’ he will probably say to the jury what I am saying to
you. You must do your best to ensure, on the question of damages,
that the sum that you will award the plaintiff, assuming he succeeds,
will fully compensate for the damage that has been caused to him by
the particular libel in the particular edition of the ‘Daily Telegraph.’
You will not take into account that part of the total damage suffered
by him which ought to enter into an assessment of damages in his
action against the ‘Daily Mail.’

“So my final request to you is to use your common sense and,
pooling your wisdom and your dispassionate views, come to a con-
clusion on the three questions which are going to be left for you.”

I cannot find anything wrong with that clear and careful direction. H
The judge did not tell the jury that the damages must be moderate and
fair to the defendants as well as to the plaintiff; but was he bound to do
that or do more than he did in favour of defendants who had aggravated
the injury to the plaintiff and consequently the compensation the jury
were entitled to award him by their conduct in a number of ways, force-
fully put before us as before the jury by Mr. Eady as the four “smears”

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A with which Mr. Bowsher, on the defendants' instructions, had sought to besmirch the plaintiff's credit and reputation?

They were (1) that the plaintiff was responsible for the office which had lost £3 million in a £40 million oil scandal and might properly be compensated by the smallest coin of the realm; (2) that he had not been frank in his evidence that the article complained of came as a bolt from the blue in spite of some earlier criticism of the Offshore Supplies Office; B (3) that the plaintiff had concocted with Lord Taylor of Gryfe a false version of a letter Lord Taylor had written to him on October 26, 1979, revised to eliminate any suggestion that the damage done to his reputation came from an article in "The Scotsman" and not from the articles in the "Daily Mail" and "Daily Telegraph"; (4) that his object in bringing the action was simply to make money. The plaintiff, Mr. Eady C submitted, told the jury of the shattering effect upon him, when just starting a new career and hoping to become a director of Morgan Grenfell (Scotland) Ltd. with Lord Taylor's help, of Mr. Lord's article in its first form. From September 1979 to February 1981 he suffered the strain of litigation, while the defendants, after publishing in later editions his own explanation of his resignation, rejected his solicitors' efforts to obtain any apology or vindication from them. On the contrary, the D second defendants published only a brief summary of a press notice of September 18, 1979, vindicating the plaintiff by correcting the inference and the evidence which defamed him, and followed a further vindication by the Secretary of State for Energy in answers given in the House of Commons on November 26, 1979, and June 3, 1980, with a report more likely to revive than destroy the implications of their first article in these E terms:

"MAN IN £44M OIL SCANDAL GIVEN £4,000

"A senior civil servant who left after a scandal in which £44 million was overpaid to North Sea oil firms is to receive a £4,000 ex gratia payment from the Department of Energy, Mr. Howell, Energy Secretary, disclosed yesterday. In a Commons written reply Mr. Howell F told Mr. Jeff Rooker (Lab., Perry Barr) that the resignation last August of Mr. Alan Blackshaw, a former director-general of Offshore Supplies, was for domestic reasons. The overpayment was disclosed in evidence in the Public Accounts Committee in July of that year. Then, the Energy Department's Permanent Under Secretary, Sir Jack Rampton, said that a dozen officials had been reprimanded over G the situation."

All the correspondence between the plaintiff's solicitors and the two defendants (which I need not read) revealing their intransigence, the jury was entitled to take into account as requiring a resounding vindication in damages by their verdict. It was not until the plaintiff got that verdict in the teeth of the defendants' persistent opposition that they vindicated H him by publishing the fair and accurate report by a High Court reporter of the trial and verdict on February 27, 1981. That kind of "neglect born of indifference," as Sir George Baker described the defendants' conduct in *Hayward v. Thompson* [1982] Q.B. 47, 70H justified (said Mr. Eady) the jury's large award, which was by no means too high.

Mr. Bowsher tried to demonstrate that it was ludicrously and inordinately high by comparison with awards in personal injury cases for pain and suffering and loss of amenities: in *Jones v. Brough* (unreported),

July 10, 1981, Glidewell J. awarded a badly brain-damaged man of 48 at the time of his accident £45,300, of which no more than £22,000 was for pain and suffering and loss of amenities: in *Croke v. Wiseman* [1982] 1 W.L.R. 71, a majority of this court upheld a judge's award of £35,000 to a totally disabled child under the same head, though Lord Denning M.R. would have reduced it by £10,000. A

For my part I find little assistance in comparing awards for defamation with awards for personal injuries, in this respect following Pearce L.J. in *Lewis v. Daily Telegraph Ltd.* [1963] 1 Q.B. 349, 381, though not quite for the same reason, and not following Diplock L.J. in *McCarey v. Associated Newspapers Ltd.* [1965] 2 Q.B. 86, 109. The differences are too great for a comparison of any real value. We were also pressed with other awards in defamation cases, both reported, like *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027 and *Hayward's* case, and unreported but recollected, no doubt accurately, by counsel from the experience of themselves and their instructing solicitors. We were also asked to consider what house or motorcar or annuity £45,000 would buy, and we were told it would purchase an annuity of £5,000 gross, £1,675 of it tax free. Mr. Bowsher also called our attention to the injury and damage caused by the "Daily Mail" article, which was the subject of another action not concluded at the date of trial; by articles in other newspapers, which did not name the plaintiff, and by the last paragraph of Mr. Lord's article, of which the plaintiff made no complaint; and he submitted that the jury's award showed that they must have taken into account more than the injury and damage specifically referable to the words complained of in Mr. Lord's article. It is, of course, easier for a jury to give a reasonable award if it tries two actions like this and the plaintiff's action in respect of the "Daily Mail" article together, as was done with consolidated actions in the *Lewis* and *McCarey* cases. B C D E

These considerations, many of them complicated by inflation, have left me uncertain what, if there are brackets for aggravated damages, is the top bracket; but I am bound to say they have reinforced the doubts I felt before hearing any argument whether this £45,000 has not gone over the top. I may have been influenced in my reaction to the figure by asking the irrelevant questions: why, if the maladministration of the Offshore Supplies Office was so serious, no senior civil servant there was reprimanded or dismissed or compelled to resign: if, on the other hand, most of the maladministration consisted in sensible decisions being taken locally by junior civil servants to benefit British industry without reference to higher authority and in disregard of guidelines which were later relaxed to permit such decisions to be taken without such reference, why should those responsible for those decisions be criticised in the strong terms used by Sir Jack Rampton, or why should that criticism have been accepted by the Public Accounts Committee at its face value? But those are not questions the jury had to consider. They saw and heard the plaintiff, as well as Mr. Smith and Mr. Lord, and they obviously felt that the defendants' conduct was, as Mr. Eady suggested to them, disgraceful and the plaintiff required to be vindicated by a really substantial sum of money. F G H

I have come to the conclusion that the defendants have brought this large award of damages on themselves by the course of action which they have chosen to take, in the perhaps understandable belief that they were exposing a "cover-up" in and by a department of the civil service. The jury have shown their disapproval of that course, as they were entitled to

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A do, and have assessed the damages at a figure which will adequately console the plaintiff and restore his reputation beyond doubt.

Though my own opinion is that that could have been achieved by a considerably lower award, I am not able to regard this as one of those rare and exceptional cases in which this court can and should order a new trial on the issues of damages or substitute a lower sum of its own.

I would accordingly dismiss the appeal.

B

DUNN L.J. (read by Stephenson L.J.). I agree that the appeal should be dismissed for the reasons given by Stephenson L.J. Although not necessary for our decision, I would add some words of my own in relation to the respondent's notice, since the matters raised by it have been fully argued. The judge ruled that the article was subject to qualified privilege under paragraph 12 of the Schedule to the Defamation Act 1952, and also at common law if, so far as material, it was a fair and accurate report of information conveyed on September 13, 1979, by Mr. Smith to Mr. Lord on the telephone. The plaintiff by a respondent's notice in this court seeks to uphold the verdict and judgment on the additional grounds that no qualified privilege attached to the article either by statute or at common law.

D

It is convenient to deal first with the plea of qualified privilege at common law. The basis of his ruling was that the judge held that any matters discussed between Mr. Smith and Mr. Lord which involved maladministration in the civil service, were so important that any right-thinking person would have an interest in knowing them, and that it was the duty of a newspaper proprietor of integrity to publish them. The judge equated the duty to publish with the degree of public interest and held that the public interest was so great that the duty arose. He based himself on the following statement of Buckley L.J. in *Adam v. Ward*, 31 T.L.R. 299, 304:

E

"But the following proposition, I think, is true—that if the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as a matter of law, but, to quote Lord Justice Lindley's words in *Stuart v. Bell* (7 T.L.R. 502; [1891] 2 Q.B. 341, 350) 'A duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.'"

F

G

The judge also founded himself on a statement by Cantley J. in *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607, 619F, that a publication was privileged at common law "where the defendant has a legal, social or moral duty to communicate it to the general public . . ."

It is true that in some cases of high authority (e.g., *Adam v. Ward* [1917] A.C. 309, in the House of Lords and *Perera v. Peiris* [1949] A.C. 1, in the Privy Council) the duty has been expressed in very wide terms.

H

In *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535, Pearson J. held, at p. 565, that qualified privilege attached to reports of foreign judicial proceedings when such reports were of public interest in England, and suggested that a plea of "fair information on a matter of public interest" could constitute a defence even if the information was defamatory. For reasons I shall give later in this judgment, although wholly unexceptionable in relation to their particular facts, these wide statements of principle taken out of context are misleading, and I do not think

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there is any defence of "fair information on a matter of public interest" in defamation proceedings. In *London Artists Ltd. v. Littler* Cantley J. rightly in my view, declined to follow the wide principle stated by Pearson J. in *Webb v. Times Publishing Co. Ltd.* and founded himself on Buckley L.J. in *Adam v. Ward*, 31 T.L.R. 299. The interesting argument of Sir Valentine Holmes K.C. in *Perera v. Peiris* [1949] A.C. 1, 9 shows that in the 18th century privilege afforded no defence to a defamatory publication. During the 19th century the judges were using the word "privilege" as meaning the existence of a set of circumstances in which the presumption of malice was negated. It was said in *Gilpin v. Fowler* (1854) 9 Exch. 615, 623-624:

"Instead of the expression 'privileged communication' it would be more correct to say that the communication was made on an occasion which rebutted the presumption of malice."

The judges, having to face the problem of what would be the circumstances in which the presumption of malice would be negated, went on two lines, duty and interest and the public good and for the public interest.

By the end of the ensuing 100 years it had been established that certain categories of documents by their very nature rebutted the presumption of malice, and publication of them was accordingly privileged. These included fair and accurate reports of judicial proceedings and of proceedings in Parliament. But the courts stressed that the categories were not closed, and in each case it was necessary to determine whether the occasion was privileged not only by reference to the subject matter of the information published but also to its status, and whether that gave rise to the duty to publish. In *Perera v. Peiris* [1949] A.C. 1 the Privy Council, in considering whether the duty arose, drew attention to the circumstances in which the report in question was produced, stressing that it was a public document which came into existence after a full investigation of the facts.

In *Purcell v. Sowler*, L.R. 2 C.P. 215, the Court of Appeal held that the publication by a newspaper of a report of proceedings at a meeting of Poor Law Guardians was not privileged by the occasion, notwithstanding that the administration of the Poor Laws, including the conduct of medical officers mentioned in the report, was a matter of public interest. In that case Mellish L.J. said, at p. 221:

"The law on the subject of privilege is clearly defined by the authorities. Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges. If one of the guardians had met a person not a ratepayer or parishioner, and had told him the charge against the plaintiff, surely he would have been liable to an action of slander. I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comments on his conduct might have been justified. But this is a very different thing from publishing ex parte statements, which not only are not proved but turn out to be unfounded in fact. I am, therefore, clearly of opinion that the occasion of the publication was not privileged, and that the judgment for the plaintiff ought to be affirmed."

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A And Bramwell L.J. said, at p. 223:

“This is a case in which the defendants have published a true and bona fide report of a statement of facts charged against the plaintiff, but a statement which shows that the person making it was making it in the absence of the plaintiff and without any knowledge on the part of the person making it. There was no duty to report such ex parte proceedings; if the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter; and the defendants, having published it, must take the consequences.”

Purcell v. Sowler was referred to by Buckley L.J. in *Adam v. Ward*, 31 T.L.R. 299 in the following passage, at p. 304:

“In *Cox v. Feeney* (4 F. & F. 13, 18) a dictum of Tenterden C.J. is quoted in the following terms:—‘A man has a right to publish, for the purposes of giving the public information, that which it is proper for the public to know.’ With great respect I doubt whether there is contained in those words an accurate statement of the circumstances in which a privileged occasion arises for the publication of matter interesting to the public. I am not prepared to hold that the publication even by a public body of its proceedings or conclusions in a matter of public interest is on that account and without more privileged. *Purcell v. Sowler* (2 C.P. 215) is, I think, an authority to the contrary. I doubt whether in *Mangena v. Wright* (25 T.L.R. 534; [1909] 2 K.B. 958) Phillimore J. was right in saying, at p. 978, that ‘where the communication is made by a public servant as to a matter within his province, it may be the subject of privilege in him’ if those words are intended to convey that those facts without more will create a privileged occasion. More, I think, is wanted.”

As I read him, Buckley L.J. was saying that the mere fact that the communication was made by a public servant in respect of a matter of public interest does not mean that the communication is made on a privileged occasion. There must be more, and *Purcell v. Sowler* shows that the court must look at the circumstances of the particular communication to the newspaper in deciding whether or not the occasion is privileged.

Purcell v. Sowler was cited in the House of Lords in *Adam v. Ward* [1917] A.C. 309 but not referred to in the speeches. In *Perera v. Peiris* counsel suggested that *Purcell v. Sowler* should be overruled, but no reference was made to the case in the judgment. So *Purcell v. Sowler*, L.R. 2 C.P. 215, which has stood for over 100 years, remains good law.

In *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535, 568 Pearson J. accepted that there must be an appropriate status for the report as well as the need for appropriate subject matter, which must be of interest to the public concerned. He held in that case that there was the ready made status of a fair and accurate report of foreign judicial proceedings, and I think that his judgment can be supported on the narrower ground that the privilege was analogous to the well-established privilege attaching to reports of English judicial proceedings, once he had found (as he did) that the report in the newspaper was a matter of legitimate and proper interest to English readers. As in so many of the

cases there was no question as to the status of the report, and the only question was whether there was sufficient public interest. A

This review of the authorities shows that, save where the publication is of a report which falls into one of the recognised privileged categories, the court must look at the circumstances of the case before it in order to ascertain whether the occasion of the publication was privileged. It is not enough that the publication should be of general interest to the public. The public must have a legitimate interest in receiving the information contained in it, and there must be a correlative duty in the publisher to publish, which depends also on the status of the information which he receives, at any rate where the information is being made public for the first time. Different considerations may arise in cases such as *Adam v. Ward* and *Dunford Publicity Studios Ltd. v. News Media Ownership Ltd.* [1971] N.Z.L.R. 961 where the matter has already been made public, and the publication in question is by way of defence to a public charge, or correction of a mistake made in a previous publication. B

As Cantley J. pointed out in *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607, if the law were otherwise, and if the wider principle on which Pearson J. decided *Webb's* case were applicable, then there would be no need for a plea of fair comment, and anyone could publish any untrue defamatory information provided only that he honestly believed it, and honestly believed that the public had an interest in receiving it. C D

Apart from *Adam v. Ward*, no case before 1952 was cited to us in which a statement issued by or on behalf of a government department was held to be privileged. It may be that in the circumstances of a particular case privilege might have been held to cover such a statement, but it is significant that in that year the position was apparently sufficiently unclear to require legislation. It is true that the Defamation Act 1952 preserved the common law, and included within its provisions some categories of documents which were already privileged at common law. But the absence of authority before 1952 indicates that the inclusion of such statements would have involved the extension of the doctrine of qualified privilege as it was understood at that date. E

I turn to consider statutory privilege. Section 7 (1) of the Defamation Act 1952 provides: F

“Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.” G

Paragraph 12 of Part II of the Schedule headed “Statements Privileged Subject to Explanation or Contradiction” is in these terms:

“A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of state, local authority or chief officer of police.” H

The plea of privilege in this case, upon which the judge ruled, was until an amendment on the first day of the trial confined to a plea in reliance on paragraph 12, and was based upon an assumption by Mr. Smith that the reprimand must have been delivered to the plaintiff since there was no one else to whom it could refer. However by an amendment made at the conclusion of the evidence it was averred:

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A "Smith . . . stated . . . that the official in charge of the Offshore Supplies Office during most of the relevant period was the plaintiff and that the person who was reprimanded must have been the plaintiff and that the plaintiff had since left the civil service for personal reasons and/or it was inevitably to be inferred from what Smith said that the plaintiff was the Under Secretary in question and the person who was reprimanded."

B In ruling on the plea of privilege, the judge said:

C "I have no doubt at all that if a journalist seeks information openly as a journalist from a government department and an official in a government department—that is, somebody who is acting in the course of his employment—discloses information to the press which the press then utilise, that information, provided it becomes the subject of a fair and accurate report or summary, deserves the cloak of privilege conferred by paragraph 12."

The question, it seems to me, is "Was what was said by Mr. Smith to Mr. Lord a notice or other matter issued for the information of the public?" The context of the telephone conversation is important. It arose out of the evidence of Sir Jack Rampton before the Public Accounts Committee on July 23, 1979, in particular paragraphs of the report which have been read by Stephenson L.J. No journalists were present at the time. No name was given in the evidence. On September 12, 1979, a press conference was held by the Public Accounts Committee. A number of journalists including Mr. Lord were present. It was stated on behalf of the Public Accounts Committee that a senior official had been dismissed after the evidence of July 23, and Mr. Joel Barnett, the chairman of the committee, stated "No fraud was involved but inefficiency, incompetence, inadequate staff, and inadequate supervision of those paying out the money." This was the first Mr. Lord knew of the matter; at that stage he did not know of the evidence which had been given on July 23, but obviously there were the makings of a newsworthy story. I suspect he had two priorities, (1) to find out exactly what was said on July 23, and (2) to find out the name of the official who had been dismissed. As a result he naturally rang Mr. Smith, a public relations officer at the Department of Energy. Mr. Smith read out the material parts of the evidence from a transcript, including paragraph 225, and told Mr. Lord that no one had been dismissed. So Mr. Lord pressed him for the name of the Under Secretary who had been reprimanded. Mr. Smith made it perfectly plain that he could not name names; that public relations officers and ministry spokesmen are not allowed to name civil servants without express authority, and Mr. Lord must have known this. All the same he continued to press Mr. Smith and eventually the name of Blackshaw was mentioned. Mr. Smith said that Blackshaw had left Glasgow to go to the Coal Division a year before the evidence, i.e., in 1978, and had subsequently resigned for personal reasons. A great deal of the evidence at the trial was directed to the phrase "must be Blackshaw" recorded in Mr. Lord's notes. The jury by their verdict must have held that those words were not said by Mr. Smith, but for the purpose of considering the judge's ruling I am content to assume that they were.

Mr. Lord's efforts to obtain the name were described by the judge as akin to the extraction of a tooth. The fact of the matter was that Mr. Lord had got two-thirds of a story; he had the material parts of Sir Jack

Rampton's evidence; he had the comments by Mr. Joel Barnett at the press conference; and he wanted the remaining one-third, namely the name of the civil servant who had been said to have been reprimanded in order to complete his story. This is a situation which must be frequently experienced by journalists. They have a hard fact here, and a hard fact there, and in order to produce a complete and newsworthy story they have to fill out the remaining facts by using intelligent deduction, drawing inferences, or just speculating. Whether the phrase "must be Blackshaw" resulted from the mental process of Mr. Lord (as the jury must have found) or that of Mr. Smith (as Mr. Lord alleged) or was a joint effort between them, it would, it seems to me, be a misuse of words to describe the result as "matter issued for the information of the public." One thing is clear, namely that Mr. Smith was not prepared to take responsibility on behalf of the Ministry for giving the name; he was not giving it or purporting to give it on behalf of his department. Not every piece of information given by a spokesman acting in the course of his employment, is necessarily information given on behalf of his department. What Mr. Smith did was to give a series of facts, including the fact that the plaintiff had resigned of his own accord, from which more than one inference could be drawn. Mr. Lord chose not to mention that fact in the article, and drew an inference defamatory of the plaintiff which turned out to be wrong.

If that analysis of the facts be correct, in my view the "Daily Telegraph" were under no duty at common law to publish the article in the form in which they did. The status of the conversation between Mr. Smith and Mr. Lord was not such as to give rise to the duty and so attract the common law privilege. Taken at its most favourable to Mr. Lord, what Mr. Smith said about the plaintiff was no more than an *ex parte* statement based on inference, into the truth of which Mr. Smith had made no investigation, and upon which the plaintiff had had no opportunity to comment.

Nor do I think that what was said by Mr. Smith to Mr. Lord could be described as "matter issued for the information of the public by or on behalf of a government department" so as to attract the statutory privilege. I adopt the statement of Jordan C.J. when considering a similar provision in *Campbell v. Associated Newspapers Ltd.* (1948) 48 N.S.W.S.R. 301, 303:

"The notice or report must be of a genuinely official nature, and must be issued in such circumstances that it may fairly be regarded as issued for the information of the public. It is not, of course, for this court to assume to lay down rules for what is, and what is not, proper to be made the subject of a governmental or police notice or report. I see no reason for doubting that an authoritative announcement of an official character made or handed to members of the press for publication in their respective newspapers would, or at least could, constitute a notice or report issued for the information of the public, and if published in the form in which it was supplied would be published with the consent of the department, etc., supplying it. On the other hand, if the matter so supplied was such as to admit of a reasonable inference that it was mere gossip and not an official notice or report, or that an official report so supplied was not published in substantially the form in which it was issued, it would be competent to the tribunal of fact to find that the

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A defence had not been made out. And, if the trial judge was satisfied that the matter was incapable of constituting a notice or report within the meaning of section 29 (1) (g), or that, if it was, it was incapable of being regarded as published substantially in the form in which it was issued, it would be his duty to direct a verdict for the plaintiff on the plea."

B What Mr. Smith said to Mr. Lord was not a notice or other matter of a genuinely official nature. Put at its highest it was an inference which Mr. Smith had drawn from facts known to him, made in reply to a series of questions which Mr. Smith had no authority to answer, and which Mr. Lord must have known he had no authority to answer. I accordingly hold that the judge was in error in holding that the publication was made on a privileged occasion.

C I now turn to damages. Speaking for myself I think that the award of £45,000 was much too high even for this serious libel, especially if one compares it with awards for pain and suffering and loss of amenity which are currently awarded for personal injuries. But that is not the test. A series of decisions which are binding on us show that this court must not interfere with such an award unless the damages are so large that no reasonable jury could have given them, or unless the jury were misled, or took into account matters which they ought not to have considered. Mr. Bowsher submitted that the judge should have warned the jury in his summing up to be moderate in their award of damages, in order to correct some suggestions made in his final speech by Mr. Eady for the plaintiff as to the conduct of Mr. Lord and the "Daily Telegraph," which Mr. Bowsher said were irrelevant to any issue in the case, there being no plea of malice. These comments related to the conduct of Mr. Lord in omitting in his article some parts of what Mr. Smith had said to him which were favourable to the plaintiff, and also to the conduct of the "Daily Telegraph" in not publishing any of the vindications of the plaintiff which had been issued not only by the Department of Energy but also by the Public Accounts Committee and the Minister in the House of Commons, and on the contrary in publishing a further article on June 3, 1980, referring to "An oil scandal," in terms which could be linked to the article of September 13, 1979. Mr. Eady also criticised the "Daily Telegraph's" conduct of the trial, including certain aspects of the cross-examination of the plaintiff and the defendants' counsel's final speech when he suggested that the jury should, if they found for the plaintiff, award him the smallest coin of the realm by way of damages.

G In my judgment in our adversary system it is a matter for the trial judge how he deals with allegations and cross-allegations of that kind. He is in a better position than anyone to get the atmosphere of the case. He will know better than anyone whether the jury have been unreasonably inflamed by anything said or done by either side during the trial. This very experienced judge gave no special warning to the jury, although at the beginning and end of the summing up he told them to act dispassionately. He summed up quite neutrally, summarising the evidence and the material facts on both sides. In no way could the jury have been misled. They were specifically warned only to give damages for the "Daily Telegraph" article, and that the plaintiff was not entitled to be compensated for injury to his reputation caused by similar articles in other newspapers. Nothing was left to the jury which it was wrong for

them to take into account and in my view no criticism can properly be made of the judge's clear and succinct summing up. A

The speeches of Lord Hailsham of St. Marylebone L.C. and Lord Reid in *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027 show that in defamation proceedings compensatory damages include damages for injury to the plaintiff's feelings, aggravating factors as they are called, and that these may be increased by any high-handed, malicious, insulting, or oppressive conduct of the defendants at any time including during the trial down to the date of the award. There were certainly aggravating factors in this case, and I cannot for my part say that no 12 men with knowledge of the world and of the value of money today, could reasonably have come to the figure of £45,000, high though I think it is. B

Before leaving the case I would add that I think that it is the greatest pity that none of the recommendations of the Committee on Defamation which was presented to Parliament in March 1975 has been implemented by legislation. In particular the amendments to the Schedule to the Defamation Act 1952 proposed in a Revised Schedule appended to the Report as Appendix XI would, as this case had demonstrated, serve to clarify an obscure and technical branch of the law. Further, although in this case both parties agreed that if this court allowed the appeal against damages the court should itself assess the figure, implementation of the recommendation at paragraph 516 (e) of the report would save the costs of a re-trial if the parties did not so consent. C D

Fox L.J. At the trial the defendants asserted that if, contrary to their contention, the article published by the "Daily Telegraph" on September 13, 1979, was defamatory of the plaintiff, it was published on a privileged occasion. The privilege claimed was that conferred by paragraph 12 of Part II of the Schedule to the Defamation Act 1952 or, in the alternative, common law privilege. There was also a plea of parliamentary privilege. The latter was rejected by the judge as a matter of law, and is not pursued. E

The privilege conferred by paragraph 12 of Part II of the Schedule to the Act of 1952 is confined to F

"A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department . . ."

I need not read any further.

The question whether the material part of the article was a fair and accurate report of what was said by Mr. Smith to Mr. Lord was put to the jury. They answered it in the negative. Since, as it seems to me, there was no material misdirection by the judge on any aspect of the case and there was material which entitled the judge to leave the matter to the jury, and evidence on which they could find as they did (on all of which matters I agree with the judgment of Stephenson L.J.), that verdict of the jury concludes the question for the purpose of this case. But as we have heard argument as to the ambit of paragraph 12 I add this (though it is not necessary for our decision). The paragraph is, I think, only concerned with information issued with the authority of the government department or other body; in other words it must be information for which the department or body accepts responsibility. As I read Mr. Smith's evidence (which in substance must, I think, have been accepted by the jury) he was not prepared, in his capacity as an official of the G H

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- A department, to name Mr. Blackshaw or anybody else as the official who had been reprimanded. "My entire line that afternoon" he said "was not to name people specifically." But even if it were the case that Mr. Lord succeeded in the end in extracting from Mr. Smith some such words as "It must have been Blackshaw," it still does not follow that that was anything more than the personal inference of Mr. Smith; and if that is all it was I do not think it could properly have been regarded as
- B "a notice or other matter . . . issued by or on behalf of . . . any government department."

- As regards common law privilege, that is specifically preserved by section 7 of the Act of 1952. I agree with Stephenson and Dunn L.J.J. that, for the purposes of the present case the matter is concluded against the defendants by the jury's finding on the second question. Here again,
- C however, we have heard argument and I will express my view though it is not necessary for the determination of the appeal.

I take the correct principle of common law privilege to be that stated by Buckley L.J. in the Court of Appeal in *Adam v. Ward*, 31 T.L.R. 299, 304:

- D "if the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but to quote Lord Justice Lindley's words in *Stuart v. Bell* (7 T.L.R. 502; [1891] 2 Q.B. 341, 350) 'a duty recognised by English people of ordinary intelligence and moral principle but at the same time not a duty enforceable by legal proceedings' . . ."

- E There is not, I think, anything in the speeches in the House of Lords in *Adam v. Ward* [1917] A.C. 309, which is inconsistent with the formulation of Buckley L.J., and it was accepted and applied by Cantley J. in *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607, after a review of the authorities. As to the speeches of the House of Lords in *Adam v. Ward* I refer to Lord Finlay at p. 318, Lord Loreburn at p. 321, Lord Dunedin at p. 324 and Lord Atkinson at p. 334.

- F No doubt the privilege may also attach if the statement is made for the protection of some lawful interest of the person who makes it, for example for the protection of his own property; but that is not this case. Again, an allegation of improper or negligent conduct against a public servant may be privileged if made to persons having a proper interest to receive it—such as the police or senior officials. That is not this case either.

- G There are, however, statements in the books which put the principle differently. In *Perera v. Peiris* [1949] A.C. 1, Lord Uthwatt, giving the advice of the Privy Council said, at p. 21: "If it appears that it is to the public interest that the particular report should be published privilege will attach." The case was primarily concerned with the Roman-Dutch law rather than English law though I think the Board was stating principles which it considered applicable to both systems: see p. 20.

- H I do not think that the case really advances the matter for present purposes. It was concerned with a newspaper report of extracts from the Official Report of the Bribery Commission set up by the Governor of Ceylon under statutory powers to inquire into allegations that bribes had been paid to members of the then State Council to influence their decisions. I should have thought that in those circumstances there was a public duty on the newspaper to publish the material. Indeed, although the Board put the matter in terms of public interest, they state, at p. 21: "the public

interest of Ceylon demanded that the contents of the Report be widely communicated to the public." That, I think, is the recognition of a duty. They added (though they say it is "perhaps" irrelevant in law) that the ordinary member of the community of Ceylon would conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the Report. The case is, on its facts, far removed for the present. A

A wider principle is stated by Pearson J. in *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535, 570: B

"As the administration of justice in England is a matter of legitimate and proper interest to English newspaper readers so also is this report [of foreign proceedings] which has so much connection with the administration of justice in England. In general, therefore, this report is privileged." C

I think that states the principle rather too widely. It is necessary to a satisfactory law of defamation that there should be privileged occasions. But the existence of privilege involves a balance of conflicting pressures. On the one hand there is the need that the press should be able to publish fearlessly what is necessary for the protection of the public. On the other hand there is the need to protect the individual from falsehoods. I think there are cases where the test of "legitimate and proper interest to English newspaper readers" would tilt the balance to an unacceptable degree against the individual. It would, it seems to me, protect persons who disseminate D

"any untrue defamatory information of apparently legitimate public interest, provided only that they honestly believed it and honestly thought that it was information which the public ought to have." See *London Artists Ltd. v. Littler* [1968] 1 W.L.R. 607, 615. E

If, as in my opinion the law requires, it is necessary for the defendants to establish that they had a duty to publish the article if they are to be entitled to common law privilege in respect of it, I do not think that the defendants have done so. Mr. Smith was not prepared to give the authority of the Department of Energy to the naming of the plaintiff. In so far as the article implied that the plaintiff had been reprimanded or forced to resign from the civil service it was based upon inference or conjecture derived from insufficient knowledge of the facts. In my opinion the defendants were under no duty to the public to publish the article in the form in which it appeared having regard to the actual degree of knowledge available to them. Accordingly, in my view the defence of common law privilege fails. F G

There remains the question of damages. It is said that they were excessive. Certainly I would not myself have awarded so much. But the assessment of the damages was committed by our law to the jury and not to judges. This court is not entitled to seize the matter from the jury and set aside the award merely because our opinion as to the proper amount of damages differs from that of the jury. If we are to interfere it can only be on the basis that no reasonable jury, properly directed, could have reached the conclusion which this jury did; or, as the same principle is sometimes put, that the damages are so high "that 12 sensible men could not reasonably have given them" (see *per* Lord Esher M.R. in *Praed v. Graham* (1890) 24 Q.B.D. 53, 55). H

The test thus propounded is a severe one. It is the more so because the assessment of damages for defamation involves a large subjective element

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A in consequence of the subject matter with which the inquiry is concerned, namely the injury to a man's reputation. We were pressed by Mr. Bowsher, in his helpful argument, with comparisons with the damages awarded in personal injury cases for the loss of a limb or a sense. The comparison is not satisfactory because of the subjective element to which I have referred and which, in a financial sense, may leave a plaintiff better off than he was before the libel. Thus in *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027,

B 1071, Lord Hailsham of St. Marylebone L.C. said:

“Not merely can he recover the estimated sum of his past and future losses but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. . . . Quite obviously, the award must include factors for

C injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. . . . What is awarded is thus a figure which cannot be arrived at by any purely objective computation.”

D Against that background, I think that, in considering whether the award was one which no reasonable jury could have decided upon, the following considerations are material: (i) It was a serious libel. The plaintiff was a distinguished public servant. The implication of the libel was, in effect, that by reason of his incompetence as the civil servant in charge of the Offshore Supplies Office, some £50 million of public money had been paid away improperly and that as a consequence the plaintiff had been reprimanded and compelled to resign from the public service. (ii) The reporting

E by the “Daily Telegraph” of the £4,000 ex gratia payment to the plaintiff by the Department of Energy did not ameliorate the position. It was headed “Man in £44 million oil scandal given £4,000.” (iii) The newspaper gave no publicity to the fact that in November 1979 the Secretary of State confirmed in the House of Commons that the plaintiff had left the department with an unblemished reputation and a record of excellent service and that

F there was no question of any blame attaching to him. (iv) No apology was ever offered. Mr. Lord in cross-examination at the trial confirmed that he still said he had done nothing which called for any apology to the plaintiff. And counsel for the defendants, in his address to the jury, told them that if they felt compelled to award some sort of damages it should be “the smallest coin in the realm.” (v) Not merely was the plaintiff subjected to

G the anxiety of litigation but allegations were made against him in that litigation. First it was suggested that his evidence that he knew little about the investigation by the Auditor General until he read of it in the papers was “pretty curious and a bit difficult to swallow.” Secondly, the second letter from Lord Taylor was described as “the false version” which the plaintiff used to support a claim against the Department of Energy. Thirdly, it was suggested that the action was little more than a money-seeking

H expedition by the plaintiff. The jury were entitled, if they thought fit, to reject those complaints.

At the time of the trial the plaintiff had left the government service and was seeking work in new fields. His reputation was of considerable practical importance to him. The perpetuation of a belief that he had, by his incompetence, lost huge sums of public money could do him very great harm. If the jury felt that a strong vindication of his reputation was necessary they would, I think, be entitled to that view. As regards quantum,

the case was not one for small damages—as the very experienced trial judge told the jury. That being so, and having regard to the circumstances which I have mentioned, I do not feel able to say that no reasonable jury could have awarded £45,000. My own opinion is that it was too much, but I do not think it is beyond the bounds of reason.

I would dismiss the appeal.

Appeal dismissed with costs.

Leave to appeal refused.

Solicitors: *Simmons & Simmons; Trower Still & Keeling.*

[Reported by ISOBEL COLLINS, Barrister-at-Law]

[COURT OF APPEAL]

GENERAL REINSURANCE CORPORATION AND OTHERS
v. FORSAKRINGSAKTIEBOLAGET FENNIA PATRIA

[1978 G. No. 1420]

1983 April 18, 19, 20, 21;
May 13

Oliver, Kerr and Slade L.JJ.

Insurance—Underwriter—Broker's slip—Amendment slip initialled by leading underwriter—Interest destroyed before slip initialled by other underwriters—Cancellation of amendment—Effect of act of initialling—Whether contractually binding—Whether custom entitling insured to cancel amendment slip before subscription by all underwriters

E. Ltd. shipped paper from British Columbia to Europe for sale. They stored the paper in four warehouses. One of the warehouses, at Antwerp, contained paper valued at Finnmarks 27m. The paper was insured with the defendants. The defendants reinsured their risk under two separate contracts of reinsurance. The first ("the whole account cover") was for the whole risk, up to the sum (as amended) of F.Mks. 20m., subject to an excess in respect of any one occurrence of F.Mks. 5m. The second ("the specific cover") was for loss by fire or flood at the four warehouses up to the sum of F.Mks. 15m., subject to an excess of F.Mks. 15m. The policy for the specific cover was entered into with 28 reinsurance companies, the first to twenty-seventh plaintiffs and one other company. On the night of February 11, 1977, a fire destroyed all the paper in the Antwerp warehouse. On February 14 the defendants, who were ignorant of the extent of the fire, instructed their brokers to prepare a slip amending the specific cover retrospectively from January 1, 1977, to F.Mks. 15m. in excess of F.Mks. 25m. The slip had already been initialled by the first and second plaintiffs when the defendants, on February 15, having learnt of the extent of the fire, cancelled their request for the amendment. The second plaintiffs later agreed to the cancellation. All issues between the second to twenty-seventh plaintiffs and the defendants were settled. The first plaintiffs claimed a declaration that the specific cover had been varied with effect from January 1 so that their liability was for their proportion of F.Mks. 15m. in excess of F.Mks. 25m., and the defendants counterclaimed for the amount due from the

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A first plaintiffs under the specific cover as originally drawn. Staughton J. held that the initialling of a broker's slip by an underwriter was an act of acceptance which created a binding contract between the underwriter and the insured or reinsured; further, that by virtue of a custom and practice of the London insurance market, which applied equally to original and amendment slips, and the need for business efficacy, the defendants had been entitled to cancel the amendment slip on February 15 before it had been subscribed by all the original subscribers. He accordingly refused the declaration sought by the first plaintiffs and gave judgment for the defendants on their counterclaim.

On appeal by the first plaintiffs:—

Held, allowing the appeal, (1) that the presentation of a slip by the broker to the underwriter constituted an offer and the writing of each slip constituted an acceptance of the offer by the underwriter so that each line written on a slip gave rise to an immediately binding contract pro tanto between the underwriter and the insured or reinsured for whom the broker was acting when he presented the slip (post, pp. 324c–E, 325B, 331B–C, 332G).

Morrison v. Universal Marine Insurance Co. (1872) L.R. 8 Ex. 40; (1873) L.R. 8 Ex. 197 applied.

Jaglom v. Excess Insurance Co. Ltd. [1972] 2 Q.B. 250 disapproved in part.

(2) That, on the evidence, it had not been proved that there was a legally binding custom or practice of the London insurance market which gave the insured or reinsured any option or right of any kind to rescind the contract resulting from the writing of a line on a slip which was immediately binding on the underwriter before the slip had been fully subscribed and, a fortiori, there was no evidence to suggest the existence of any such custom in relation to indorsement slips, let alone after the occurrence of a loss; that no unfettered option of cancellation arose by implication of law as a matter of business efficacy; and that, accordingly, the first plaintiffs were entitled to the declaration sought (post, pp. 330E–H, 331E–F, 332D–F, 333H–334A).

Decision of Staughton J. [1982] Q.B. 1022; [1982] 2 W.L.R. 518 reversed in part.

The following cases are referred to in the judgments:

Cunliffe-Owen v. Teather & Greenwood [1967] 1 W.L.R. 1421; [1967] 3 All E.R. 561.

Jaglom v. Excess Insurance Co. Ltd. [1972] 2 Q.B. 250; [1971] 3 W.L.R. 594; [1972] 1 All E.R. 267.

Morrison v. Universal Marine Insurance Co. (1872) L.R. 8 Ex. 40; (1873) L.R. 8 Ex. 197.

The following additional cases were cited in argument:

Anglo-African Merchants Ltd. v. Bayley [1970] 1 Q.B. 311; [1969] 2 W.L.R. 686; [1969] 2 All E.R. 421.

Brown v. Inland Revenue Commissioners [1965] A.C. 244; [1964] 3 W.L.R. 511; [1964] 3 All E.R. 119, H.L.(Sc.).

Forres (Lord) v. Scottish Flax Co. Ltd. [1943] 2 All E.R. 366, C.A.

Kum v. Wah Tat Bank [1971] 1 Lloyd's Rep. 439, P.C.

Moorcock, The (1889) 14 P.D. 64, C.A.

Pindos Shipping Corporation v. Raven (unreported), March 2, 1983.

Sagar v. H. Ridehalgh and Son Ltd. [1931] 1 Ch. 310, C.A.

Soya G.m.b.H. Kommanditgesellschaft v. White [1982] 1 Lloyd's Rep. 136, C.A.

Universo Insurance Co. of Milan v. Merchants Marine Insurance Co. Ltd. [1897] 2 Q.B. 93, C.A.

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The following further cases were referred to in the skeletal argument A
handed in to the court:

Erlanger v. New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218,
H.L.(E.).

Hulton v. Hulton [1917] 1 K.B. 813, C.A.

Powell v. Streatham Manor Nursing Home [1935] A.C. 243, H.L.(E.).

Produce Brokers v. Olympia Oil and Cake Co. Ltd. [1916] 1 A.C. 314,
H.L.(E.). B

Watt v. Thomas [1947] A.C. 484; [1947] 1 All E.R. 582, H.L.(Sc.).

APPEAL from Staughton J.

On October 30, 1981, Staughton J., in an action by the first plaintiffs,
General Reinsurance Corporation, and 27 other plaintiffs, against the
defendants, Forsakringsaktiebolaget Fennia Patria, refused to make a C
declaration that a facultative fire and flood excess of loss reinsurance
slip policy made between the first plaintiffs and the defendants on June 3,
1976, by which the first plaintiffs agreed to reinsure stocks of paper in
store at, inter alia, Antwerp for 28.571 per cent. of F.Mks. 15 million each
and every loss or series of losses arising out of one occurrence in excess of
F.Mks. 15 million each and every loss was varied so that, with effect from
January 1, 1977, the first plaintiffs' liability under the policy was for 28.571 D
per cent. of F.Mks. 15 million in excess of F.Mks. 25 million. The judge
entered judgment for the defendants on their counterclaim for 28.571 per
cent. of F.Mks. 11,932,363 in excess of F.Mks. 15 million (namely, F.Mks.
3,409,195) the amount due on the policy as unamended, together with
interest at 10 per cent. from July 1, 1977.

The first plaintiffs ("the plaintiffs") appealed on the grounds, inter alia, E
that the judge was wrong to have found that by reason of the custom and
practice of the London insurance market an insured or reinsured had a
right to cancel an original slip until it had been subscribed for 100 per cent.
on uniform terms (subject only to cancellation within a reasonable time
and upon payment of an appropriate time on risk premium); that the judge
was wrong to and there was no proper basis upon which he could, or alter- F
natively, should have found that for reasons of business efficacy an insured
or reinsured had a right to cancel an original slip until it had been sub-
scribed for 100 per cent. on uniform terms (subject only as aforesaid).
Business efficacy did not require any such right because if an insured or
reinsured wished to test the market so as to find out what insurance was
available on what terms his broker could and should use a quotation slip; G
that there was no or no consistent or alternatively satisfactory or sufficient
evidence of established custom and practice of the London insurance
market to support the finding that an insured or reinsured had a right to
cancel an amendment slip until it had been subscribed for 100 per cent.
on uniform terms; and that the judgment of the judge was wrong and
ought to be set aside or varied. H

The plaintiffs accordingly asked for (i) a declaration that the facultative
fire and flood excess of loss reinsurance slip policy made between them
and the defendants on June 3, 1976, was varied so that with effect from
January 1, 1977, until February 15, 1977, the plaintiff's liability under the
policy was for 28.571 per cent. of F.Mks. 15 million in excess of F.Mks.
25 million, and (ii) that judgment be entered for the defendants on their
counterclaim for 28.571 per cent. of F.Mks. 1,932,363 in excess of F.Mks.

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A 25 million (namely, F.Mks. 552,095) together with interest at 10 per cent. from July 1, 1977.

The facts are stated in the judgment of Kerr L.J.

James Fox-Andrews Q.C. and Jeremy Storey for the plaintiffs.

Michael Harvey Q.C. and Jonathan Sumption for the defendants.

B

Cur. adv. vult.

May 13. The following judgments were handed down.

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KERR L.J. This is an appeal on one important issue decided by Staughton J. in a judgment delivered on October 30, 1981, which is reported, inter alia, in [1982] Q.B. 1022. For convenience and brevity I will be referring to various passages in this report hereafter. The issue, to put it broadly for the moment, can be stated as follows: where insurance—or, as in this case, reinsurance—is placed by a broker on the London market by means of a “slip” which is taken round to various underwriters—whether at Lloyd’s or, as in this case, in the company market—who write “lines” by way of participation towards the 100 per cent. cover which the broker and his client seek from the market, what is the contractual position after the slip has been partially subscribed and before it has been subscribed to the extent of 100 per cent? Is there a binding contract as and when, and to the extent that, each participating line is written? Secondly, if each line results in a binding contract pro tanto, does the insured (or reinsured) nevertheless have an option to rescind such contract? Thirdly, if an option of rescission exists, what are the permitted limits of its exercise as against the underwriters?

In *Jaglom v. Excess Insurance Co. Ltd.* [1972] 2 Q.B. 250 Donaldson J. held obiter that the writing of each line constituted an offer by the underwriter and that there was no concluded contract until the slip had been fully subscribed. From the evidence given in the present case it is clear that this conclusion does not accord with the understanding of the insurance market. It regards the slip as an offer presented by the broker which each underwriter accepts pro tanto when writing his line and which thereupon becomes binding on him. For this and other reasons Staughton J. declined to follow *Jaglom’s* case. He held, however, that by the custom or usage of the market, or alternatively by the implication of a term necessary to give business efficacy to the transaction, there remains an option of rescission as against the underwriters up to the time when the slip is fully subscribed, and that this option had been validly exercised by the defendants in the present case. The issue on this appeal by the plaintiffs is whether or not he was correct in these conclusions.

Before turning to the facts and the evidence it is convenient to explain the background against which the issue arises. In every insurance or reinsurance transaction the object of the insured is to secure a contract which provides him with the full desired cover on acceptable terms. But where the risk is not covered by one insurer, as it is in the tariff market, and the slip method of participation is used, it is clear that the total cover results, both in fact and in law, from the conclusion of the individual contracts made with the various syndicates or companies on whose behalf the participating lines are written. An ordinary lay insured may not appreciate this, but a professional insurer who seeks reinsurance will know that this is

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so. In either case, if and when a claim arises, the legal position is that the insured or reinsured can only claim against the individual insurers to the extent of the proportion which they have underwritten, and for this purpose it is irrelevant whether the ultimate evidence of the contract appears in a policy or whether—as in many reinsurances—it rests on the slip itself. In most such cases the underwriters will no doubt adopt a common stance in relation to claims, and—if it comes to litigation—put forward the name of a representative underwriter. In other cases, however, they may differ as to whether or not the claim should be paid, with the result that some may contest it, some may compromise it and others may decide to pay in full. I mention this only to demonstrate, as is common ground, that the slip method of placing insurance results in the conclusion of separate contracts with the subscribers of the slip.

However, in placing the desired cover in this way, the completion of the slip may well take days and sometimes weeks. In the great majority of cases, the first line, written by the leading underwriter on the slip as presented to him, will be followed by the remainder writing different proportions—whether by way of percentage or amount—on identical terms and at the same rate of premium until the 100 per cent. subscription has been achieved. But in some cases this may not happen, because the subsequent underwriters may insist on different terms to which the broker may agree, albeit reluctantly, or because there may be some other intervening event, such as a change of circumstances or a change of mind by the insured, or because of the inability of the broker to procure completion of the slip up to 100 per cent. on any terms which are acceptable to him. In such cases, apart from the problem concerning the status of the lines already written which arises in the present case, the position will be unsatisfactory to the insured, because his initial object of obtaining 100 per cent. cover on identical terms will not have been achieved. It will also be administratively unsatisfactory in the market, because one insured or reinsured risk will have been written on different terms. In the present case Staughton J. described this situation as follows at [1982] Q.B. 1022, 1039B–C, referring to the evidence of one of the witnesses and to the decision of Donaldson J. in *Jaglom's* case:

“These difficulties are not of course insuperable. The position was summed up by Mr. Shaw in his evidence: market practice abhors a slip on different terms; it is possible, but daft. This too was one of the consequences which Donaldson J. described as absurd.”

In order to deal with the difficulties which may arise before a slip has been fully subscribed, the judge listed a number of situations in which these problems may fall to be resolved. This list appears at p. 1037, but it is convenient to set them out again in slightly different terms: (a) The broker may obtain subscriptions for part of the risk and be unable to obtain any more. (b) The broker may obtain subscriptions for part of the risk and then his client may decide that insurance is not required. (c) The broker may obtain subscriptions for 100 per cent. of the risk, and then his client may decide that insurance is not required. (d) The broker may obtain subscriptions for more than 100 per cent. of the risk. (e) Underwriters subsequent to the leading underwriter may alter the terms of the slip. (f) Situations similar to (a), (b), (c) and (e) may arise with a slip amending an existing insurance contract, i.e., an “indorsement” slip as opposed to an original slip. (g) Any of the above situations may arise (i) before the risk has commenced (or “incepted”), or (ii) after it has

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A commenced. It will be noted that in this list the judge makes no reference to cases where a loss giving rise to a claim arises after the partial, and before the complete, subscription of the slip, and I shall have to return to this point later on.

B Three matters should be mentioned in the context of this list of possible situations. First, as the judge points out at the end of this passage, where a broker wishes to test the market, it is always open to him to circulate a "quotation slip," viz., one which makes it plain that he is merely seeking a quotation rather than a contract, so that he can then decide whether or not to proceed by means of an unqualified slip on the same or different terms. Secondly, the situation referred to in (d) requires some explanation. It may often happen, when all the subscriptions on the slip are added up, that these will be found to total more than 100 per cent.; indeed, the broker may not discourage excessive subscriptions, because the degree of interest and participation may give him some indication about the attitude of various underwriters for the future if the cover is to be renewed after its expiry or to be increased in the interim. Provided that this over-subscription does not occur to an unreasonable extent, it is accepted by the subscribers of a slip, albeit perhaps reluctantly, that upon the ultimate "closing"—which they may not receive for weeks or even months after they have written their line—this may fall to be written down proportionately to some extent, so that the total subscription does not exceed 100 per cent. The judge dealt with this at pp. 1037–1038 as a recognised and binding practice of the market, and this was fully accepted on the present appeal. Thirdly, it was common ground before the judge, as well as on this appeal, that the problems raised by the various situations listed above fall to be resolved in the same way, irrespective of whether the transaction is one of insurance or reinsurance, or whether the slip is an original slip or an indorsement (or amendment) slip which is circulated during the period of the cover, or whether it is a marine or non-marine risk. It was also accepted that no distinction is to be drawn between insurances at Lloyd's and those placed by means of slips in the company market.

F However, given the fact that every line may require to be written down proportionately to some extent, in order to produce a total cover of no more than 100 per cent., there remains the crucial question as to the contractual status of each line once it has been written and before the slip has been completed.

G In this connection the first consideration is the decision of Donaldson J. in *Jaglom's* case [1972] 2 Q.B. 250 to which I have already referred. The judge discussed this case in detail at pp. 1032–1037. His conclusions were accepted by both parties, and I can therefore deal with the case somewhat more shortly. It concerned a slip which took several weeks to complete and which was amended in different respects by subsequent underwriters during this process. After it had been completed there was a loss, and the resulting claim was resisted by the leading underwriter on behalf of all the subscribers of the slip. The issue turned on the true construction of the slip in the context of the events which had taken place. As appears from the arguments [1972] 2 Q.B. 250, 252–254, both parties proceeded on the basis of the terms of the slip in its finally amended form, irrespective of the chronology of the amendments in relation to the lines as these were written. No issue appears to have been raised as to the status of each line in relation to the slip as it then stood, and there was no argument or evidence as to what the contractual

position in this respect was considered to be, either by custom or implication. However, in an obiter passage in his judgment, which is quoted by the judge [1982] Q.B. 1022, 1032–1033, Donaldson J. concluded that each line represented an offer by the underwriter in question on the basis of the slip as it then stood, and that a binding contract only came into existence when the slip had been fully subscribed. It would therefore follow from this analysis that no contractually binding commitment is accepted by any underwriter when he writes a line. In the present case, in which considerable evidence as to the custom or practice of the market was adduced, this conclusion was rejected by all the witnesses. Accordingly the correctness of the analysis in *Jaglom's* case was not supported by either party on this appeal, and there was no cross-appeal by the plaintiffs against the conclusion of Staughton J. that to this extent *Jaglom's* case should not be followed.

Nevertheless, since the decision has been reported and discussed in several of the textbooks to which the judge refers, we felt it necessary to consider it afresh, bearing in mind that if it is correct in law it cannot be ousted by agreement between the parties. Having done so, and with respect to Donaldson J. who did not have the benefit of any argument or evidence on this point, I am in no doubt that Staughton J. was right in the present case in concluding, as he did at p. 1038, that the orthodox understanding of the position is correct, viz., the presentation of the slip by the broker constitutes the offer, and the writing of each line constitutes an acceptance of this offer by the underwriter pro tanto. The evidence in the present case clearly shows that in the insurance market this is the intention of both parties to the transaction, and the legal analysis must accord with their intention. Where an underwriter varies the terms of the slip with the consent of the broker before writing his line, this would accordingly constitute a counter-offer which is accepted by the broker on behalf of his client.

In connection with the decision in *Jaglom's* case [1972] 2 Q.B. 250 I would only add that, since the hearing of this appeal, I discovered, more or less by chance, that the foregoing conclusion is in fact borne out by one authority cited in *Chalmers' Marine Insurance Act 1906*, 8th ed. (1976), p. 36 in the notes to section 21, which deals with the "Slip or covering note or other customary memorandum of the contract," and which concerned an uncompleted slip. This is *Morrison v. Universal Marine Insurance Co.* (1872) L.R. 8 Ex. 40 and, on appeal to the Exchequer Chamber, (1873) L.R. 8 Ex. 197. It is not mentioned in any of the textbooks in their discussion of *Jaglom's* case, but it shows that the understanding in the insurance market has differed from *Jaglom's* case for more than a century. In that case a broker was instructed to obtain cover for £5,000, respectively, on a vessel and her chartered freight. He then received information suggesting that the vessel had stranded, but was doubtful as to its accuracy and procured a line of £500 on chartered freight from the underwriter of the defendants. The news of the stranding then became known and thereafter, as appears from the unanimous judgment on appeal, at p. 206, "the broker could not succeed in covering the ship or freight for any amount beyond that already effected." The action was accordingly brought to recover the sum of £500 in relation to the only line which had been written. The issue concerned the direction to the jury as to whether the subsequent issue of a policy in terms of the partially completed slip constituted an election by the insurers not to rely on the non-disclosure. For present purposes the

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A importance of the case is that, on behalf of the underwriters, "it was admitted that in effecting marine insurances the matter is considered merely as negotiation till the slip is initialled, but when that is done the contract is considered to be concluded," notwithstanding that the slip had only been partially subscribed: see L.R. 8 Ex. 40, 45 and L.R. 8 Ex. 197, 199.

B I therefore proceed, as did Staughton J. and both parties on this appeal, on the basis that each line written on a slip gives rise to a binding contract pro tanto between the underwriter and the insured or reinsured for whom the broker is acting when he presents the slip. The underwriter is therefore bound by his line, subject only to the contingency that it may fall to be written down on "closing" to some extent if the slip turns out to have been over-subscribed. The crucial issue, however, is

C whether the insured or reinsured is also bound to the same extent, or whether—as the defendants contend and Staughton J. accepted—the latter have an option to rescind the contract thereafter, at any rate until the time when the slip is fully subscribed to the extent of 100 per cent. or more. The defendants contend that until that time, and for whatever reason and in whatever circumstances, there remains a continuing option

D to rescind all the contracts resulting from the lines written on a partially completed slip. This result was said to flow either from the implication of a term, as and when each line is written, which is necessary to give business efficacy to the resulting contract or, alternatively, from a binding usage or practice in the insurance market.

E In relation to the first of these pleas, the defendants were asked for particulars of the facts and matters relied upon in support of this allegation, and it is convenient to set out their answer:

F "If such terms were not implied—(1) a single contract of insurance would bind the several underwriters to different terms in the event that after some underwriters had initialled the slip (a) the assured failed to render terms to the other underwriters, or (b) the assured tendered a slip in different terms to the other underwriters, or (c) the other underwriters refused to initial the slip without an amendment or at all. (2) An assured would be compelled to accept and pay for incomplete cover in the event that it proved possible to start but not to complete the slip."

G If one then turns back to the different situations listed under (a) to (g) above and to the report of the judgment of Staughton J. [1982] Q.B. 1022, 1037–1041, it will be seen that he accepted this conclusion—either on the basis of custom or of an implied term, or both—in all cases other than (c), i.e. where the slip has been fully subscribed and the insured or reinsured changes his mind thereafter. His conclusion in relation to (c) was not challenged on this appeal, and it does not arise on the facts. However, there cannot in my view be any doubt about its correctness: see section 21 of the Marine Insurance Act 1906 and the two authorities

H referred to by Donaldson J. in *Jaglom's* case [1972] 2 Q.B. 250 which Staughton J. cites at pp. 1031–1032. His conclusion as to (d)—the custom of writing down if the slip is subscribed to the extent of more than 100 per cent. was also accepted as a matter of binding custom, and again there can be no doubt as to its correctness. However, in relation to all the other situations his conclusion as to the existence of an option of rescission was strongly challenged on this appeal, both by reference to implication and to usage. In particular, this conclusion was challenged

in relation to (b), which corresponds most closely to the facts of the present case. Further and a fortiori it was challenged in situations which are not mentioned by the judge at all, but which relate directly to the present case, where a loss occurs before a slip is completed. In such cases, depending on the terms of the slip and the facts, the existence of an option would have the consequence that the underwriter of any line would or not be held liable for his proportion of the loss depending on how the option is exercised. This is so in particular in the case of indorsement slips, as explained hereafter. A B

I now turn to the facts against this background. They are fully set out in the report of the judgment at [1982] Q.B. 1022, 1025-1031, but since the issues on this appeal are considerably narrower I can summarise them fairly shortly.

I will refer to the first plaintiffs as "General Re" and to the defendants as "Fennia." Fennia are insurers carrying on business in Finland and insured linerboard, sack kraft and pulp, i.e. paper products, in transit from Canada to Europe on a warehouse to warehouse basis. One of their customers was Eurocan Pulp Paper Co. Ltd. Eurocan used four principal places of storage in Europe, one of these being a warehouse in Antwerp. Fennia decided to reinsure their liabilities under this open cover, and did so in the first instance by a "whole account" reinsurance on all risk terms. In May 1976 this stood at F.Mks. 12 million in excess of 3 million any one occurrence. (The figures are in Finnmark throughout; it appears from the judgment that the rate of exchange was from six to eight Finnmark to the pound sterling, so that the amounts involved are substantial.) The effect of this reinsurance was accordingly that Fennia would bear the first 3 million of any loss, the next 12 million would fall on the whole account reinsurers, and Fennia would again be liable for any excess. Fennia considered this to be inadequate, in particular for the risk of a catastrophic loss by fire or flood at one of the warehouses. They accordingly instructed their brokers, J. K. Buckenham Ltd., to place further facultative reinsurances on the London market against the risks of fire and flood at Eurocan's four storage locations in Europe, including the warehouse in Antwerp, for 15 million in excess of 15 million any one occurrence, so that Fennia would be liable for the first 3 million and then only for any excess over 30 million. This reinsurance was written by means of a slip on which General Re were the leading underwriters, for 5 of the 15 million; the next was the Insurance Corporation of Ireland Ltd. ("ICI"); and there followed 25 other reinsurers to complete the slip. C D E F G

Next, Fennia decided to increase the whole account cover as from January 1, 1977. Instead of 12 million in excess of 3 million it was altered to 20 million in excess of 5 million. There was therefore a partial overlap between the two reinsurances for losses due to fire or flood in the four locations, where the layer between 15 and 25 millions was doubly reinsured. At first this passed unnoticed, but when news of a fire at the Antwerp warehouse reached Fennia, on about February 12, 1977, though without appreciating its seriousness or relevance, they decided to rearrange the facultative cover retrospectively by placing it wholly on top of the whole account cover as from January 1, 1977. A Mr. Holmes, employed by the brokers, accordingly prepared an indorsement slip in the following terms: H

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- A “It is understood and agreed that effective January 1, 1977, the sum reinsured hereon is amended to F.Mks. 15,000,000 each and every loss, etc. excess of F.Mks. 25,000,000 each and every loss, etc. All other terms and conditions remain unaltered.”

- On February 14, 1977, Mr. Holmes presented this slip to Mr. Hollis, the manager of General Re's London branch, who initialled it. Mr. Holmes then took the slip to the ICI underwriter who also initialled it. However, the latter had by then already heard that the fire was serious, and this had by then also become clear to Mr. Holmes and Fennia. Accordingly, after consultation between them, Mr. Holmes was instructed not to proceed with the slip and to request General Re and ICI to cancel the amendment lines which they had written. At first both refused, but later ICI agreed, as the judge said at p. 1029F, “on the very proper ground that they had known of the loss at Antwerp when their representative initialled the amendment slip.” Mr. Hollis, however, maintained his refusal. He was understandably somewhat mystified, if not suspicious, about the indorsement slip generally, particularly since Mr. Holmes was not asking for any return of premium although the amendment removed the reinsurers' liability to a higher layer. However, all these matters were carefully investigated by the judge, and any suggestion of a material non-disclosure or other impropriety on the part of Fennia has disappeared from the case. The only issue is whether Fennia were in law entitled to demand that Mr. Hollis should cancel his line on the indorsement slip.

- I now return to the fire at the Antwerp warehouse which took place on the night of February 11–12, 1977. This destroyed paper stocks to a value of about 27 million. On the basis of the original slip without the amendment, the 27 London reinsurers were accordingly liable for 12 million in excess of 15 million. However, on the basis of the indorsement slip their liability would only have been 2 million. Although a writ was originally issued in the name of all 27 reinsurers, with General Re and ICI as the effective plaintiffs, ICI dropped out following their agreement to cancel their signature on the indorsement slip, and they and all the other reinsurers have settled with Fennia on the basis of the original slip. The issue now only concerns General Re, who claim a declaration that the line which they wrote on the amendment slip remains binding, so that their liability is only for their proportion of 2 million and not of 12 million. As against this, Fennia counterclaim General Re's proportion of 12 million on the ground that they were entitled to cancel the uncompleted indorsement slip. In the result Staughton J. refused the declaration and gave judgment for Fennia on the counterclaim on the ground that Fennia were entitled to exercise the alleged option of rescission.

- Before turning to the evidence and the judge's reasoning, it is important to focus on the consequences flowing from the writing of a line on an indorsement slip in circumstances such as the present. It was written by General Re on February 14, 1977, with retrospective effect as from January 1, 1977. On this appeal, and for the reasons already explained, it was accepted by both sides that, when written, it resulted in a binding contract, subject only to the issue whether or not Fennia retained an option to rescind the contract thereafter. Under the terms of this line General Re were only liable on and after January 1, 1977, for their proportion of 15 million in excess of 25 million, i.e. of 2 million in relation to the loss by fire on February 11–12. On the other hand, by purporting to exercise an option to rescind this contract, Fennia were

accordingly increasing General Re's liability very substantially, and this, of course, was the reason why Mr. Holmes was instructed to request cancellation of the amending line. However, consider for one moment what would have been the position if, instead of this re-arrangement of the cover, the indorsement slip had provided for an increase in the cover to, say, 25 million in excess of 5 million on payment of an additional premium. I realise that this does not fit in with the "whole account" cover on the facts of the present case, but it is nevertheless necessary to consider such examples, because the legal position resulting from the alleged option would still apply in the same way. In that event the effect of General Re writing the line on the amendment slip would be, retrospectively to January 1, 1977, that their liability for a loss of 27 million would have been their proportion of 22 million, with the result that, obviously, Fennia would not have sought to exercise the alleged option of rescission.

This example of what may, in particular, be the position in relation to indorsement slips, if there is an intervening loss before the slip has been fully subscribed, is of considerable importance when one comes to consider the evidence and the judge's conclusions concerning the alleged custom and implied term. In the case of an original slip, if the loss is covered—though of course only partially—by a line which has already been written, the insured or reinsured will have no interest in exercising the alleged option of rescission. He will hold the subscriber to the contract resulting from the line, even though the intervention of the loss will in practice preclude him from procuring the completion of the slip on the same terms. This is precisely what happened in *Morrison v. Universal Marine Insurance Co.*, L.R. 8 Ex. 40 and 197 to which I have already referred. In such cases no question of exercising any alleged option to rescind is ever likely to arise. However, in the case of uncompleted indorsement slips the position will be different according to whether the amending line increases or decreases the extent of the cover. In such cases, if the alleged option exists, the position of the insured or reinsured can be summarised as "heads I win, tails you lose." If the cover is increased, he will hold the underwriter to his line. But if it is decreased, as in the present case, he will seek to exercise the alleged option.

When one then considers the evidence of the alleged custom which the judge found to exist in the present case, one finds in my view that none of the witnesses were directing their minds to these implications, because none of them had in mind the possibility of an intervening loss before the slip had been fully subscribed. In effect, their evidence was only directed to the following question in the context of original slips and not of indorsement slips: "If an insured or reinsured changes his mind before a slip has been fully subscribed, or if it becomes apparent that the broker cannot procure completion of the slip on its original terms from the other underwriters, because they decline to follow the leader and require some alteration in the terms of the cover, is there a right or option of rescission, by the custom or practice of the market, in relation to the lines already written, in particular if the risk has already incepted?" The judge answered this question in the affirmative in relation to original slips, and went on to hold that the same consequences also apply to indorsement slips, despite the absence of any evidence of custom in this regard: see [1982] Q.B. 1022, 1039–1041. However, with great respect, in my view no option or right of rescission of any kind, whether by custom or implication of law, has been established in the present case, let alone after the occurrence of a loss

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A affecting lines previously written on an indorsement slip. In relation to original slips, I do not think that the evidence was sufficient to establish any binding custom, even within the limits of the question set down above. In relation to indorsement slips there was simply no evidence at all, and no reason to believe that the market would accept the full implications which would follow from the judge's conclusion in this regard.

The relevant law on this issue is clear.

B “Every usage [to use the technical term for a custom or practice which is imported into any transaction as a matter of binding obligation], whether in respect of a particular trade, branch of business or occupation . . . must be notorious, certain and reasonable . . .”: see *Halsbury's Laws of England*, 4th ed., vol. 12 (1975), para. 450.

C Five witnesses were called in this context, and I must briefly review the effect of their evidence. No issue as to credibility or demeanour arises; as shown by the passage of the judgment at p. 1040A, the judge regarded the main experts called on both sides as persons of considerable experience in the market without preferring one to the other. Indeed, as pointed out by the judge, at p. 1039G, the general tenor of the evidence was not given in any partisan spirit. This court is therefore in as good a position to assess the effect of the evidence as the judge; indeed, the fact that we have a verbatim transcript may be an advantage.

First, there were the two witnesses who were concerned in the transaction. Mr. Holmes, the broker, clearly considered that the indorsement line bound the underwriter, Mr. Hollis, once he had initialled it; on this point all the witnesses were unanimous. But he never suggested that he could require the cancellation of the line as a matter of right; he merely regarded Mr. Hollis's refusal to do so as having been unreasonable. Mr. Hollis, for his part, obviously felt entitled to refuse to cancel, but in cross-examination he conceded that, “subject to mutual agreement,” the broker had a “right” to ask for cancellation. The tenor of his evidence was that requests for cancellation of uncompleted slips were reasonable, particularly where there is some change of circumstances; though, like the others, he made no reference to the consequences of an intervening loss in this connection. Further, he considered that the underwriter would in any event be entitled to demand “time on risk” premium if cancellation was requested, and agreed, after the risk had inception.

I then turn to the three expert witnesses. Mr. Stark, a retired underwriter called on behalf of Fennia, considered that “up to the moment of attachment”—which may have meant the inception of the risk—a reinsured has an absolute right not to proceed with an uncompleted slip, though he had had no experience of such a case. After attachment, the underwriter would not be bound to agree to cancel, although “in market practice the underwriters would, maybe reluctantly, have agreed.” In his view the outcome would in each case depend on the relationship between the parties and the reasons offered for the request for cancellation. Mr. Hickmott, a former underwriter called on behalf of General Re, appeared to think that there was no settled market practice of any kind, that everything depended on agreement, but that there was certainly no right to have a line, once written, cancelled ab initio.

This leaves Mr. Shaw, a retired broker called by Fennia who was also a barrister. He had written a book *Cockerell & Shaw, Insurance Broking & Agency: the Law and Practice* (1979), from which the judge quoted a passage, at p. 1037, which clearly recognises, though reluctantly, that in cases

of uncompleted slips there would be a partial liability for any claims which might have arisen in the interim, and that this was an unsatisfactory situation. The book made no reference to any right of cancellation on the part of the insured or reinsured, but Mr. Shaw thought that in practice there was such a right. In an answer which the judge echoed, at p. 1038, and which was perhaps the high-water mark of Mr. Shaw's evidence on which the judge appears to have mainly relied, he said:

"As to the withdrawal while the slip is going round the market then, as I understand the practice, the underwriters who have subscribed the slip prior to that point cheerfully, readily and habitually accept that the matter may be withdrawn from them despite the fact that in law cover may have inceptioned."

This had been his experience on one occasion when he found himself unable to procure completion of an original slip beyond the 50 per cent. written by the first underwriter, who then cancelled on request; and this was also the only actual occasion of a cancellation within the experience of any of the witnesses. However, how can this evidence begin to establish a legal right of cancellation as a matter of binding custom? Moreover, having given this answer, Mr. Shaw immediately added that he wished "to put one gloss on that," to the effect that in some cases a "time on risk" premium might be demanded as the price of cancellation. Later on he qualified this again by saying: "The practice is [that] upon the broker being reasonable and going back speedily, the underwriter will not require of him a time on risk charge," and that if the underwriter refused to cancel altogether "the market would be against him."

That was as far as his evidence went. With the greatest respect to Staughton J., I cannot begin to accept that any of this evidence goes anywhere near to establish a binding custom entitling an insured or reinsured, as of right and at his unfettered option, to cancel the contract resulting from the writing of a line which—as everyone agreed—is immediately binding on the underwriter. No doubt such situations would in practice be readily resolved by agreement, possibly subject to any "time on risk" premium which may be due, if and when requests for cancellation are made. But this is a long way from proof of a legal right by custom. A fortiori it is clear that there was no evidence whatever to suggest the existence of any such custom in relation to indorsement slips, let alone after the occurrence of a loss which, depending on the terms of the slip, would place the insured or reinsured in the "heads I win, tails you lose" position to which I have referred. Accordingly, I cannot accept the judge's conclusions concerning the allegation of a binding custom.

One then comes finally to the alternative basis on which an optional right to cancel was said to rest, viz., implication of law. However, given the conclusion that no custom to this effect has been established, it would clearly be impossible to conclude that an unfettered option of cancellation arises by implication of law as a matter of necessary business efficacy. Any such implication would be unnecessary, since it was agreed on all sides that it is always open to a broker wishing to test the market without commitment to do so by circulating a "quotation slip." Moreover, in the case of indorsement slips which, depending on their terms, would entitle the insured or reinsured to cancel or to hold the underwriter to his line in the face of a claim which has meanwhile arisen, the implication of any

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A such option would also be clearly unreasonable, since one party would be at the mercy of the other.

For these reasons I am left in no doubt that this appeal must be allowed and that Fennia's counterclaim for payment on the basis of the original unamended slip must be dismissed. They had no right to require cancellation of the line written by Mr. Hollis on the indorsement slip. The declaration to the same effect claimed by General Re appears to follow,
 B but we should hear counsel as to whether it is appropriate to make any order in this regard.

SLADE L.J. I have had the advantage of reading in draft the judgment of Kerr L.J. I respectfully agree with all of it and, out of deference to Staughton J., will simply add some observations of my own on the question of the alleged custom and practice.
 C

The critically important finding by the judge appears in the following passage in his judgment [1982] Q.B. 1022, 1038:

"It was proved, in my judgment, that while an original slip is going round the market and is not yet subscribed for 100 per cent., those underwriters who have subscribed cheerfully, readily and habitually accept that it may be withdrawn, but they may require time on risk premium if the cover has already commenced . . . I hold that these rights to cancel and to time on risk premium are binding on both the underwriter and the assured by reason of the custom and practice of the London insurance market."
 D

The evidence of the witnesses referred to by Kerr L.J. did, I think, establish that, save in the case where an actual loss has intervened before the slip had been fully subscribed, to which they did not direct their minds, the situation referred to by Staughton J. is likely in practice to be resolved by the underwriters acceding to a request by the brokers concerned to cancel the contract concluded by the signature of the slip, subject in some cases to payment of a "time on risk" premium. However, I think the evidence went no further than this. And this, in my judgment, does not
 E come near to establishing any legally binding custom and practice.

No doubt underwriters who operate in the London insurance market will value the goodwill of brokers who operate in the same market. It is not surprising, therefore, that in the situation referred to by Staughton J. underwriters who have subscribed a slip may not ordinarily in practice stand on their strict rights, but will, as a matter of grace, permit cancellation. There is, however, the world of difference between a course of conduct that is frequently, or even habitually, followed in a particular commercial community as a matter of grace and a course which is habitually followed, because it is considered that the parties concerned have a legally binding right to demand it. As Ungood-Thomas J. pointed out in *Cunliffe-Owen v. Teather & Greenwood* [1967] 1 W.L.R. 1421, 1438: "What is necessary is that for a practice to be a recognised usage it should be established as
 G a practice having binding effect."

The evidence most favourable to the defendants was that of Mr. Shaw. The judge clearly relied on it heavily, since the phrase "cheerfully, readily and habitually" was taken by him verbatim from the evidence of that witness. In the relevant passage of his evidence, Mr. Shaw was setting out what he understood the practice of the London insurance market to be. Yet even he, in the course of his full evidence, nowhere unequivocally stated that the assured is regarded by the market as having a legally enforce-
 H

able right to cancel the slip in the circumstances now under discussion. On the contrary, the only specific example which he gave, of a case where cancellation had in fact occurred, suggested quite the contrary. He was asked (in chief) "Can you think in your experience of any incidents where it has happened?" He replied:

"It is not a very close parallel, my Lord, but I placed a risk last year in Monrovia, Liberia at what I felt was an attractive rate. It took me some days to convince myself that I was unable to place the rest of the risk at that rate. I went back to my client, who withdrew his instructions, so I had to go back to the leading underwriter *and ask to be released*, which he cheerfully did."

The emphasis on the words "and ask to be released" is my own. It is not, in my opinion, the language of a man who considered that, because of a legally binding custom and practice of the London insurance market, he had a legal right to be released in the circumstances.

A significant analogy may, in my opinion, be drawn with the acquisition of customary rights in relation to land. In such a case the claimant has to show that his enjoyment has been "as of right," that is to say, that all acts alleged to have been done by virtue of the custom have been done not only without violence and without secrecy, but also without leave or licence asked for and given, either expressly or impliedly, from time to time; if the acts relied on have been done in pursuance of some licence, they will not suffice to support the claim; see *Halsbury's Laws of England*, 4th ed., vol. 12 (1975), para. 423. So too, in my judgment, a practice by which underwriters as a matter of grace ordinarily give an assured, in the circumstances under discussion, permission to cancel a contract concluded by a slip, does not suffice to give rise to a legally binding custom and practice.

With great respect to the judge, I therefore think that the evidence did not suffice to support his finding that there is a custom and practice of the London insurance market which gives an assured a legally enforceable right of the nature referred to at the beginning of this judgment. A fortiori, as Kerr L.J. has said, it is clear that there was no evidence to suggest the existence of any such custom in relation to indorsement slips, let alone after the occurrence of a loss.

On the question of an implied term, I have nothing to add to what Kerr L.J. has said, with which I fully agree. For these reasons and the further reasons given by him, I agree that this appeal must be allowed.

OLIVER L.J. I am fully in agreement with the judgment of Kerr L.J. and I add what follows only because we are differing from the careful judgment of the judge. Understanding of the contractual procedures of the insurance market does not come easily to those who are unfamiliar with it and, indeed, the hearing of the present appeal induces me to believe that even amongst those very much more experienced than I there remains room for a considerable degree of uncertainty. In the instant case, however, shorn of these technical and jurisprudential difficulties inherent in the way in which the market operates, the question comes down simply to one of whether there was sufficient evidence to justify the conclusion at which the judge arrived that there had been established a binding market practice or usage leading him to refuse the declaration which the plaintiffs sought. It is common ground that it is not sufficient for the defendants merely to establish a practice commonly adopted: they must establish a practice which the courts will recognise as binding upon those dealing in the market

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A to which it relates. The essentials of such a practice are conveniently set out in the following passage from the judgment of Ungood-Thomas J. in *Cunliffe-Owen v. Teather & Greenwood* [1967] 1 W.L.R. 1421, 1438:

“‘Usage’ as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.”

C The first two of these requirements are matters of evidence and, in my judgment, neither could, in the instant case, be said to be established on the only evidence before the court. Mr. Harvey has criticised Ungood-Thomas J.’s first requirement as applying some unusual and extraordinary burden of proof beyond the ordinary civil standard of balance of probability. But I do not, for my part, read that judge as meaning more than that the usage relied upon is to be established by the application of ordinary standards of proof and that what the usage is must be clearly defined. I cannot find in the evidence before the judge in the instant case clear definition either of the usage claimed or of the circumstances in which it is to apply. For instance, Mr. Stark’s view was that the reinsured is entirely free from any liability up to the inception of risk, but that thereafter he would have to give an acceptable reason to withdraw. He seems to have been clearly of the view that, once cover had incepted, a reinsurer was not bound to accept a cancellation but would normally do so as a matter of mutual agreement. Mr. Shaw, on the other hand, alternated between saying (a) that pending 100 per cent. subscription “or close to it,” there was no contract at all binding upon the assured, and (b) that there was a contract but one subject to cancellation on payment, in cases of personal accident insurance, of a time on risk charge but subject in any case to a qualification that a time on risk charge might be required if the broker behaved unreasonably or did not go back to the underwriter with due speed. Asked, however, whether he knew of any case in which the insured had been able to say, and it had been accepted, “You have not got a say in this at all as insurers. I am entitled as of right to put an end to this,” he replied “If he took that line, the market would be against him.” Asked to expand upon that he described “the practice and custom and law” as “a grey area.” As Kerr L.J. has mentioned, the only witness who came within measurable distance of supporting the usage found by the judge was Mr. Shaw and in my judgment his evidence, read as a whole, is quite insufficient for that purpose either as a matter of establishing with any degree of certainty what the usage was or as applying it to the circumstances of the signature of an indorsement slip and of a loss having arisen.

H Mr. Shaw, it is true, was asked what he thought would be the market’s reaction to an underwriter’s refusal to permit the withdrawal of an indorsement in circumstances similar to those in the instant case, but his reply was that he could not put it higher than that “the market would take a very dim view.” That could not, in my judgment, possibly be evidence of the existence of such a usage as that claimed by the defendants. As regards the further requirement of notoriety, not only was there no unanimity among the defendants’ witnesses as to what the usage was, but there was a remarkable lack of any evidence of general familiarity with it. The evidence has already been analysed by Kerr L.J. and to review it again would be a

work of supererogation. I say no more than that I entirely agree with his conclusion both as regards the defendants' failure to establish the market usage claimed and as to the implication of a term to the same effect as a matter of business efficacy. I too would allow the appeal. A

Appeal allowed.

Declaration as prayed in (i) of notice of appeal with deletion of "until February 15, 1977." B

Judgment on counterclaim for defendants as set out in (ii) of notice of appeal.

Plaintiffs' costs of appeal.

No order for costs below. C

Leave to appeal refused.

Solicitors: *Davies Arnold & Cooper; Ince & Co.*

E. M. W.

July 7. The Appeal Committee of the House of Lords (Lord Fraser of Tullybelton, Lord Roskill and Lord Brightman) dismissed a petition by the defendants for leave to appeal. D

[COURT OF APPEAL] E

AMHERST v. JAMES WALKER GOLDSMITH
& SILVERSMITH LTD.

[1980 A. No. 3928] F

1983 March 15, 16; 30

Lawton, Ackner and Oliver L.JJ.

Landlord and Tenant—Rent—Revision—Landlord to serve notice initiating rent review by specified date—Notice served over four years late—Time held not to be of essence—No prejudice to tenants—Whether landlord precluded by delay from invoking rent review—Whether notice valid G

A lease provided for a rent review to be initiated by the landlord serving a rent assessment notice on the tenants by December 25, 1974. The landlord failed to serve a notice by that date and the tenants refused a request by the landlord to extend the time and allow the rent review to proceed. But in proceedings commenced by the landlord in October 1978 it was held that time was not of the essence in regard to the initiation of the rent review, and in May 1979 the landlord served the tenants with a notice assessing a revised rent. The validity of that notice being disputed, the landlord sought a declaration that he was entitled to such rent as was determined pursuant to the rent review provisions of the lease notwithstanding the delay in serving a notice. The judge held that in the absence of prejudice to the tenants the delay, though unreasonable, did not prevent the landlord from relying on the rent review provisions and he granted the declaration. H

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A On appeal by the tenants:—

Held, dismissing the appeal, that, time not being of the essence, mere delay, however lengthy, could not preclude the landlord from exercising his contractual right to invoke the rent review provisions (post, pp. 343F, 346F–G, 347H–348A); and that (*per* Lawton and Oliver L.JJ.) there was no justification for reading into the lease any implied term that, the time stipulation in regard to the rent assessment notice not being of the essence, the landlord had to serve the notice within a reasonable time (post, pp. 343G, 347A–B).

Telegraph Properties (Securities) Ltd. v. Courtaulds Ltd. (1980) 257 E.G. 1153 overruled.

Dicta of Slade L.J. in *London & Manchester Assurance Co. Ltd. v. G. A. Dunn & Co.* (1982) 265 E.G. 39, C.A., and Lord Denning M.R. in *C. H. Bailey Ltd. v. Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, 732, C.A. applied.

C Dicta of Goff J. in *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559, 1564, and Megarry J. in *Kenilworth Industrial Sites Ltd. v. E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069, 1072 not followed.

Per Lawton and Oliver L.JJ. (i) Even delay plus hardship to the tenants would not disentitle the landlord to exercise the right which he has, on the true construction of the contract, unless the combination amounted to an estoppel (post, pp. 344A–B, 347F–G).

D Dicta of Lord Salmon in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 951, 956, H.L.(E.) considered.

(ii) The concept of abandonment is not apt in rent review cases (post, pp. 344E, 347H).

Decision of Mr. John Mowbray Q.C. sitting as a deputy High Court judge of the Chancery Division affirmed.

E The following cases are referred to in the judgments:

Accuba Ltd. v. Allied Shoe Repairs Ltd. [1975] 1 W.L.R. 1559; [1975] 3 All E.R. 782.

Bailey (C. H.) Ltd. v. Memorial Enterprises Ltd. [1974] 1 W.L.R. 728; [1974] 1 All E.R. 1003, C.A.

Cornwall v. Henson [1900] 2 Ch. 298, C.A.

Farrant v. Olver [1922] W.N. 47.

F *James v. Heim Gallery (London) Ltd.* (1980) 256 E.G. 819, C.A.

Kenilworth Industrial Sites Ltd. v. E. C. Little & Co. Ltd. [1974] 1 W.L.R. 1069; [1974] 2 All E.R. 815.

Kirkland Properties Ltd. v. G.R.A. Developments Ltd. (unreported), May 4, 1978.

London & Manchester Assurance Co. Ltd. v. G. A. Dunn & Co. (1982) 265 E.G. 39, C.A.

G *M.E.P.C. Ltd. v. Christian-Edwards* [1978] Ch. 281; [1978] 3 W.L.R. 230; [1978] 3 All E.R. 795, C.A.

Mills v. Haywood (1877) 6 Ch.D. 196.

Raineri v. Miles [1981] A.C. 1050; [1980] 2 W.L.R. 847; [1980] 2 All E.R. 145, H.L.(E.).

Stickney v. Keeble [1915] A.C. 386, H.L.(E.).

Telegraph Properties (Securities) Ltd. v. Courtaulds Ltd. (1980) 257 E.G. 1153.

H *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904; [1977] 2 W.L.R. 806; [1977] 2 All E.R. 62, H.L.(E.).

Woods v. Mackenzie Hill Ltd. [1975] 1 W.L.R. 613; [1975] 2 All E.R. 170.

The following additional cases were cited in argument:

Grice v. Dudley Corporation [1958] Ch. 329; [1957] 3 W.L.R. 314; [1957] 2 All E.R. 673.

Lloyd v. Collett (1793) 4 Bro.Ch. 469.

APPEAL from Mr. John Mowbray Q.C. sitting as a deputy High Court judge of the Chancery Division. A

By originating summons dated October 1, 1980, the plaintiff landlord, William John Amherst, sought, inter alia, a declaration that on the true construction of a lease dated August 29, 1961, and made between the landlord and the predecessors in title of the defendant tenants, James Walker Goldsmith & Silversmith Ltd., and in the events which had happened the landlord was entitled to receive from the tenants as from June 24, 1975, rent at such rate as might be determined by an independent surveyor appointed by the President of the Royal Institution of Chartered Surveyors notwithstanding the fact that the landlord did not submit to the tenants a written assessment of rent for approval on or before December 25, 1974, in pursuance of the terms of the lease but submitted such written assessment on or about May 9, 1979. On October 12, 1981, Mr. John Mowbray Q.C. granted the declaration. B C

The tenants appealed by notice of appeal dated January 29, 1982, on the grounds that (1) the deputy judge having decided that the landlord was guilty of unreasonable delay in submitting the assessment of rent to the tenants was wrong in law in holding that nonetheless that assessment was effective in the absence of any hardship or prejudice to the tenants; (2) the deputy judge was wrong in law in holding that the landlord's delay in having the rent reviewed was not so great as to amount to abandonment of his right to have the rent reviewed; and (3) on the evidence the deputy judge ought to have found that the landlord had abandoned his right to have the rent reviewed. D

The facts are stated in the judgment of Oliver L.J. E

Michael Rich Q.C. and *Richard Moshi* for the tenants.
John Hamilton for the landlord.

Cur. adv. vult.

March 30. The following judgments were handed down. F

OLIVER L.J. This is an appeal from an order made by Mr. John Mowbray Q.C. sitting as a deputy judge of the Chancery Division on October 12, 1981, declaring that on the true construction of the lease referred to below and in the events which have happened the plaintiff landlord is entitled to receive from the tenants from June 24, 1975, rent at such rate as may be determined by an independent surveyor nominated in accordance with the lease notwithstanding the failure of the landlord to serve a notice of assessment of rent on the tenants prior to December 25, 1974. G

This is yet another rent review clause case, but the history here is an unusual one. The tenants are the lessees by assignment of certain commercial premises, no. 449, High Road, Wembley, demised by a lease dated August 29, 1961, and made between the landlord of the one part and Walton Hassel and Port Ltd. of the other part for a term of 28 years from June 24, 1961. The original rent reserved was a sum of £2,500 for the first 14 years of the term and thereafter a rent of £2,500 or such higher sum as should be ascertained under the subsequent provisions of the lease. The proviso to the *reddendum*, which is the only part of the lease that matters for present purposes, is (so far as material) in the following terms: H

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- A " Provided always and it is hereby agreed that the yearly rent payable by the lessee during the second 14 years of the term hereby granted (hereinafter called 'the second period') shall be the yearly sum of £2,500 aforesaid or such yearly sum representing the rental value of the demised premises in the open market on a lease for 14 years certain on the assumption that the premises are available for letting with vacant possession and without the payment of a premium whichever shall be the higher such assessment of the second period rent to be made in the following manner that is to say: (a) such assessment shall be made in the first instance by the lessor and submitted to the lessee for approval in writing on or before December 25, 1974 . . ."
- B

- C There follow certain provisions about what is to happen if the assessment is not agreed. If they fail to agree the assessment before December 25, 1974, (time being of the essence for this agreement) then the matter is to be referred to an independent surveyor appointed by the parties, but if they fail to agree on his appointment by January 25, 1975, (in respect of which, again, time is of the essence) then the independent surveyor is to be appointed by the President of the Royal Institution of Chartered Surveyors.

- D The clause is a slightly unusual one, since it prescribes expressly that time is to be of the essence for the two subsequent stages of the review machinery but does not so prescribe in relation to the initiating assessment.

- E In fact the landlord—or, to be more accurate, the solicitors then acting for him—allowed December 25, 1974, to pass without serving the triggering assessment. They woke up to that omission fairly shortly afterwards and on January 25, 1975, they wrote seeking an extension of time and asking for the matter to be referred to an independent surveyor. Perhaps not altogether surprisingly, in the light of the law as it then stood, the tenants declined to entertain either of these suggestions. Nothing daunted, the landlord nevertheless, on February 10, 1975, approached the President of the Royal Institution of Chartered Surveyors to make an appointment but, after some correspondence, he, having learned that the appointment was opposed by the tenants' solicitors, declined to act in the matter. That was
- F in March 1975 and thereafter nothing further was done and, indeed, nothing further could then have been done unless the landlord was sufficiently hardy to start proceedings and litigate the matter to the House of Lords. There the matter rested until 1978. In March of that year the House of Lords gave their decision in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, which was reported first in *The Times* and a few weeks later in the *Weekly Law Reports*. The landlord's then
- G solicitors then wrote to the tenants' solicitors on June 2, 1978, calling on them to withdraw their objection to the appointment of an independent surveyor. That received the perhaps predictable answer that, whatever may have been the position in the *United Scientific* case, the clause in the instant case was one where time was of the essence and that accordingly, there having been no triggering notice within time, the subsequent machinery
- H never came into operation. After some further correspondence up to the end of July 1978, the landlord, on October 12, 1978, issued an originating summons seeking, in effect, declarations (a) that time was not of the essence with regard to the initiation of a rent review and (b) that the tenants were not entitled to object to the appointment of an independent surveyor.

Evidence was duly filed on that summons which came on for hearing in May 1979 before Judge Mervyn Davies. He held that, in the light of the *United Scientific* case [1978] A.C. 904 and on the true construction

of the lease, time was not of the essence of the review clause but that the occasion for the appointment of an independent surveyor had not yet arisen since the letter of January 25, 1975, was merely a request for an extension of time and was not the landlord's assessment of rent required to trigger the operation of the review clause. Thus he granted the landlord the first declaration sought but refused the second. The point that the January 25 letter did not operate as the necessary trigger does not seem to have occurred to the landlord or his advisers until the hearing and on May 9, 1979, a belated attempt was made to rectify the omission by serving a notice which specified a market rent of £16,000 per annum. The judge declined to rule on the validity of that notice. He expressed a view that there had been unreasonable delay in serving it and that if that had resulted in prejudice to the tenants such prejudice might invalidate it, but since the tenants had not come to court to meet a case of an *ex facie* valid notice and therefore had not been given the opportunity to adduce any evidence of prejudice, he felt himself unable to deal with the matter. The tenants appealed to the Court of Appeal against the judge's declaration that time was not of the essence and on January 18, 1980, that appeal was dismissed. Thereafter the President of the Royal Institution of Chartered Surveyors was persuaded to make an appointment but the surveyor so appointed was, perhaps not unnaturally, reluctant to enter upon a determination whilst there was still a dispute about whether the notice which triggered the clause was a valid notice.

Accordingly, on October 1, 1980, the landlord issued a further originating summons claiming a declaration that the landlord is entitled to receive from the tenants such rent as is determined by the surveyor appointed despite the failure to serve a notice of assessment prior to May 9, 1979. That summons came before Mr. Mowbray Q.C. in October 1981 and the sole question which fell to be argued before him was whether the delay which had occurred since December 25, 1974, in serving the triggering notice was such as to invalidate the notice of assessment. The tenants did not rely upon any point of estoppel nor did they seek to adduce any evidence to show that they had suffered any prejudice as a result of the delay. The only questions before the deputy judge were (a) whether the delay amounted to an abandonment of the landlord's right to serve a notice and (b), assuming no abandonment, whether the delay (i) was unreasonable and (ii) of itself invalidated the notice.

The deputy judge found that the delay which had occurred was unreasonable. He gave no independent reasons for this finding but adopted the reasoning of Judge Mervyn Davies on the previous summons which was, in effect, that the landlord ought to have served his assessment notice before the issue of the first originating summons (on October 12, 1978) and that failure to serve between then and May 9, 1979, constituted unreasonable delay. He held, however, that such delay, although unreasonable, did not invalidate the assessment notice as a matter of law because *mere* delay, without proof of prejudice to the tenant, does not prevent a landlord from relying out of time on a rent review clause where time is not of the essence. He went on to hold, on the facts, that the delay which had occurred was not evidence of abandonment. He accordingly granted the landlord the declaration sought.

It is against that declaration that the tenants now appeal and in this court Mr. Rich, who appears for them, has not sought to found any argument on abandonment, but has been content to confine himself to the two propositions (a) that the delay which took place was unreasonable and

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- A (b) that unreasonable delay, without more—and, in particular, without any evidence of prejudice or hardship to the tenants—is fatal to the landlord. Thus this case raises directly for decision a question which has been touched upon in a number of previous cases but answered—or at least arguably answered—in only one of them, that being the decision of Foster J. in *Telegraph Properties (Securities) Ltd. v. Courtaulds Ltd.* (1980) 257 E.G. 1153, a case explained by the deputy judge on the ground that the delay
- B there under consideration was so extensive as to constitute an abandonment of the landlord's rights.

In approaching the problem the convenient course will, I think, be first to consider some of the previous authorities in which there has fallen to be considered the question of the effect of delay where time is not of the essence of the contract. The question was touched on briefly by Lord

C Denning M.R. in *C. H. Bailey Ltd. v. Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728 and it seems to have been his view that mere delay would not affect the landlord's right unless it had in some way induced the tenant to act to his detriment so as to amount to an equitable estoppel. He observed, at p. 732:

- D “It was said: suppose the landlords did not apply for the rent revision for months or years after the date when they became entitled to it. Would not this operate unfairly on the tenant? In most cases it would not do so. . . . But, if there was a case where the delay of the landlord did prejudice the tenant, then I should think the tenant might well pray in aid the principle of equitable estoppel to hold up the increase. It is to be remembered, too, that it is always open to the tenant himself to take steps to ascertain the increased rent.”

E On the other hand, Megarry J. in *Kenilworth Industrial Sites Ltd. v. E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069 seems to have entertained the view that mere delay might be fatal. He said, at p. 1072:

- F “No doubt, as Mr. Rimer accepted, the landlord could not wait for several years after the first five years had run, and then demand what in effect would be a retrospective increase of rent for the whole of the second five years: . . .”

However, in a subsequent passage in the judgment, he expressly disclaimed any decision as to the effect of a notice not served within a reasonable time.

- G Both these cases were cited by Goff J. in his judgment in *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 where he had to deal directly with the question of unreasonable delay simpliciter. What he said was, I think, strictly obiter because he decided on the facts that the delay in the case before him was not unreasonable. Nevertheless, it seems clear that he was accepting in principle that the landlord's right to operate a clause of this sort in a case where time is not of the essence can be defeated simply by unreasonable delay. He said, at p. 1564:

- H “The submission for the tenants is that the landlords have a reasonable time and no more and that was exceeded. Counsel for the landlords contends that notice could be given at any time before the tenants gave notice making time of the essence which they never did. I think the latter contention is too narrow: see *Farrant v. Olver* [1922] W.N. 47 where Sargant J. said: ‘It was not necessary that time should be made of the essence of the contract when the defendant had so persistently and for so long refused to perform the contract.’ Sargant J. there

referred to refusal, but it was not a case of positive refusal, rather of A
failure to perform."

The *Accuba* case was referred to by their Lordships in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 but this particular point was not commented upon and, indeed, Lord Salmon appears to have been of the view that mere delay, however prolonged, was not of itself fatal unless accompanied by prejudice to the B
tenant. He observed, at p. 951, that the provisions for rent review, in general, were directory only, adding:

"Nevertheless any unreasonable delay caused by the landlords and which is to the tenants' prejudice would prevent the rent being revised after the review date."

That is reflected in a further passage in his speech at p. 956. C

This passage from the speech of Lord Salmon was adopted by Slade J. in *Kirkland Properties Ltd. v. G.R.A. Developments Ltd.* (unreported), May 4, 1978. He expressed the view that delay would defeat the exercise of the right of review only if it caused hardship to the tenant or if it amounted to abandonment by the landlord of his right. This, again, however, was obiter, since in the case before him he held that time was of D
the essence.

In *James v. Heim Gallery (London) Ltd.* (1980) 256 E.G. 819 the matter of abandonment was very briefly touched on by Buckley L.J. in his judgment but without expressing any view about whether, in fact, a right could be defeated in this way, and the only reported direct decision on the effect of delay is that of Foster J. in *Telegraph Properties (Securities) Ltd. v. Courtaulds Ltd.*, 257 E.G. 1153. There something over six years had elapsed between the date fixed by the lease for giving notice and the date on which notice was actually given. Foster J., at p. 1154, rejected any suggestion that the defeasance of the right in the case before him was attributable to a promissory estoppel: E

"In my judgment, the plaintiff has been guilty of such a delay as to make it unreasonable for it to call on the defendant for a rent review and to do so would be of necessity unfair for the defendant. . . . I therefore need not go into the facts in regard to the matters which have been put in evidence as to the effect both on the plaintiff and the defendant if the notice is not held to be good." F

Thus the judge clearly there was adopting what seems to have been the view of Goff J. in *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 and rejecting the suggestion implicit in the speech of Lord Salmon in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 that prejudice or hardship to the tenant is essential before delay can operate to defeat the landlord's right. Mr. Rich naturally prays this decision in aid in the instant case and it is certainly consistent with the argument which he has advanced before this court. G
The deputy judge took the contrary view, because he regarded Foster J.'s decision as being consistent only with his having formed the view that the plaintiff in that case had abandoned his rights. I do not, for my part, find the decision explicable on that ground and, as appears hereafter, I have the gravest reservation, despite dicta to the contrary, whether any such concept as unilateral abandonment can exist. In my judgment Foster J.'s decision was a direct decision of the point in Mr. Rich's H

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A favour and the question which has to be squarely grasped in this court is whether it was correct.

Mr. Rich, in a most skilful and persuasive argument, has submitted that it was and his reasoning may be summarised as follows. (1) A stipulation as to time in a contract is a term of the contract just like any other term and it means exactly what it says. (2) If, therefore, the party who is obliged under the contract to perform by a certain time, fails to do so, he is in breach of contract and the other party is *prima facie* entitled to treat himself as discharged from the performance of *his* obligation. (3) Prior to the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 77), however, a court of equity would nevertheless still decree specific performance at the instance of the party in default—and indeed would restrain an action at law based upon the failure to perform—if, in all the circumstances, it was equitable to do so. Instances of its being inequitable to do so would be, for instance, case where the parties themselves had in terms agreed that the time stipulation was to be essential or cases where the nature of the property was such as to indicate that time was of critical significance. (4) The effect of section 41 of the Law of Property Act 1925 is merely that in all contracts stipulations as to time are to be treated as governed by the equitable rule, that is to say, it has to be asked in each case whether it would be equitable for the contract to be specifically enforced notwithstanding that the stipulated timetable has not been adhered to. (5) In answering that question the court has simply to apply the ordinary rules of equity and if, therefore, the other party shows that there is some ground upon which specific performance should be refused, the party in default will not be entitled to enforce the contract. (6) Delay in applying for the remedy of specific performance is one ground upon which the remedy may be refused. Accordingly in a case where a rent review date has been allowed to pass and where unreasonable delay has taken place in seeking to invoke the clause, the court should, by analogy, hold that the right to rely upon it has been lost.

It is, Mr. Rich submits, only by an analysis along these lines that it is possible to explain the references by Lord Salmon in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 951, 956 and by Slade J. in *Kirkland Properties Ltd. v. G.R.A. Developments Ltd.* (unreported) to hardship to the tenant, for if, as a matter of construction of the contract, the stipulation as to time is effectively deleted, save as fixing the earliest date at which the given event may occur and the date after which the other party may call for performance if he requires it, then hardship cannot come into the matter. These references show, therefore, he submits, that after the contractual date has passed there is an alteration of the contractual right. It becomes a right which can only be exercised under the control of the court and in exercising its control the court will have regard to the ordinary principles applicable to specific performance actions, one of which is that prolonged delay, of itself and by itself, may operate as a bar to specific performance, without regard to any consideration of whether it causes unfairness or hardship to the other party. In support of this proposition Mr. Rich relies upon Cotton L.J.'s statement in *Mills v. Haywood* (1877) 6 Ch.D. 196, 202 that "a party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager" and upon the decision of Sargant J. in *Farrant v. Olver* [1922] W.N. 47 where he is reported as having held that "It was not necessary that time

should be made of the essence of the contract when the defendant had so persistently and for so long refused to perform the contract.” A

Whilst not doubting the proposition that prolonged and unexplained delay in seeking specific performance may, in a proper case, be a ground for refusing that relief, I doubt in fact whether it emerges from that particular decision, where in fact a notice to complete had been given and the only question was whether the plaintiff, having elected to sue for specific performance with an alternative claim for rescission, could, in default of defence, opt for the alternative relief at the hearing. B

In my judgment, however, the analogy which Mr. Rich so persuasively urges upon us is itself fallacious, and for several reasons. First and foremost, although no doubt the practice of courts of equity to grant specific performance forms the historical basis for the rule that time is not of the essence of the contract, it is, in my judgment, a fallacy to test the rights arising under a contract as a matter of construction by reference to what the consequences would be in a hypothetical action for specific performance if such an action were appropriate. Secondly, even if that were the proper approach, I am not sure that I see any logical reason why the equitable principles governing the circumstances in which the court may withhold the remedy of specific performance where it is needed to enforce the mutual rights and obligations arising out of a contract should necessarily be applied to the rather different question of whether a unilateral privilege reserved by one party to a contract has been extinguished. Thirdly, the argument, in my judgment, involves a confusion between the initial construction of the contract and the remedies which may be available for its breach. It assumes that the moment that the date specified in the contract is past the party who has allowed it to pass is seeking an indulgence which he can only get through the intervention, notional or actual, of the court. That may have been true in 1872 but it does not, in my judgment, accurately reflect the position today. C D E

It seems to me that Mr. Rich's argument seeks to revive and to perpetuate the very error which Lord Diplock, in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, was seeking to lay to rest. Lord Diplock points out, at p. 924, that when one speaks of time being “of the essence” of a contract one is speaking of a stipulation compliance with which is to be treated as a condition precedent to performance of the contract by the other party, so that default may itself be treated as a repudiation by the party in default of his obligations: and, at p. 926, he rejects specifically the contention (based upon a passage from the speech of Lord Parker of Waddington in *Stickney v. Keeble* [1915] A.C. 386, 417) that in each case one has to inquire whether prior to the Supreme Court of Judicature (Consolidation) Act 1925 a court of equity would have granted relief. Lord Diplock draws attention [1978] A.C. 904, 927 to the danger involved in treating the expression “the rules of equity” as anything more than a description of the source from which the current rules of substantive or adjectival law are derived. Section 41 of the Law of Property Act 1925 provides: F G H

“Stipulations . . . as to time . . . which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.”

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A Essentially, as it seems to me, the question is one of construction not of remedies and what one has to ask is whether, as a matter of construction of the contract, compliance with the time stipulation is so essential to the contract that any failure to comply with it entitles the other party, without more, to treat the contract as repudiated. Of course, that does not mean either that the contract is to be treated for all purposes as if the time had never been mentioned or that, when it comes to exerting any remedies for breach of contract, the ordinary rules of specific performance are suspended or abrogated. Thus, albeit the contract is not to be construed as if time were essential, damages may still be obtained for failure to comply with the fixed date for completion if damage can be shown: see *Raineri v. Miles* [1981] A.C. 1050.

B Equally where, as a matter of construction, time is not of the essence, it does not follow that the party in default may not, by extensive delay or other conduct, disentitle himself from having it specifically performed: see, e.g., *Cornwall v. Henson* [1900] 2 Ch. 298 and *M.E.P.C. Ltd. v. Christian-Edwards* [1978] Ch. 281.

C But the question of how the contract should be construed and the question of whether a party in default may have deprived himself of a right to rely on the contract must now, in my judgment, be treated as logically distinct and separate questions, whatever may be the historical origin of the rule of construction.

D Mr. Rich's submission treats the service of a renewal notice after the time stipulated as a submission to the court of the issue whether or not the contract should be performed. But the landlord, in serving notice, is not invoking the aid of the court to perform the contract. He is exercising the right which the contract, as properly construed, confers upon him. If it is to be construed in the sense that time is of the essence, he has no right to serve the notice. If it is not, then the right subsists, unless the tenant can show either that the contract, or that part of the contract, has been abrogated or that the landlord has precluded himself from exercising it. He may do that by showing that the contract has been repudiated—for instance, where he has served a notice calling upon the landlord to exercise his right within a reasonable time or not at all and such notice is ignored—or that some event has happened which estops the landlord from relying on his right. But I know of no ground for saying that mere delay, however lengthy, destroys the contractual right. It may put the other party in a position where, by taking the proper steps, he may become entitled to treat himself as discharged from his obligation; but that does not occur automatically and from the mere passage of time. I know of no authority for the proposition that the effect of construing a time stipulation as not being of the essence is to substitute a fresh implied term that the contract shall be performed within a reasonable time and even if such a term is to be substituted the passage of a reasonable time would not automatically abrogate the contract. It is, I think, important to distinguish between that which entitles a party to treat the contract as at an end and that which entitled the party not in default to enforce it. No one contests that, once the stipulated date is passed, proceedings may be instituted to enforce the agreement (see, e.g., *Woods v. Mackenzie Hill Ltd.* [1975] 1 W.L.R. 613), but that is quite a different question.

H Mr. Rich warns us against the dangers which, he suggests, lie in the notion that the effect of construing a time clause as not being of the essence is, in effect, to write the clause out of the contract altogether.

I see no such danger. As has been pointed out on more than one occasion the remedy of the party who feels he may be prejudiced by delay lies in his own hands.

In my judgment, therefore, the deputy judge was right in the conclusion at which he arrived, although I would in fact go further and suggest that, despite what Lord Salmon said in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, even delay plus hardship to the tenants would not disentitle the landlord to exercise the right which he has on the true construction of the contract unless the combination amounted to an estoppel. In my judgment, the contractual right continues to exist unless and until it is abrogated by mutual agreement or the contract is discharged by breach or, to adopt the example of Lord Diplock in the *United Scientific* case, by the obligor being substantially deprived of the whole benefit that it was intended that he should have (which I take to be a reference, in effect, to frustration or failure of consideration and which I cannot envisage as arising in this sort of case). Apart from these circumstances, the only way in which I can envisage the landlord as being precluded from relying upon the clause is by an estoppel and I think that that must have been what Lord Salmon had in mind in the passages to which I have referred.

In particular, I cannot, speaking for myself, see how the right can be lost by "abandonment." So far as I am aware, this is not a term of art but I take it to mean the unilateral signification of an intention not to exercise the contractual right in question. If that is right, then I cannot see how it could bind the landlord save as a promise (promissory estoppel) or as a representation followed by reliance (equitable estoppel) or as a consensual variation of the agreement or as a repudiation accepted by the other party. I know of no ground for importing into the law of contract the notion that mere non-exercise of a contractual right is to be treated as analogous to an abandonment of chattels or of an appurtenant right such as an easement. It follows that, in my judgment, *Telegraph Properties (Securities) Ltd. v. Courtaulds Ltd.*, 257 E.G. 1153 in so far as it rests (as I believe that it does) on simple delay or, alternatively, on abandonment was wrongly decided.

Finally, I should add that I am not, for my part, persuaded that in fact the instant case is one where "unreasonable" delay has occurred. The expression "unreasonable delay" does, I think, require some definition. It must, I think, mean something more than "prolonged delay" and it may, I suppose, be used to express the notion either of delay for which no acceptable reason can be advanced or delay which no reasonable man would incur acting in his own interest. But if this is its meaning then the absence of reason has no necessary relation to duration. If on the other hand, as I suspect, the phrase is used to describe such delay as it would not in the circumstances be reasonable to expect the other party to put up with, then it seems to me that it contains within it, by necessary implication, the notion of hardship or prejudice, for how otherwise is the other party harmed by it?

In the instant case certainly no prejudice is shown nor does it seem to me that there has been any substantial delay which is not perfectly rationally accounted for. The landlord's solicitors tried to rectify their omission within a month of the contract date and they can hardly be blamed, in the state of the law as it then stood, for not pursuing the matter further prior to 1978. If, thereafter, they had appreciated that their original letter did not, in fact, comply with the lease not only as to

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A date but in point of form also, they could, no doubt, have issued a fresh notice before issuing the first originating summons, so that all matters could be dealt with in one set of proceedings. That they did not do so may be unfortunate, but it has been extremely beneficial to the tenants who got a further uncovenanted reprieve; but I cannot, speaking for myself, regard their failure to do so as “unreasonable.”

B Finally, I am encouraged to find that the view that I have formed as to the way in which this type of problem should be approached coincides (save in the one respect of the possibility of abandonment as a separate legal concept) with the views expressed by Slade L.J. in the recent decision of the court in *London & Manchester Assurance Co. Ltd. v. G. A. Dunn & Co.* (1982) 265 E.G. 39, 135:

C “In the absence of binding authority compelling a different conclusion, I am satisfied that delay on its own, even if unreasonable, will not in general disentitle a landlord from invoking a rent review clause in a case where time has not been made of the essence of the contract. There is, I think, no general principle of the law of contract that mere delay in the enforcement of a contractual right, or in the performance of a contractual duty, by one party to a contract (‘A’) will entitle the other party (‘B’) to regard himself as discharged from the obligation to recognise such right or from the contract as a whole (as the case may be). If in such circumstances A has been guilty of unreasonable delay, then, ordinarily, the prudent and proper course for B to adopt, if he wishes to bring matters to a head, will be to serve a notice on A fixing a reasonable period within which A must exercise his right (if at all) or must perform his part of the contract (as the case may be). In some circumstances, of course, the delay on the part of A may be so gross and inexplicable as to make it so clear that he does not intend to exercise his right or to perform his part of the contract that any such notice is unnecessary. But, ordinarily, it will be necessary for B to serve a notice on A or at least to have some communication with him before he can properly and safely regard himself as being absolved.”

F

It is true that in the circumstances of that case what Slade L.J. said was obiter, but it forms part of a carefully reasoned analysis which I gratefully adopt.

In my judgment, the appeal fails and should be dismissed.

G ACKNER L.J. The rent review clause in this lease, which was for a term of 28 years, enabled the landlord to ensure that for the second half of the term, viz., 14 years, he received the rent reserved in the lease—£2,500—or the market rent for the premises, whichever was the higher. Since the clause could only enure for his benefit, understandably the trigger mechanism, as it is conveniently called, could only be operated by him. The lease provided that the rent review for the second period was to be initiated by an assessment made by the landlord of the market rent, such assessment to be submitted in writing on or before December 25, 1974, to the tenants for their approval. It made further provision should the tenants not approve the landlord’s assessment.

H

Once it was established, by an appeal heard in this court in January 1980, that, following the decision in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, time was not of the essence in relation to operating the trigger mechanism, the resolution of this dispute

seems relatively simple. The landlord having not lost his opportunity to implement the rent review clause by not serving a written notice of his assessment of the rent on or before December 25, 1974, the question is: has anything occurred thereafter to disentitle him from invoking the clause? Mr. Rich, on behalf of the tenants, contended that the landlord was obliged to give the notice of the assessment within a reasonable time after December 25, 1974, and having failed so to do he has thereby lost the right given to him under the lease. But what is a reasonable time is a question of fact to be determined in the light of all the circumstances, and the circumstances of this case are most unusual. If a reasonable time had elapsed the tenants could have given a notice fixing a time for performance. This must itself be reasonable, notwithstanding that, *ex hypothesi*, a reasonable time for performance had, in the view of the tenants, already elapsed. Such a notice would operate as evidence that the tenants considered that a reasonable time for performance had elapsed by the date of the notice and as evidence of the date by which they considered it reasonable for the notice to be given. In such a situation the tenants would have been saying, "Unless you give your notice of assessment by such and such a date we shall treat your failure as a refusal to invoke the clause": see the observations of Lord Simon of Glaisdale in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 946. However, the tenants never gave such or any notice. They were content to let matters be until the landlord took the initiative. In such circumstances it cannot lie in the tenants' mouth to contend that the landlord has refused to exercise his rights.

In this appeal the tenants have not sought to suggest that the landlord waived or abandoned his entitlement to invoke the clause. Moreover, they have not sought to contend either that the landlord's delay in ultimately giving the notice of assessment amounted to an express or implied representation that the landlord accepted that the rent for the second period should remain at £2,500. Nor have the tenants sought to argue that they have in any way been prejudiced by the delay described by Oliver L.J. On the contrary, it has to be accepted that they have gained by such delay, because their obligation to pay the market rent, which one may assume to be higher than the rent reserved in the lease, has been delayed several years and they have had the use of that money in the meantime. Thus no possible question of an estoppel can arise.

In such circumstances, there seems to me to be no basis on which the tenants could effectively claim that the landlord has lost his right to invoke the rent review clause.

I too would accordingly dismiss this appeal.

LAWTON L.J. During the hearing of this appeal there were many references to "the rules of equity" and to "equitable relief." The use of these phrases obscured the issue. In *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 924-927 Lord Diplock pointed out that nowadays perpetuating a dichotomy between rules of equity and rules of common law is conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years. I do not intend in this judgment to use either of these phrases.

The question whether the plaintiff landlord's rent assessment notice given on May 10, 1979, operated to start the rent review procedure provided for in the lease made on August 29, 1961, can only be answered by constru-

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A ing it. Neither the landlord nor the tenants had any rights or obligations towards one another save those which were given or imposed by the lease itself. What these rights and obligations were depended upon the terms of the lease when construed in accordance with the ordinary canons of construction and the provisions of section 41 of the Law of Property Act 1925. In my judgment there is no justification for reading into the lease an implied term that if the landlord did not serve a rent assessment notice on or before
B December 25, 1974, he had to do so within a reasonable time thereafter. Such an implied term would not have been necessary to give business efficacy to the lease. The landlord would not have wanted it and the tenants benefited by not having it. Any delay on the landlord's part would mean that the tenants went on paying the original rent until such time as the landlord did serve a notice. If for any reasons of their own, such as
C a general fall in rental values, they had wanted the landlord to come to a decision about the service of a rent assessment notice they themselves could have served what has come to be known, inaccurately, as a notice "making time of the essence of the contract": see *Stickney v. Keeble* [1915] A.C. 386 and *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904.

D By the judgment given on January 18, 1980, this court adjudged that on its true construction time was not of the essence of the rent review provisions in this lease. It followed that the landlord's failure to deliver a rent assessment notice on or before the stipulated date did not bring the lease to an end. The tenants continued to be bound by it. They had taken benefits under it and had agreed to pay an increased rent if the landlord did serve a rent assessment notice, even though it was not served on or before
E the fixed date. On May 10, 1979, the landlord did serve a rent assessment notice. As the tenants were still bound by the lease, they continued to be subject to the obligations contained in it, one of which was to pay a higher rent in the specified circumstances. They could only be relieved of this obligation in a way known to the law. One way was by agreement with the landlord. There was no such agreement in this case. Another way of their
F getting relieved of their liability to pay a higher rent would have arisen if they could have shown that the landlord's conduct had been such that he was estopped from relying on the rent assessment notice which he did serve. He would only have been estopped if the tenants could have proved that by his words or conduct he had represented that he did not intend to ask for the payment of a higher rent and in reliance on that representation they had altered their position to their prejudice. In my judgment nothing short of
G estoppel would have relieved the tenants from their liability to pay a higher rent. The concept of abandonment has been referred to in some of the rent review cases. I do not regard it as a term of art apt to describe a defence to a landlord's claim for a higher rent. If a landlord by his words or conduct leads his tenant reasonably to infer that he did not intend to claim a higher rent he makes a representation to that effect so that the foundation
H of an estoppel is laid; but the landlord will not be estopped unless the tenant has acted on the representation to his prejudice. A landlord who over a long period makes no attempt to set a rent review procedure in motion may be adjudged to have represented that he did not intend to exercise his rights; but whether he did would be a matter of inference from the circumstances in which the delay had occurred, not from the mere fact of the delay. I can see no reason why mere delay, not amounting to a representation, can be a bar to a landlord in this kind of case claiming a

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higher rent. He has his contractual rights to a higher rent and the tenant has an obligation to pay it unless he can prove that there is some good reason why he should not. Mere delay would not be a good reason. On the facts of this case, as Mr. Rich admitted when opening the appeal, there was no evidence which would have founded an estoppel. A

In this judgment I have tried to deal with the issue from principle as enunciated in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904. I had the advantage of reading in draft the judgment which Oliver L.J. has delivered. He has examined and commented on all the relevant cases. I agree with what he has said. I too would dismiss the appeal. B

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: *Bulcraig & Davis; Macdonald Stacey for Thorne & Thorne, Minehead.* C

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3 W.L.R.

A

[HOUSE OF LORDS]

REGINA RESPONDENT

AND

B

SEYMOUR (EDWARD) APPELLANT

1983 June 7;
July 21Lord Diplock, Lord Fraser of Tullybelton,
Lord Roskill, Lord Bridge of Harwich
and Lord Templeman

C

Road Traffic—Reckless driving—Causing death by—Offence—Whether co-existing with manslaughter—Whether ingredients of two offences co-extensive—Direction to jury—Power of Prosecution to choose which offence to charge—Joinder of charges in single indictment—Road Traffic Act 1972 (c. 20), s. 1 (as amended by Criminal Law Act 1977 (c. 45), s. 50 (1))

D

Lord Diplock in *Reg. v. Lawrence* [1982] A.C. 510, 526–527 stated that the appropriate direction to a jury considering a charge of causing death by driving recklessly contrary to section 1 of the Road Traffic Act 1972¹ (as substituted by section 50 (1) of the Criminal Law Act 1977) was that they should be satisfied:

E

“First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road . . . and Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.”

F

The defendant while driving an 11 ton lorry on the highway attempted to push a stationary motor car out of his way and in so doing crushed B, with whom he had recently quarrelled, between the two vehicles. B, who had just got out of the car, was so severely injured that she died six days later. The defendant was indicted and convicted of manslaughter, and was sentenced, inter alia, to five years' imprisonment. The defendant was prepared to plead guilty to the offence of causing death by recklessly driving contrary to section 1 of the Act of 1972 but the prosecution declined to accept the plea they preferring to receive a jury's verdict upon the only count charged in the indictment, that of manslaughter. The defendant appealed on the ground that the trial judge had misdirected the jury in that where manslaughter was charged and the charge arose out of the reckless driving of the defendant on the highway, the direction propounded in *Reg. v. Lawrence* was inadequate and that in such circumstances the jury should be directed that the prosecution must further prove that the defendant recognised that some risk was involved and had nevertheless proceeded to take that risk. The Court of Appeal (Criminal Division) dismissed the appeal.

H

On appeal by the defendant:—

Held, dismissing the appeal, that where manslaughter was charged and the circumstances were that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in *Reg. v. Lawrence* but that it was appropriate also to point out that in order to constitute the offence of

¹ Road Traffic Act 1972, s. 1: see post, p. 354E–F.

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manslaughter the risk of death being caused by the manner of the defendant's driving must be very high (post, pp. 351C-D, 353D-E, 359H-360B). A

Reg. v. Lawrence (Stephen) [1982] A.C. 510, H.L.(E.) and *Reg. v. Governor of Holloway Prison, Ex parte Jennings* [1983] A.C. 624, H.L.(E.) applied.

Dunn v. H.M. Advocate, 1960 J.C. 55 considered.

Per curiam. In England and Wales it is for the prosecution and not for the court to decide what charge or charges should be made against a particular defendant. In the present case the prosecution properly charged manslaughter alone. The fact that had the defendant been acquitted he would have gone unpunished even though the jury might have convicted him of the statutory offence, if charged, could not justify the joinder of both charges in a single indictment. In future if in any case in England and Wales any such joinder should occur it will be incumbent upon the trial judge to require the prosecution to elect upon which of the two counts they wished to proceed (post, pp. 351C-D, G, 359E-G). B

Per Lord Fraser of Tullybelton. In Scotland the practice is to prosecute the driver on one charge of culpable homicide, or alternatively of the statutory offence, leaving the jury (if it decides to convict) to decide whether to do so on the first or second alternative, and there are good reasons why the Scottish practice should continue as it is in Scotland (post, pp. 351E-F, G). C

Decision of the Court of Appeal (Criminal Division) [1983] R.T.R. 202 affirmed. D

The following cases are referred to in their Lordships' opinions:

Advocate, H.M. v. Earnshaw (unreported), May 22, 1981; (Note), 1982 S.L.T. 179. E

Andrews v. Director of Public Prosecutions [1937] A.C. 576; [1937] 2 All E.R. 552, H.L.(E.).

Dunn v. H.M. Advocate, 1960 J.C. 55.

Reg. v. Caldwell [1982] A.C. 341; [1981] 2 W.L.R. 509; [1981] 1 All E.R. 961, H.L.(E.).

Reg. v. Church [1966] 1 Q.B. 59; [1965] 2 W.L.R. 1220; [1965] 2 All E.R. 72, C.C.A. F

Reg. v. Governor of Holloway Prison, Ex parte Jennings [1982] 1 W.L.R. 949; [1982] 3 All E.R. 104, D.C.; [1983] 1 A.C. 624; [1982] 3 W.L.R. 450; [1982] 3 All E.R. 104, H.L.(E.).

Reg. v. Lawrence (Stephen) [1982] A.C. 510; [1981] 2 W.L.R. 524; [1981] 1 All E.R. 974, H.L.(E.).

Reg. v. Lowe [1973] Q.B. 702; [1973] 2 W.L.R. 481; [1973] 1 All E.R. 805, C.A. G

Reg. v. Pigg [1982] 1 W.L.R. 762; [1982] 2 All E.R. 591, C.A.

The following additional cases were cited in argument:

Connelly v. Director of Public Prosecutions [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, H.L.(E.).

Director of Public Prosecutions v. Newbury [1977] A.C. 500; [1976] 2 W.L.R. 918; [1976] 2 All E.R. 365, H.L.(E.). H

Reg. v. Stone [1977] Q.B. 354; [1977] 2 W.L.R. 169; [1977] 2 All E.R. 341, C.A.

Rex v. Bateman (1925) 19 Cr.App.R. 8, C.C.A.

Rex v. Larkin [1943] K.B. 174; [1943] 1 All E.R. 217, C.C.A.

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by leave of the House of Lords by the appellant, Edward John Seymour, from a judgment dated January 12, 1983, of the

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- A Court of Appeal (Criminal Division) (Watkins L.J., Lawson and Stephen Brown JJ.) against his conviction at Northampton Crown Court (Bush J.) on January 15, 1982, on an indictment containing the one count of manslaughter in unlawfully killing Iris Ada Burrows by his reckless driving of a lorry. The appellant was sentenced to five years' imprisonment, disqualified for six years and a suspended sentence of nine months' imprisonment imposed on November 13, 1980, for wounding and criminal damage to property was activated to take effect concurrently with the sentence of five years.

The facts are stated in the opinion of Lord Roskill.

Michael Connell Q.C. and *John Cartwright* for the appellant.

Graeme Hamilton Q.C. and *Conrad Seagroatt Q.C.* for the Crown.

- C Their Lordships took time for consideration.

July 21. LORD DIPLOCK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Roskill. I agree with it, and for the reasons he gives I would dismiss this appeal.

- D LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Roskill. I agree that, for the reasons stated by him, the appeal should be refused.

- E But I wish to refer to the difference which the appeal has brought to light between the practice in the courts of England and Wales and that in the courts of Scotland with regard to prosecutions for causing death by reckless driving of motor vehicles, in cases which are regarded as particularly bad. In England and Wales the practice is to prosecute the driver on a charge of manslaughter, but not to charge the statutory offence of causing death by reckless driving, contrary to the Road Traffic Act 1972, section 1, as amended by the Criminal Law Act 1977, section 50. In Scotland the practice is to prosecute on one charge of culpable homicide, or alternatively of the statutory offence, leaving the jury (if it decides to convict) to decide whether to do so on the first or second alternative. The fact that there is such a difference between the procedure in the two jurisdictions is perhaps surprising, as there is no relevant difference between the crimes of manslaughter and culpable homicide, and the statutory offence is laid down by the same Act in both countries.

- G Lord Roskill has explained the logical reasons why the English practice, at least since the passing of the Criminal Law Act 1977, has been to prosecute only for one or other of the common law or the statutory offences. I have no intention of criticising the English practice, as it is applied in England, but there are in my opinion good reasons why the Scottish practice should continue as it is in Scotland.

- H The Scottish practice was settled in *Dunn v. H.M. Advocate*, 1960 J.C. 55 where the accused had been tried on an indictment which charged culpable homicide and the statutory offence as alternatives, and had been convicted of culpable homicide. At that time, the statutory offence was that created by the Road Traffic Act 1956, section 8 (1) (driving "recklessly or at a speed or in a manner which is dangerous to the public"). As the degree of negligence which constitutes dangerous driving is less than that which constitutes reckless driving, the statutory offence in that form was clearly less serious than the common law crime of culpable

homicide, which requires recklessness. But it is plain that neither the trial judge (Lord Guest) nor the Lord Justice-Clerk (Lord Thomson), who delivered the only reasoned opinion in the High Court of Judiciary, based the distinction on the use of the word "dangerous." Accordingly the amendment made by the Act of 1977, which deleted dangerous driving from the statutory offence leaving it consisting only of driving recklessly, has not affected the practice, which continues to be that in cases which appear to the prosecutor to be particularly bad cases, culpable homicide and the statutory offence are charged alternatively. At least one case has been prosecuted in that way since 1977: see *H.M. Advocate v. Earnshaw*, tried at Ayr on May 22, 1981 (reported only on another point on appeal in 1982 S.L.T. 179).

The Scottish practice can, in my view, be justified on the ground that, when Parliament created the statutory offence of reckless driving, it left the common law crimes of culpable homicide, and manslaughter, in existence. This House decided in *Reg. v. Governor of Holloway Prison, Ex parte Jennings* [1983] 1 A.C. 624 that the crime of manslaughter had not been impliedly repealed and the decision is in principle applicable to culpable homicide in Scotland. But in *Jennings* [1983] 1 A.C. 624, 644, 645, Lord Roskill said that "the ingredients of the statutory offence are co-extensive with the ingredients of the . . . common law offence of manslaughter," and it is suggested that the effect of that statement is that any attempt to distinguish between the two offences according to their respective degrees of gravity, or indeed on any other ground, is illogical and wrong. It is said that they are not two offences but only one offence with two names. I do not accept that argument. Although the ingredients of the two offences are the same, the degree of recklessness required for conviction of the statutory offence is less than that required for conviction of the common law crime. That is why the maximum sentence for the statutory offence (five years' imprisonment) is less than the maximum sentence for culpable homicide or manslaughter (imprisonment for life). That is also why, in cases such as that which is the subject of the instant appeal, which the prosecutor considers to be very grave, it is thought appropriate to prosecute for the common law crime.

But then it is said to be wrong for the jury to be concerned with assessing the different degrees of turpitude between one case and another. It is of course the law in Scotland, as in England, that the decision on sentence is for the judge alone, but the jury's decision to convict of culpable homicide rather than of the statutory offence does not oblige the judge to impose a sentence of more than five years' imprisonment. It merely makes it possible for him to do so, by increasing the range of punishments within which he can select that which he considers appropriate. Since the common law crime and the statutory offence continue to exist together, and since (as is agreed) the distinction between the two depends on the degree of wickedness exhibited by the accused, it seems to me to be perfectly proper (to put it no higher) that the duty of assessing the degree of wickedness should be performed by the jury in order to decide which offence (if any) he has committed. That view has the overwhelming advantage in practice that it avoids the risk, which existed in the instant appeal, that a person who is accused only of manslaughter or culpable homicide may be acquitted of that charge and may then go unpunished, although he would have been convicted of the statutory offence if it had been charged as an alternative. Such a result would not, in my view, be

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of Tullybelton

- A in the interests of justice and I would be sorry to see the risk of its occurring being introduced into Scottish procedure where at present it does not arise. If it became necessary for the judge, in answer to questions from the jury, to refer to the question of sentence, I think that a jury is well able to understand the difference between selecting the *actual* sentence (which is the duty of the judge) and selecting the offence which carries a *maximum* sentence at least adequate to cover what is required in the
- B circumstances of the case (which is the effect of the jury's decision between culpable homicide and the statutory offence). If the choice is between leaving the jury with a poor impression of the trial process, on the one hand, and risking allowing a guilty motorist to escape wholly unpunished because of some supposed technical difficulty in bringing alternative charges against him, on the other hand, I would have no hesitation in preferring
- C the former.

- I would only add that the number of cases in which, either in Scotland or in England, it will be appropriate to prosecute a motorist on a charge of culpable homicide or manslaughter must be very small, as it is extremely rare for conviction on such a charge to result in a sentence in excess of five years' imprisonment. In the instant appeal, and also in the case of
- D *Earnshaw*, where the accused was convicted of culpable homicide, sentences of five years' imprisonment were imposed.

- With regard to the certified question in this appeal, Mr. Connell's submission that the direction suggested in *Reg. v. Lawrence (Stephen)* [1982] A.C. 510, should not be given in its entirety where the charge is one of manslaughter, is not, in my opinion, well founded. If any modification of the "*Lawrence* direction" is appropriate in a case where manslaughter
- E alone is charged, it would be to add a warning to the jury that before convicting of manslaughter they must be satisfied that the risk of death being caused by the manner of the accused's driving was very high. Such a direction will, of course, always be necessary where the common law crime and the statutory offence are charged alternatively, but where, as in this case, the common law crime is charged alone, it may be unnecessary and inappropriate. In the present case I think it was unnecessary.
- F

I would dismiss the appeal.

- LORD ROSKILL. My Lords, this appeal arises from the dismissal on January 12, 1983, by the Court of Appeal Criminal Division (Watkins L.J. and Lawson and Brown J.J.), of the appellant's appeal against his conviction on January 15, 1982, for manslaughter after a trial at Northampton
- G Crown Court before Bush J. and a jury. The Court of Appeal (Criminal Division) granted the appellant a certificate to the terms of which I will later refer. Leave to appeal was refused by that court but was later given by your Lordships' House.

- The Crown's case which was accepted by the jury was that the appellant had killed Mrs. Ada Burrows by his reckless driving on a public highway of an 11 ton lorry. The allegation was that on April 30, 1981, following a quarrel between the appellant and Mrs. Burrows with whom the appellant had been living, the appellant met Mrs. Burrows driving a Vauxhall car in the opposite direction from that in which he was driving the lorry. There was a slight collision. Mrs. Burrows got out of the Vauxhall car and approached the lorry. He, allegedly intending only to push her car out of the way, drove his lorry up against the car. He did so so violently that the car was moved some ten to twenty feet and one of its tyres was forced
- H

off. In the course of so doing Mrs. Burrows was crushed between the two vehicles. Her injuries were such that in the words of an ambulance driver who gave evidence as quoted by the learned judge in his summing up, "had the ambulance driver picked her up in the normal way as ambulance drivers do, she would have broken in two." She died about a week later on May 6, 1981.

The jury accepted those facts as established without hesitation for they unanimously convicted the appellant in just over three-quarters of an hour. It was an extremely grave case of "motor-manslaughter" to use the popular phrase, a view which the learned trial judge clearly took since he passed a sentence of five years' imprisonment upon the appellant and your Lordships were told that there was no appeal to the Court of Appeal (Criminal Division) against that sentence.

My Lords in recent years and indeed since the enactment of section 8 of the Road Traffic Act 1956 when the statutory offence of causing death by reckless or dangerous driving was first created, charges of "motor manslaughter" have been comparatively rare. It is common knowledge that the statutory offence was created carrying a maximum penalty of five years' imprisonment because of the extreme reluctance of juries to convict motorists of manslaughter. After 1956 when the statutory offence was created, the practice in England and Wales was to charge the offence of causing death by dangerous driving only and not by reckless driving.

The subsequent legislative history of this offence has recently been twice discussed in your Lordships' House, first in the speech of my noble and learned friend Lord Diplock in *Reg. v. Lawrence (Stephen)* [1982] A.C. 510 and secondly in my speech in *Reg. v. Governor of Holloway Prison, Ex parte Jennings* [1983] 1 A.C. 624 and requires no further repetition. Suffice it to say that by reason of the enactment of section 50 of the Criminal Law Act 1977, the former provisions of section 8 of the Act of 1956, which by 1977 had become section 1 (1) of the Road Traffic Act 1972, were replaced by a new section 1 which provided that "a person who causes the death of another person by driving a motor vehicle on a road recklessly shall be guilty of an offence."

This enactment in due course gave rise to two questions. First, what was the meaning of the word "reckless" in this new section? Or, to put the same point in other words, what was the proper direction for the trial judge to give to a jury as to the test to be applied in determining whether or not a person charged under this section was guilty of the offence charged? Secondly, and in particular having regard to the speech of Lord Atkin in *Andrews v. Director of Public Prosecutions* [1937] A.C. 576, 584, did the common law offence of manslaughter by reckless driving of a motor vehicle survive the enactment of section 50 of the Act of 1977, for if it did so survive there would be two offences, one at common law and the other by statute which, since the ingredients of each were indistinguishable, would be co-extensive, though one carried the maximum penalty of imprisonment for life, and the other of five years' imprisonment only.

The meaning of the words "reckless" and "recklessly" came before your Lordships' House in two cases, *Reg. v. Caldwell* [1982] A.C. 341, and in *Reg. v. Lawrence (Stephen)* [1982] A.C. 510, to which I have already referred. The former case arose out of the Criminal Damage Act 1971. The latter was a tragic case arising under section 1 of the Road Traffic Act 1972, as amended in 1977, of causing death by reckless driving.

The decisions in this House in the former case by a majority, and in

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A the latter, unanimously, made it plain what the words “reckless” or “recklessly” meant in these statutes, and in the latter case what the proper direction to the jury was in a case of causing death by the reckless driving of a motor vehicle. My noble and learned friend, Lord Diplock, in a speech with which all my noble and learned friends then sitting agreed, said [1982] A.C. 510, 526–527:

B “In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:

“First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and

C “Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

D “It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves.

E “If satisfied that an obvious and serious risk was created by the manner of the defendant’s driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.”

As to the second question, there had been, as Watkins L.J. said in giving the judgment of the Court of Appeal (Criminal Division) in the present case, a body of opinion which thought that the common law offence of manslaughter by the reckless driving of a motor vehicle must be taken to have been impliedly repealed by section 50 of the Act of 1977, or possibly earlier. That view was taken by the Divisional Court in *Jennings* [1982] 1 W.L.R. 949. But your Lordships’ House in that case unanimously held otherwise. The argument founded on implied repeal was rejected for the reasons given in my speech [1983] 1 A.C. 624, 639–644 which I will not repeat. But I added at p. 644, “No doubt the prosecuting authorities today would only prosecute for manslaughter in the case of death caused by the reckless driving of a motor vehicle on a road in a very grave case.”

G My Lords, *Jennings* was decided on July 29, 1982, over a year after Mrs. Burrows’s death and some six months after the appellant’s trial at Northampton Crown Court. This trial also preceded the hearing of *Jennings* in the Divisional Court. As already stated, the appellant was charged only with manslaughter, no doubt because of the view which the prosecuting authorities took of the gravity of the case. Your Lordships H were told that a plea of guilty to the statutory offence, had that also been charged, was proffered but was rejected by learned counsel for the Crown. I agree with the view of the Court of Appeal that this was an entirely proper course for counsel for the Crown to have adopted. The jury was, of course, unaware of this fact.

After the close of the evidence, Mr. Michael Connell, for the appellant, invited the learned judge not to give the jury what I will call for brevity the “*Lawrence* direction” simpliciter, arguing that that direction was

applicable only where the statutory offence was charged. He submitted that where the common law offence of manslaughter was charged, the jury should be directed that the Crown must further prove that the appellant recognised that some risk was involved and had nonetheless proceeded to take that risk.

The learned judge rejected the submission and gave the "*Lawrence* direction" subject only to the omission of any reference to the "obvious and serious risk . . . of doing substantial damage to property": see *Reg. v. Lawrence (Stephen)* [1982] A.C. 510, 526. In my view, he was entirely right not to refer to damage to property, a reference to which was irrelevant in this case and might well have confused the jury. His admirably clear direction not only properly reflected the decision of this House in *Lawrence* but also Lord Atkin's speech in *Andrews* [1937] A.C. 576. I quote the relevant passages:

"The second question you have to decide; was the driving that caused those injuries reckless? If so, then it is manslaughter. If you are not satisfied that it was reckless, then the verdict is not guilty. To amount to reckless driving mere negligence is not enough. His conduct must go beyond the question of compensation between citizens and amount to, in your view, criminal conduct requiring punishment. You have to be satisfied upon the question of recklessness that he drove in such a manner as to create an obvious and serious risk of causing physical harm to some other person who might happen to be using the road at the time. . . . Once you are satisfied that the matter of his driving was such as to create an obvious and serious risk of causing physical harm to a person using the road at the time, you also have to be satisfied that driving in that manner he did so without having given any thought to the possibility of there being any such risk, or alternatively, having recognised that there was some risk involved, nonetheless went on to take it; in other words, he was reckless. He reckoned not of the consequences.

"In determining the quality of his driving, you apply the standards of the ordinary reasonable motorist. You, of course, take into account all the evidence including his explanation. . . ."

As already stated, the appellant was convicted. He appealed and his appeal to the Court of Appeal was dismissed. By the date of the appeal, *Jennings* [1983] 1 A.C. 624 had been decided in your Lordships' House. The reasons given for the dismissal of his appeal were in substance, that since your Lordships' House had held that the ingredients of the common law and statutory offences were identical, the *Lawrence* direction, which was appropriate when the statutory offence was charged, must be equally appropriate when the common law offence of manslaughter was charged. The Court of Appeal (Criminal Division) granted the appellant a certificate in the following terms:

"Where manslaughter is charged and the circumstances of the offence are that the victim was killed as a result of the reckless driving of the defendant on a public highway; should the trial judge give the jury the direction suggested in *R. v. Lawrence* in its entirety; or should the direction be that only a recognition by the defendant that some risk was involved and he had nonetheless gone on to take it would be sufficient to establish the commission of the offence?"

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- A In his able submissions on behalf of the appellant, Mr. Connell accepted, as he was indeed bound to accept, that the common law and statutory offences co-existed but he challenged that it necessarily followed that the same direction was appropriate in both cases. He founded upon the phrase “aggravating circumstances”—a phrase used by Mr. Littman, counsel for the respondent in *Jennings* [1983] 1 A.C. 624 and adopted in the last paragraph but two of my speech. Mr. Connell urged that the
- B reference to “aggravating circumstances” showed that there might be different degrees of recklessness in the different cases. He also urged that what I had said regarding the ingredients of the two offences being identical was obiter and should not be followed, especially as there had been no argument that knowledge of the risk involved was a prerequisite to conviction for manslaughter though not for the statutory offence. He also
- C challenged as obiter the sentence on p. 644 of the report that “the offence of causing death by reckless driving of a motor vehicle on a road is still manslaughter by the law of England . . .,” saying that the sentence should have read only “is still capable of being manslaughter. . .”

- My Lords, I have carefully considered these criticisms but I am unable to accept any of them as valid. On p. 639 of the report I had listed the four prerequisites to a successful application for the extradition of the
- D respondent of which the first was that the crime charged in California was properly described in England as manslaughter. The argument was that it was not properly so described because of the suggested implied repeal of the relevant part of the law of manslaughter. That argument was rejected for the reasons given at some length on pp. 639–644. The criticised sentence on p. 644 was the last sentence of that part of my speech
- E setting out those reasons. It states the conclusion to which the reasoning had led and is not obiter.

- As to the passage in the last paragraph but two of my speech on p. 645, this was directed to the fourth prerequisite stated at p. 639. Since for the reasons given the two offences co-existed and the ingredients were thus the same, there was no room for Mr. Littman’s argument on
- F “aggravating circumstances.” This passage was also not obiter but was essential to the reasoning leading to the rejection of Mr. Littman’s argument in connection with the fourth prerequisite.

- Mr. Connell also submitted that if the “*Lawrence* direction” were given in manslaughter cases and a conviction followed, the trial judge when considering sentence would not know whether the jury took the view that the defendant had deliberately taken a risk of which he was aware or not.
- G My Lords juries do not and should not be asked to explain their verdicts. It is by no means unusual for a guilty verdict to be properly founded for a number of reasons and it is for the judge, who is the person best placed to assess the degree of turpitude involved in the light of the evidence and the jury’s verdict, to pass such sentence as he thinks right in all the circumstances. That sentence is of course always open to review if
- H necessary.

My Lords, I would accept the submission of Mr. Hamilton for the Crown that once it is shown that the two offences co-exist it would be quite wrong to give the adjective “reckless” or the adverb “recklessly” a different meaning according to whether the statutory or the common law offence is charged. “Reckless” should today be given the same meaning in relation to all offences which involve “recklessness” as one of the elements unless Parliament has otherwise ordained. That this has been so

in the past is shown by the respective decisions of the Court of Criminal Appeal and the Court of Appeal (Criminal Division) in *Reg. v. Church* [1968] 1 Q.B. 59, 68, and *Reg. v. Lowe* [1973] Q.B. 702, 708, to neither of which was the attention of this House drawn in either *Reg. v. Caldwell* [1982] A.C. 341 or *Lawrence*. This was also clearly the view taken by the Court of Appeal (Criminal Division) in *Reg. v. Pigg* [1982] 1 W.L.R. 762: see especially the judgment of Lord Lane C.J. at pp. 770-772, with all the reasoning in which I respectfully agree. A B

In truth, Mr. Connell's argument is an attempt to overcome an anomaly resulting from the amendment of the law in 1977, an amendment made not for the purpose of effecting a reform of substantive law but, as my noble and learned friend, Lord Diplock pointed out in his speech in *Lawrence* [1982] A.C. 510, 524, in connection with the re-distribution of criminal business between the Crown Courts and magistrates' courts. The very difficulty which Mr. Connell encountered in trying to distinguish between a defendant who gave no thought to a risk to which he was indifferent and who even if he had thought of that risk would have acted in precisely the same way and a defendant who gave no thought to a risk because it never crossed his mind that the risk existed, is eloquent of the need to prescribe a simple and single meaning of the adjective "reckless" and the adverb "recklessly" throughout the criminal law unless Parliament has otherwise ordained in a particular case. That simple and single meaning should be the ordinary meaning of those words as stated in this House in *Caldwell* [1982] A.C. 341 and in *Lawrence* [1982] A.C. 510. C D

Parliament must however be taken to have intended that "motor manslaughter" should be a more grave offence than the statutory offence. While the former still carries a maximum penalty of imprisonment for life, Parliament has thought fit to limit the maximum penalty for the statutory offence to five years' imprisonment, the sentence in fact passed by the learned trial judge upon the appellant upon his conviction for manslaughter. This difference recognises that there are degrees of turpitude which will vary according to the gravity of the risk created by the manner of a defendant's driving. In these circumstances your Lordships may think that in future it will only be very rarely that it will be appropriate to charge "motor manslaughter": that is where, as in the instant case, the risk of death from a defendant's driving was very high. E F

My noble and learned friend, Lord Fraser of Tullybelton drew Mr. Hamilton's attention to the decision of the High Court of Justiciary in *Dunn v. H.M. Advocate*, 1960 J.C. 155, a case decided before the change in the law in 1977. It is clear from that decision and from other cases decided in Scotland since 1977 that the practice in Scotland has been to charge both culpable homicide, an offence identical with manslaughter in English law, and the statutory offence and to leave both charges with the jury for their determination according to their view of the gravity of the offence proved. I have had the advantage of reading the speech of my noble and learned friend upon the practice which has prevailed in Scotland. G H

My Lords, there was some debate before your Lordships whether in England and Wales it should, since the decision in *Jennings* [1983] 1 A.C. 624, be permissible to join in the same indictment one count alleging manslaughter and another alleging the statutory offence, it now being clear that these offences co-existed and their ingredients were identical in point of law.

I know of nothing in the Indictments Act 1915 or the Indictments Rules 1971 to preclude such joinder but in my view there are considerable prac-

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A tical difficulties in permitting it arising from the fact that, as I have just endeavoured to explain, though the legal ingredients of the two offences are the same, the degrees of turpitude may vary greatly between one case and another. Under the practice in England and Wales the assessment of differing degrees of turpitude between one case and another is not a matter relevant to the determination by jury of a defendant's guilt or innocence of the particular offence charged. It is a matter relevant to the determination by the judge of the appropriate penalty to be inflicted upon a defendant found guilty of the offence with which he has been charged. Yet a jury if required to make a choice between convicting a defendant of motor manslaughter at common law and convicting him of the less grave statutory offence, would have to be told what criteria they should apply in determining on which side of the boundary line between the two offences the case against the defendant falls. The only criterion that Parliament has laid down is that the statutory offence does not merit a punishment exceeding five years' imprisonment while the common law offence of motor manslaughter may. To tell the jury this, whether they be told it in the speech of counsel for the defence or in answer to a question that a justifiably puzzled jury might well put to the judge, would make it difficult to avoid leaving them with the impression that only if they think that what the defendant did deserved to be punished by more than five years' imprisonment should they find him guilty of motor manslaughter. If the judge were then to sentence him to five years (as in the present case) or less, as well he might, the jury would be left with a very poor impression of the trial process.

E In England and Wales it is for the prosecution and not for the court to decide what charge or charges should be made against a particular defendant. The prosecution is entitled to consider all the circumstances of the case before so deciding. In the instant case the prosecution properly charged manslaughter and manslaughter alone. In doing so the prosecution took the risk that a jury might have refused to convict the appellant of that crime though on the evidence it is difficult to see how any reasonable jury could have acquitted him of that offence. But had he been acquitted he would have gone unpunished even though the jury might have convicted him of the statutory offence had that been charged.

G In my opinion that consideration cannot justify the joinder of both charges in a single indictment. In future if in any case in England and Wales any such joinder should occur I think it must behove the trial judge to require the prosecution to elect upon which of the two counts in the indictment they wish to proceed and not to allow the trial to proceed upon both counts. This may result in a different practice prevailing in England and Wales from that which has prevailed in Scotland, a part of the United Kingdom over which no criminal jurisdiction is exercised by this House. But since it is clear that the substantive law is the same in both countries, differences in practice may be thought to be not of great importance.

H I would therefore answer the certified question as follows: "Where manslaughter is charged and the circumstances are that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in *Reg. v. Lawrence* but it is appropriate also to point out that in order to

Lord Roskill**Reg. v. Seymour (H.L.(E.))****[1983]**

constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high." A

I would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Roskill, with which I agree, I would dismiss the appeal. B

LORD TEMPLEMAN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Roskill. I agree with it, and for the reasons he gives I would dismiss this appeal.

Appeal dismissed. C

Solicitors: *Sharpe, Pritchard & Co., for Keith Turner & Galpin, Northampton; Director of Public Prosecutions.*

J. A. G.

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[COURT OF APPEAL]

REGINA v. TAN AND OTHERS

1982 Dec. 7, 8;

May L.J., Parker and

B

1983 Feb. 10

Staughton J.J.

Crime—Common law offence—Contra bonos mores—Keeping disorderly house—Indecent conduct between two people in private—Whether premises “disorderly house”

C

Crime—Sexual offences—Living on earnings of prostitution—Biological male registered as male at birth—Undergoing sex-change treatment—Psychologically and socially female—Whether “a man”—Sexual Offences Act 1956 (4 & 5 Eliz. 2, c. 69), s. 30—Sexual Offences Act 1967 (c. 60), s. 5

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The appellant T. for reward would subject a man in private to humiliating and perverted sexual treatment. She used for that purpose a flat she had leased from the appellant G. G., who used other premises for a similar purpose, had been born and was biologically a man but, as a result of medical treatment, was psychologically and socially female. Both T. and G. were charged with keeping a disorderly house and G. was charged with living on the earnings of a prostitute, T., contrary to section 30 of the Sexual Offences Act 1956. The third appellant, B., was charged, inter alia, with living on the earnings of prostitution of another man, G., contrary to section 5 of the Sexual Offences Act 1967. The recorder rejected submissions that premises could not be a disorderly house where one prostitute provided services to a man in private and that G. was not a man for the purposes of section 30 of the Act of 1956 and section 5 of the Act of 1967. The jury convicted the appellants.

On appeals against conviction:—

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Held, dismissing the appeals, (1) that for premises to be a disorderly house, there had to be an element of keeping open house so that those who wished to take advantage of the services provided could resort thereto and those services were of such a character that they amounted to an outrage of public decency or were intended to harm the public interest so as to call for condemnation and punishment; that premises could be a disorderly house where the conduct complained of was between two people in private; and that, since there were no specific categories of conduct that would merit a charge of keeping a disorderly house, it was for the jury to determine whether the manner and use to which the premises were put by T. and G. were such that they were both keeping a disorderly house (post, pp. 367A–C, 368A–D, H–369A).

Rex v. Berg (1927) 20 Cr.App.R. 38, C.C.A. and *Reg. v. Quinn* [1962] 2 Q.B. 245, C.C.A. applied.

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Shaw v. Director of Public Prosecutions [1962] A.C. 220, H.L.(E.) considered.

(2) That a person who was born and remained biologically a man was a man for the purpose of a charge under section 30 of the Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967 even though he had undergone operative or other sex-change treatment (post, p. 369C–E).

Corbett v. Corbett [1971] P. 83 applied.

Per curiam. The same test would apply also if a man had indulged in buggery with another biological man (post, p. 369E).

Reg. v. Tan (C.A.)

[1983]

The following cases are referred to in the judgment of the court:

Corbett v. Corbett [1971] P. 83; [1970] 2 W.L.R. 1306; [1970] 2 All E.R. 33.

Jenks v. Turpin (1884) 13 Q.B.D. 505, D.C.

Reg. v. Brady [1964] 3 All E.R. 616; 47 Cr.App.R. 196.

Reg. v. Quinn [1962] 2 Q.B. 245; [1961] 3 W.L.R. 611; [1961] 3 All E.R. 88, C.C.A.

Rex v. Berg (1927) 20 Cr.App.R. 38, C.C.A.

Rex v. Higginson (1762) 2 Burr. 1233, C.C.A.

Rex v. Rogier (1823) 2 D. & R. 431.

Shaw v. Director of Public Prosecutions [1962] A.C. 220; [1961] 2 W.L.R. 897; [1961] 1 All E.R. 330; [1961] 2 All E.R. 446, C.C.A. and H.L.(E.).

The following additional case was cited in argument:

Reg. v. Calderhead (1978) 68 Cr.App.R. 36, C.A.

APPEALS against convictions.

On September 28, 1982, at the Inner London Crown Court before the assistant recorder (Mr. R. V. Thomas) and a jury, the appellant, Moira Tan, was convicted by a majority of 11 to 1 on count 1 of keeping a disorderly house; the appellant, Gloria Gina Greaves, was convicted by a majority verdict of 11 to 1 on counts 1 and 2 of keeping a disorderly house and by a majority of 10 to 2 on count 3 of (being a man) living on earnings of prostitution and the appellant, Brian Edwin Greaves, was convicted unanimously on count 4 of living on earnings of prostitution and by a majority of 10 to 2 on count 5 of living on earnings of male prostitution. The appellant Tan was sentenced to six months' imprisonment and was deprived of property rights in apparatus at 89b, Warwick Way, London S.W.1. The appellant, Gloria Greaves, was sentenced to six months' imprisonment on each of counts 1 and 2 concurrent and 12 months' consecutive on count 3, was fined £10,000 on count 3 with six months' imprisonment consecutive in default, and was deprived of property rights in apparatus at 89b, Warwick Way, and 15, Clarendon Street, London S.W.1 and ordered to pay the taxed prosecution costs. The appellant, Brian Greaves, was sentenced to 12 months' imprisonment concurrent on each of counts 4 and 5.

They appealed against conviction and sentence. The appellants Tan and Gloria Greaves appealed against conviction on counts 1 and 2 on the ground that the assistant recorder erred in law in directing that premises used by the appellants for the provision of sexual services for one client at a time in private were capable of being a disorderly house. The appellants Gloria and Brian Greaves appealed against conviction on counts 3 and 5 on the ground, inter alia, that since Gloria Greaves, although biologically male, had been psychologically and socially female for more than 18 years she ought to have been deemed to be female and the jury ought to have been directed accordingly.

At the conclusion of the hearing of the appeals on December 8, 1982, the court allowed the appeal of Brian Greaves against conviction on count 4, dismissed all the other appeals against conviction and allowed all the appeals against sentence to the extent that the sentences of imprisonment were suspended for two years, for reasons to be given later. The case is reported only on the appeals against conviction on counts 1, 2, 3 and 5.

The facts are stated in the judgment.

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Reg. v. Tan (C.A.)

- A *Nicholas Freeman* for the appellant, Tan.
Andrew Patience for the appellants, Gloria and Brian Greaves.
John Bevan for the Crown.

Cur. adv. vult.

- February 10, 1983. PARKER J. read the following judgment of the court. On September 28, 1982, the appellants were convicted in the Crown Court at Inner London on an indictment containing five counts. On count 1 Tan and Gloria Greaves were convicted of keeping a disorderly house at 89b, Warwick Way, London, S.W.1, and were each sentenced to six months' imprisonment. Both were, in addition, deprived of property rights in apparatus found at such premises. On count 2 Gloria Greaves was convicted of keeping a disorderly house at 15, Clarendon Street, London, S.W.1, and was sentenced to six months' imprisonment, concurrent with the sentence on count 1, and was also deprived of property rights in apparatus found there. On count 3 Gloria Greaves was convicted of living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act 1956 and was sentenced to 12 months' imprisonment, consecutive to the sentences imposed on counts 1 and 2. On count 4 Brian Greaves was convicted of living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act 1956 and was sentenced to 12 months' imprisonment. On count 5 Brian Greaves was also convicted of living on the earnings of male prostitution contrary to section 5 of the Sexual Offences Act 1967 and was sentenced to 12 months' imprisonment, concurrent with the sentence on count 4.

- All the appellants appealed on points of law. Tan appealed against sentence by leave of the single judge. Applications by Gloria and Brian Greaves for leave to appeal against sentence were referred by the single judge to the full court. The single judge also granted all three defendants bail pending the hearing of their appeals and applications.

- The appeals against conviction, the appeal against sentence and the applications for leave to appeal against sentence were heard on December 7 and 8, 1982. On the conclusion of the hearing the appeal of Brian Greaves against his conviction on count 4 was allowed and that conviction was quashed, but all other appeals against conviction were dismissed. The applications for leave to appeal against sentence were granted and the hearing treated as the hearing of the appeals against sentence. All the appeals against sentence were allowed to the extent only that all sentences of imprisonment were suspended for two years. We then said that we would give our reasons later. This we do now. We deal first with counts 1 and 2.

- At 89b, Warwick Way, Tan, and at 15, Clarendon Street, Gloria Greaves, provided sexual services for reward to those wishing to receive them. Tan rented 89b, Warwick Way from Greaves. The services provided were of a like nature in each case. They involved the use of much equipment of a similar kind and were provided in the case of Warwick Way by Tan alone and in the case of Clarendon Street by Gloria Greaves alone. They were provided in private, in that there were no other participants than the client or customer and, in the one case Tan, and in the other Greaves. In no case were there any observers. There might, however, from time to time

be a customer waiting in a neighbouring room whilst a previous customer was in receipt of the services for which he had come to the premises. A

The services provided at both premises were of a particularly revolting and perverted kind. Straightforward sexual intercourse was not provided at all. With the aid of a mass of equipment, some manual (such as whips and chains), some mechanical and some electrical, clients were subjected, at their own wish and with their full consent, to a variety of forms of humiliation, flagellation, bondage and torture, accompanied often by masturbation. The availability of the services provided at both premises was advertised extensively including by insertion in what are known as "contact magazines," which are published and available to the public. B
An example of such an advertisement in relation to each of the premises is as follows. 89b, Warwick Way:

"Humiliation enthusiast, my favourite pastime is humiliating and disciplining mature male submissives, in strict bondage, lovely tan coloured mistress invites humble applicants, T.V., C.P., B.D. and rubber wear, 12 p.m. to 7 p.m. Mon. to Fri., 89 Basement Flat, Warwick Way, Victoria S.W.1." C

15, Clarendon Street:

"The most equipped mistress in Town, report now for C.P., W.S., D.H.N., Racks, stocks, pillory, dungeon, uniforms, T.V.'s wardrobe, stiletto-heels, boots, rubber, leather, E-shocks, Maid-training etc., etc. You name it? Madam has it, also madam does nursing treatments intimate examinations, Victorian and modern enemas. Bottle and breast feeding. Nappy changing by Nanny. Report to Madam Stern, 15, Clarendon Street, Basement Flat, Victoria, London S.W.1." D E

It is to be noted that in these two cases addresses but not telephone numbers were given. In other cases there were telephone numbers provided and appointments could be made either by telephone or by going to the premises. The advertisements constitute a clear invitation to any member of the public so inclined to resort to the premises and there submit himself to perverted practices. F

At the close of the prosecution case at the trial it was submitted that there was no case to answer on the ground that, where a single prostitute provided sexual services to a single client at a time in private in certain premises, such premises were incapable in law of being a disorderly house. That submission was rejected. The case was left to the jury who duly convicted on both counts. No complaint is made of the summing up and it was indeed accepted that if premises are, despite the fact that the sexual services are always provided to a single client in private, capable of being a disorderly house then both the premises here in question were virtually certain to be found by a jury to be within that description. The submission made at the trial was repeated before us as the only ground of appeal on counts 1 and 2. G

Keeping a disorderly house is a common law offence, albeit that it received limited statutory attention in the Disorderly Houses Act 1751 (25 Geo. 2, c. 36) in two respects, namely, first, that by section 2 places kept for public dancing, music or other public entertainment within, or within 20 miles of the cities of London and Westminster were, unless licensed, deemed to be disorderly houses and, second, that by section 5, prosecutions were encouraged against those keeping bawdy houses, gaming houses or other disorderly houses. H

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A We can find little assistance in this Act on the question whether, as was submitted on behalf of the appellants, an essential ingredient of a disorderly house is a plurality of either participants or spectators. Such indication as there is suggests, however, that such plurality is not required. A bawdy house would clearly cover a house in which two prostitutes operated entirely in separate rooms, never saw more than one client at a time and were never observed by anyone else and the wording accepts or recognises that a bawdy house is or may be a disorderly house.

B Two early cases were cited in argument, namely, *Rex v. Higginson* (1762) 2 Burr. 1233 and *Rex v. Rogier* (1823) 2 D. & R. 431. In the first of such cases, a motion in restraint of judgment on the ground that the indictment upon which the defendant had been convicted was too general failed, but the court held the indictment good without giving reasons and without hearing argument. The particulars in the indictment certainly alleged that "certain evil and ill-disposed persons . . . came together . . . fighting of cocks, boxing, playing at cudgels and misbehaving themselves," but there is nothing to indicate that had the indictment alleged that a succession of "evil and ill disposed persons" had resorted to the premises and there separately and successively indulged with the proprietor in "cock-fighting, boxing, playing at cudgels and misbehaving," the indictment would have been bad.

D *Rex v. Rogier* is more helpful. The defendants were convicted of keeping a common gaming house and permitting an unlawful game called "Rouge et Noir." As in *Higginson*, there was a motion in restraint of judgment. In his judgment, Abbott C.J. said, at p. 433:

E "If a common gaming house be so conducted it becomes a receptacle for idle and disorderly persons, who are permitted to assemble there and enter into play for sums of an illegal amount, it becomes a public nuisance, and the maintaining it is an offence indictable at common law; and if the game of 'Rouge et Noir,' or any other game, however innocent in itself, is played at by such persons, and to an excessive amount, it becomes an illegal game, and those who hold out to others the means of so playing at it are guilty of a common law offence."

F This case is of importance for two reasons. First, it shows that a game innocent in itself may become unlawful if it is played for stakes which a jury consider to be excessive. Second, it contains the plain statement that "those who hold out to others the means of [playing such a game] are guilty of a common law offence." The reference to people being permitted to assemble was said to indicate that a plurality of persons was necessary. G In its context, however, we have no doubt that it contains no such indication. It is no more than a reference to the facts of the particular case. We should also mention that, if and in so far as this case appears to indicate that there can be no conviction for keeping a gaming house or indeed other disorderly houses unless there is a public nuisance, it has since been decided that this is unnecessary: see *Reg. v. Quinn* [1962] 2 Q.B. 245 to which we H revert hereafter.

The first case in which the definition of what constitutes a disorderly house was expressly considered was *Rex v. Berg* (1927) 20 Cr.App.R. 38. The appellants in that case were convicted of a "conspiracy to corrupt the morals of and to debauch persons resorting to a certain disorderly house," and two of them were convicted of keeping a disorderly house. The recorder, in directing the jury, had used the definition of "disorderly" in *Webster's Dictionary*, namely, "not regulated by the restraints of morality;

unchaste; of bad repute, as a disorderly house.” In his judgment, Avory J. A
said, at p. 41 :

“ The recorder’s definition, from Webster is somewhat vague, but would
be correct if the element of keeping open house is present and there is
added ‘ being so conducted as to violate law and good order.’ . . . The
argument that unless the house is open to the public at large its disorderliness is not indictable is refuted by *Rogier* (1823) 2 D. & R. 431, B
cited by Hawkins J. in *Jenks v. Turpin* (1884) 13 Q.B.D. 505 : those
cases referred to gaming houses, but the decisions equally apply to the
practices here in question. . . The gist of the indictment was that the
accused were lewd and immoral persons assembled for the purpose
of unnatural practices.”

The facts of the case are not set out in the report but it may be inferred C
that the accused and others took part in exhibitions of a perverted nature
for the edification of those resorting to the premises.

The case provides clear authority that (a) there must be some element
of keeping open house albeit the premises need not be open to the public
at large, (b) the house must not be regulated by the restraints of morality
or must be unchaste or of bad repute and (c) that it must be so conducted D
as to violate law and good order.

The definition of disorderly house was further considered in *Reg. v. Quinn* [1962] 2 Q.B. 245. The premises there in question were used for
the performance of acts of striptease, some of which acts were, on the
evidence, seriously indecent and, in some respects, revolting. The appellants
were convicted of keeping a disorderly house and the convictions were
upheld. The court, subject to two comments, accepts a definition in the E
following terms, which was advanced by the prosecution and derived, at
least in part, from observations of the House of Lords in *Shaw v. Director
of Public Prosecutions* [1962] A.C. 220. That definition was in the
following terms, at p. 255 :

“ A disorderly house is a house conducted contrary to law and
good order in that matters are performed or exhibited of such a F
character that their performance or exhibition in a place of common
resort (a) amounts to an outrage of public decency or (b) tends to
corrupt or deprave or (c) is otherwise calculated to injure the public
interest so as to call for condemnation and punishment.”

The two comments made by the court were first, that the essence of the
charge in that case was that indecent performances had taken place and G
that the charge might be based on some other ground. The definition
must therefore be taken as limited to cases in which indecent exhibitions
are alleged. Second, although the elements specified in (a), (b) and (c) of
the definition were expressed as alternatives they should not be regarded
as mutually exclusive.

In addition to accepting, subject to the two comments, the definition H
advanced by the prosecution the court also rejected in short shrift both the
argument that a public nuisance was a necessary ingredient of the offence
and the argument that since those resorting to the premises did not themselves
take part in any indecent behaviour the premises could not be a
disorderly house.

The last case to which it is necessary to refer is *Reg. v. Brady* [1964]
3 All E.R. 616 where the court accepted without deciding that, in order

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A to constitute the common law offence of keeping a disorderly house, some element of persistent use was required.⁶

If the definition in *Rex v. Berg*, 20 Cr.App.R. 38 is taken, there can be no doubt that there was evidence in the present case on which the jury could find that the premises were in each case not regulated by the restraints of morality. It is said, however, that it was not so conducted as to violate law and good order, since what took place between the defendants and each client was not itself a criminal offence and that there was not the necessary element of open house.

Both contentions we reject. A striptease performance is not itself a criminal offence, but *Reg. v. Quinn* [1962] 2 Q.B. 245 shows that it may so overpass what is acceptable that it may become unlawful just as gaming may be excessive and thus unlawful. It is for the jury to set the standard. As to the element of open house, there was clearly a public invitation to resort to the premises for the purpose of indulging in perverted and revolting practices. This invitation by advertisement was equally clearly part of the conduct of the premises, and we have no doubt that it was open to the jury to find both that this constituted a sufficient element of open house and that, as a result, the premises were conducted in violation of law and good order.

D In *Shaw v. Director of Public Prosecutions* [1962] A.C. 220 Lord Reid in his minority opinion, said, at p. 281:

E "The evidence shows that the invitations were to resort to certain of the prostitutes for the purpose of certain forms of perversion. That I would think to be an offence for a different reason. . . . the authorities . . . establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency. . . . In my view it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence."

F Lord Reid was not prepared to go as far as other members of the House but, even on the basis of his minority opinion, it would have been open to the jury to hold that the advertisements in the present case alone constituted an offence and thus that the premises were conducted contrary to law and good order.

G Turning to the definition in *Reg. v. Quinn* [1962] 2 Q.B. 245, it clearly cannot be applied in terms to the present case, for here there were no performances or exhibitions as such. If, however, *Rex v. Berg*, 20 Cr.App.R. 38 and *Reg. v. Quinn* are taken together, in the light of what was said in *Shaw's* case [1962] A.C. 220 we have no hesitation in rejecting the submission made. Were it correct it would mean that it would be open to anyone (so long as perverted practices were conducted with one client at a time) to advertise such services without restriction no matter how revolting they might be, thereby encouraging the public to indulge in them and to allow others (so long as they did not observe or take part) to H await their turn to partake of such practices.

No doubt a prosecution in circumstances like the present is novel. It was submitted that the trend is for the criminal law to withdraw from concern with what takes place between consenting adults in private (with the single exception of buggery between a man and a woman) and that the courts should not create a new offence. We accept that the prosecution is novel, that the courts should not, or should at least be slow to, create new offences and that the tendency alleged exists. Novelty is,

however, no valid objection (see *Berg* and *Shaw*) and to reject the submission is not to create a new offence, but to hold that a certain set of circumstances, not hitherto made the subject of the charge, fall squarely within the scope of an existing offence. A

In *Reg. v. Quinn* the court did not seek to lay down an exhaustive definition. Nor do we. Many forms of conduct may fall within the scope of the offence and to attempt to establish a universal definition with precision is both undesirable and impossible. It is, however, both desirable and possible to indicate how a jury should be directed where the ground upon which the charge is based is that the premises are being used for the provision of sexual services. In such cases, the direction, adapting the definition in *Reg. v. Quinn*, would in our judgment be that, in order to convict, the jury must be satisfied that the services provided are open to those members of the public who wish to partake of them and are of such a character and are conducted in such a manner (whether by advertisement or otherwise) that their provision amounts to an outrage of public decency or is otherwise calculated to injure the public interest to such an extent as to call for condemnation and punishment. They should further be directed that the fact, if it be a fact, that the services are provided by a single prostitute to one client at a time and without spectators does not prevent the house being a disorderly house. B C D

Finally, with regard to the appeal on counts 1 and 2, we observe that acceptance of the submission would involve results that fly in the face of common sense. Premises would, for example, be incapable of being a disorderly house if there was a large notice in neon lights over the door containing an open invitation to be whipped or subjected to any form of perversion with the tariff set out. Yet the law would be powerless to intervene, save perhaps under the Indecent Displays (Control) Act 1981, so long as the service itself was provided successively to those resorting to the premises and this would be so notwithstanding that the adjoining premises had similar notices and provided similar services. To hold that the law was powerless in such a case, but could act in the case of a much more discreet invitation so long as there was in addition to the prostitute and her client a watcher or watchers, offends against common sense. E F

In *Shaw v. Director of Public Prosecutions* [1962] A.C. 220, 268, Viscount Simonds said:

“Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence.” G

It may well be that in the circumstances supposed by Viscount Simonds a jury would not now convict but it is for the jury and not the judges to decide whether conduct exceeds the limits of what, at any period of time, is acceptable. For the judges to adopt the stance that no matter how it may be advertised or provided anything, except heterosexual buggery, is permissible between consenting adults in private would be for the judges partially to usurp the functions of juries. The judges' task is to determine whether conduct is capable of being a crime. It is for the H

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A jury to decide in an individual case whether it is. In the case of the two counts presently under consideration the recorder rightly decided that it was open to the jury to convict. On the evidence the jury did convict and it could not be and was not suggested that, if the legal submission failed, there was otherwise than ample evidence to justify the convictions in both cases. For the above reasons the appeals on counts 1 and 2 were dismissed.

B An essential ingredient of the offences charged in counts 3 and 5 was that Gloria Greaves was a man. It was accepted that Gloria Greaves was born a man and remained biologically a man albeit he had undergone both hormone and surgical treatment, consisting in what are called "sex change operations," consisting essentially in the removal of the external male organs and the creation of an artificial vaginal pocket.

C In *Corbett v. Corbett* [1971] P. 83 it was held that a person who was born a man and remained biologically a man was a man for the purposes of marriage, and thus that a form of marriage between a man and another person born a man was a nullity no matter that such last mentioned person had undergone operative and other sex change treatment.

D It was, however, contended that for the purposes of section 30 of the Sexual Offences Act 1956 and section 5 of the Sexual Offences Act 1967 another test should be applied, that if the person had become philosophically or psychologically or socially female, that person should be held not to be a man for the purposes of the sections and that, on this basis, the evidence was inconclusive and the counts ought to have been withdrawn from the jury.

E We reject this submission without hesitation. In our judgment both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v. Corbett* should apply for the purpose not only of marriage but also for a charge under section 30 of the Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man. That *Corbett v. Corbett* would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.

G A further ground of appeal was raised in relation to count 3, namely, that the jury were incorrectly, or insufficiently, directed as to the ingredients of the offence. As to this we need say no more than that having carefully considered the summing up we can discern no insufficiency of directions or any misdirection. The appeals on counts 3 and 5 were accordingly dismissed.

H [His Lordship went on to state that in relation to the conviction of Brian Greaves on count 4, upon the withdrawal of an earlier direction to the jury that the prosecution relied on the presumption in section 30 (2) of the Sexual Offences Act 1956 the assistant recorder ought to have reminded the jury of the precise matters of which they had to be satisfied before they could convict, and that, accordingly, the conviction was unsafe and unsatisfactory; and that in relation to the sentences passed

on all the appellants there were circumstances that justified the suspension of the prison sentences imposed.] A

Appeal against conviction on count 4 allowed.

Appeals against conviction on counts 1, 2, 3 and 5 dismissed.

Appeals against sentence allowed. B

February 17. The Court of Appeal certified under section 33 (2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely, "Can premises be a disorderly house notwithstanding that every sexual act that takes place therein is between a single prostitute and a single customer unobserved by any other person?" C

Leave to appeal refused.

April 14. The Appeal Committee of the House of Lords (Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook) dismissed a petition by the appellants Tan and Gloria Greaves for leave to appeal. D

Solicitors: *Coles & Stevenson; Knapp-Fishers; Solicitor, Metropolitan Police.*

[Reported by GNANA MOTT, Barrister-at-Law]

[QUEEN'S BENCH DIVISION]

REGINA v. DORKING JUSTICES, *Ex parte* HARRINGTON

1983 May 4; 20

Robert Goff L.J. and Glidewell J. F

Judicial Review—Certiorari—Magistrates' court—Justices dismissing informations—Prosecution given no opportunity to present case—Breach of rules of natural justice—Whether certiorari available to quash dismissals

The defendant pleaded not guilty to charges of assault and threatening behaviour. On the prosecution's application for an adjournment, the justices announced that the cases would be heard on a date when the defendant would be away on holiday. Counsel for the defendant objected and the justices, without having inquired whether the prosecution were able to proceed, dismissed the informations. Counsel for the prosecution, who had been in a position to proceed immediately, albeit without a principal witness, thereupon requested the justices to reconsider their decision but, on the advice of their clerk, the justices decided that the dismissals had to stand. G H

On an application for judicial review on the ground that the justices' failure to afford the prosecution the opportunity either to gather all the witnesses or to proceed immediately with such witnesses as were available was a breach of the rules of natural justice:—

Held, refusing the application, that, although the failure of the justices to give the prosecution an opportunity to present

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A their case amounted to a breach of natural justice, it was not such as to render the proceedings a nullity; that accordingly, since the defendant had been in jeopardy, even although there had been no hearing on the merits, the dismissal of the charges against him amounted to an acquittal and the Divisional Court had no power on an application for a judicial review where the defendant had been in jeopardy to quash the acquittal and order a new trial (post, pp. 373A-B, 374D-F).

B *Reg. v. Middlesex Quarter Sessions (Chairman), Ex parte Director of Public Prosecutions* [1952] 2 Q.B. 758, D.C. applied.

C *Per curiam.* The anomalous procedure for reviewing decisions of the justices is disquieting. The statutory procedure for appeals by case stated recognises that a superior court may review decisions of justices under which they acquit defendants but when there is a breach of natural justice the proper mode of proceeding is by an application for judicial review under which, if there has been an acquittal, this court has no power to intervene (post, p. 374B-C, F-H).

Dictum of Viscount Caldecote C.J. in *Rex v. Wandsworth Justices, Ex parte Read* [1942] 1 K.B. 281, 283, D.C. considered.

The following cases are referred to in the judgment:

D *Reg. v. Birmingham Justices, Ex parte Lamb* [1983] 1 W.L.R. 339, D.C.
Reg. v. Middlesex Quarter Sessions (Chairman), Ex parte Director of Public Prosecutions [1952] 2 Q.B. 758; [1952] 2 All E.R. 312, D.C.
Rex v. Simpson [1914] 1 K.B. 66, D.C.
Rex v. Wandsworth Justices, Ex parte Read [1942] 1 K.B. 281; [1942] 1 All E.R. 56, D.C.

E The following additional cases were cited in argument:

Reg. v. Essex Justices, Ex parte Final [1963] 2 Q.B. 816; [1963] 2 W.L.R. 38; [1962] 3 All E.R. 924, D.C.
Reg. v. Horseferry Road Justices, Ex parte Stock [1980] R.T.R. 467, D.C.
Rex v. Marsham, Ex parte Pethick Lawrence [1912] 2 K.B. 362, D.C.
Rex v. Neal [1949] 2 K.B. 590; [1949] 2 All E.R. 438, C.C.A.
Reg. v. Seisdon Justices, Ex parte Dougan [1983] 1 All E.R. 6, D.C.
Reg. v. Uxbridge Justices, Ex parte Smith [1977] R.T.R. 93, D.C.

APPLICATION for judicial review.

G On an application for judicial review made pursuant to leave granted by McCullough J. on November 10, 1982, the applicant, Police Sergeant John Alfred Harrington, sought an order of certiorari to bring up and quash an order made by the Dorking justices on August 13, 1982, whereby they had dismissed two informations laid against the defendant, Peter Arnold Roots, and an order of mandamus requiring the justices to hear the evidence against the defendant.

H The grounds upon which the relief was sought were that the order was wrong in law; and that, the defendant having entered a plea of not guilty, it was a denial of natural justice not to give the prosecution the opportunity either to gather all the witnesses or to call such witnesses as were available at court.

The facts are stated in the judgment.

Howard Vagg for the applicant.

Roger Bull for the defendant.

Reg. v. Dorking JJ., Ex p. Harrington (D.C.)**[1983]**

May 20. ROBERT GOFF L.J. read the judgment of the court. There is before the court an application for judicial review by John Alfred Harrington. The applicant is a police sergeant of the Surrey Constabulary, and he was the supervising courts' officer in the Dorking Magistrates' Court on August 13, 1982, when the justices made the decision which is the subject of the present application. A

The matter arises as follows. The defendant appeared at the Dorking Magistrates' Court on August 13, 1982, charged with (1) assaulting Simon Lane a constable in the execution of his duty at Dorking on July 2, 1982, contrary to section 51 (1) of the Police Act 1964, and (2) using threatening behaviour whereby a breach of the peace was likely to be occasioned at Dorking on July 2, 1982, contrary to section 5 of the Public Order Act 1936. There were in fact four other defendants, all charged with similar offences, though only the case of the present defendant appears to have been dealt with by the Dorking justices on August 13, 1982, in the manner in which we will now set out. B C

The prosecution and the defendant were both legally represented. At the start of the case, counsel for the prosecution made an application for an adjournment in the case of the defendant on the basis that P.C. Lane was on annual leave, the defence and the court having been previously informed that such an application would be made. Counsel for the defence raised no objection. Following a retirement by the justices, they decided to adjourn the case until August 24, 1982. This date was not suitable for the respondent, because he had already booked his holiday for a period within which that date fell; indeed, we were informed that the justices had been informed of the dates of the respondent's holiday booking before they retired. Accordingly, counsel for the defence asked the justices for another date. After some discussion, the justices decided not to allocate another date. Counsel for the defence thereupon pursued the matter with the justices pointing out that his client would lose both his holiday and the money paid for his holiday if the rearranged date stood, and submitting that the same courtesy should be shown to the defendant as had been shown to the prosecution. Counsel for the prosecution did not oppose this application. The chairman then stated that they were in a difficult position and for that reason the justices had decided that the case should be dismissed. Counsel for the prosecution then invited the justices to reconsider that decision, because at no time had he stated that he could not present the prosecution case; on the contrary, he was able to proceed with the case on such evidence as was then available, there being present in court another police officer, P.C. Campbell, who had witnessed the assault on P.C. Lane. He submitted that, if the justices decided contrary to their previous decision not to adjourn, their proper course was to inform the prosecution; and it would then be for the prosecution either to offer no evidence, or to proceed with the case calling such evidence as was available. The justices then retired to consider the situation. On their return, it was stated that they had obtained advice from another court's senior clerk, and that their decision to dismiss the case against the defendant would have to stand. At no stage did the justices ask counsel for the prosecution if the prosecution was in a position to proceed without P.C. Lane before they purported to dismiss the charge. D E F G H

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A In these circumstances, the applicant has applied for an order of certiorari removing the decision of the justices into this court for the purpose of its being quashed, and for an order of mandamus directing the Dorking justices to hear the evidence against the defendant. The basis of the application is that the justices were in breach of the rules of natural justice.

B It is plain to us that there indeed was, in these circumstances, a breach of the rules of natural justice by the Dorking justices in dismissing the charge without giving the prosecution an opportunity to present their case. Counsel for the defendant before this court found it impossible to contend otherwise. If authority is needed for the proposition, it is to be found in the decision of this court in *Reg. v. Birmingham Justices, Ex parte Lamb* [1983] 1 W.L.R. 339. Prima facie, therefore, it would appear
C that this is an appropriate case to make the orders asked for by the applicant. But it was submitted by counsel for the defendant that we should not make any such orders. Founding his argument on authority, to which we will refer in a moment, he submitted that the decision of the justices to dismiss the charge against his client amounted to an acquittal; and that in such circumstances the court has no power to re-open the
D matter by quashing the acquittal and remitting the matter to the justices to hear the evidence.

We have come to the conclusion that we are bound by authority to accept the submission advanced on behalf of the defendant. The authorities were reviewed by this court, consisting of five judges presided over by Lord Goddard C.J., in *Reg. v. Middlesex Quarter Sessions (Chairman), Ex parte Director of Public Prosecutions* [1952] 2 Q.B. 758.
E In that case there had been the most flagrant misconduct by the chairman of quarter sessions of a trial by jury of a defendant charged with driving a motor car when under the influence of drink. After counsel for the prosecution had opened the case, the chairman, who had read the depositions, expressed the obviously unjustified opinion that it would be a waste of time for the jury to hear any evidence, and in effect directed the
F jury to enter a verdict of not guilty, thereby depriving the prosecution of their right to present the case to the jury. The Director of Public Prosecutions applied for an order of certiorari to quash the acquittal, and an order of mandamus directing the quarter sessions to try the defendant on the charge. Lord Goddard C.J., in delivering the judgment of the Divisional Court, expressed the gravest disapprobation of the conduct of the chairman, but concluded that it was impossible for the court to
G interfere. Where a defendant has been in jeopardy and has been acquitted, the court cannot interfere to quash the acquittal and order a new trial, however improperly the verdict may have been obtained. The matter will however be different if there has been such a mis-trial as to render the proceedings a nullity; because if they are a nullity, the defendant will not have been lawfully liable to suffer judgment for the offence charged
H against him, and so will not have been in jeopardy.

The case before the Divisional Court on that occasion was concerned with a trial by jury: but we can see no reason why the same principle should not apply where a charge has been dismissed by justices. Indeed, in *Rex v. Simpson* [1914] 1 K.B. 66, Scrutton J. said, at p. 75: "There never has been a case in which an acquittal by a court of summary jurisdiction has been quashed by certiorari . . ." At first sight, the situation

appears to be anomalous; because on appeal by way of case stated this court frequently allows appeals brought by the prosecution, quashes the order of the justices dismissing the charge against the defendant and directs that the defendant shall be convicted of the charge in question. However, the jurisdiction so to do arises under statute, now sections 111 and 112 of the Magistrates' Courts Act 1980. Under those provisions, a complainant who is aggrieved by an order dismissing his complaint may apply for a case to be stated by the justices; and if he does so, and a case is stated, this court has power to review the decision of the justices by answering the questions posed for decision on the facts stated in the case, and making the appropriate order consequent upon the answering of those questions. However, where the allegation is (as here) that the justices failed to comply with the rules of natural justice, it is established by authority that the proper mode of proceeding is not by an appeal by way of case stated, but by an application for judicial review, because the facts have to be placed before the superior court and "the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit": see *Rex v. Wandsworth Justices, Ex parte Read* [1942] 1 K.B. 281, 283, *per* Viscount Caldecote C.J.

Apart possibly from anxiety to expedite the matter, that was no doubt the reason why the present case was brought before this court by way of an application for judicial review. In such a case, there is no statutory power for the court to quash an order dismissing a charge against the defendant and, for the reasons already stated, the court cannot interfere where the defendant has been in jeopardy and has been acquitted.

In the present case, it is plain to us that the defendant was in jeopardy. He had been charged with the offence before the justices and, on the date fixed for the hearing, that charge had been dismissed. In our view, the fact that there had been no trial on the merits does not in these circumstances affect the matter. The case was no different in that respect from a case where the prosecution had offered no evidence on a charge, and the charge had in consequence been dismissed; in such a case, it could not be said that the defendant had never been in jeopardy, so that the prosecution was free to commence fresh proceedings for the same offence. Furthermore, it cannot be said, and indeed it was not argued, that the breach of the rules of natural justice which occurred in the present case rendered the proceedings a nullity. In these circumstances, we have no option but to dismiss the application before the court.

We wish to record our disquiet at the anomaly which appears to us to be revealed by the present case in the procedure for reviewing decisions of justices. Of course, the policy underlying the pleas of *autrefois acquit* and *autrefois convict* is well understood, but the procedure for appeals by way of case stated constitutes in reality, if not in form, a recognition that superior courts may review decisions of justices under which they acquit defendants, and that the procedure of review may result in conviction of the defendant, despite the earlier decision by the justices to acquit him. It must appear strange to complainants that, when the basis of their case is so serious a matter as a breach of the rules of natural justice, they are bound to adopt a procedure under which, if there has been an acquittal, this court has no power to intervene, although in less serious matters an appeal may lie by way of case stated, in which event the court has power to interfere despite the decision of the justices to acquit the

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Reg. v. Dorking JJ., Ex p. Harrington (D.C.)

- A defendant. However that is, as we see it, the effect of the law as it now stands, which we have been bound to apply in the present case.

Application dismissed.

Applicant's and defendant's costs to be paid from central funds.

- B Solicitors: *Wontner & Sons; Downs, Dorking.*

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

- C [PRIVY COUNCIL]

JAVAN NEWBOLD APPELLANT

AND

THE QUEEN RESPONDENT

- D [APPEAL FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS]

1983 April 25;
June 21

Lord Diplock, Lord Elwyn-Jones, Lord Roskill,
Lord Bridge of Harwich and Lord Templeman

- E *Bahama Islands—Crime—Evidence—Trial for murder—Autopsy report admitted in evidence—Report prepared in anticipation of request by coroner—Whether report admissible as exception to hearsay rule—Applicability of proviso—Evidence Act (Statute Law of the Bahama Islands, 1965 rev., c. 42), s. 42 (5)—Court of Appeal Act (Statute Law of the Bahama Islands, 1965 rev., c. 34), s. 12 (1)*

- F The defendant was charged with murder. At his trial the judge admitted in evidence a report of an autopsy carried out on the deceased. The doctor who made the report did not give evidence. The defendant was convicted and appealed. The Court of Appeal held by a majority that the report was to be regarded as having been prepared in anticipation of a request for it by the coroner and as such was "an official record . . . kept for the information of the Crown" admissible in evidence as an exception to the rule against hearsay evidence under section 42 (5) of the Evidence Act.¹ The court held unanimously that even if the report had not been admissible no substantial miscarriage of justice had occurred and dismissed the appeal.

- G On the defendant's appeal to the Judicial Committee:—

- H *Held*, dismissing the appeal, (1) that an autopsy report made by a doctor, even if made in anticipation of a request by the coroner, could not be regarded as an official record kept for the information of the Crown, by a public servant in the discharge of a duty enjoined by law and, accordingly, was not admissible by virtue of section 42 (5) of the Evidence Act as an exception to the rule excluding hearsay evidence (post, pp. 378D–G, 379A–D).

(2) That even though the autopsy report had been wrongly admitted in evidence, no substantial miscarriage of justice had

¹ Evidence Act, s. 42: see post, p. 377A–B.

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[1983]

occurred through its admission since any reasonable jury would inevitably have convicted the defendant even if the report had been excluded and, therefore, the conviction should be upheld (post, pp. 380D-E, 382C-D). A

Decision of the Court of Appeal of the Bahamas affirmed.

The following cases are referred to in the judgment of their Lordships:

Cooper and Pinder (Errol) v. The Queen (unreported), March 21, 1978, Nos. 47 of 1976 and 13 of 1978, Court of Appeal of the Bahamas (Criminal Side). B

Pinder (Kendall) v. The Queen (unreported), March 20, 1978, No. 18 of 1977, Court of Appeal of the Bahamas (Criminal Side).

The following additional cases were cited in argument:

Anderson v. The Queen [1972] A.C. 100; [1971] 3 W.L.R. 718; [1971] 3 All E.R. 768, P.C. C

Reg. v. Jones (Benjamin) [1978] 1 W.L.R. 195; [1978] 2 All E.R. 718, C.A.

Stirland v. Director of Public Prosecutions [1944] A.C. 315; [1944] 2 All E.R. 13, H.L.(E.).

Woolmington v. Director of Public Prosecutions [1935] A.C. 462; 51 T.L.R. 446; 25 Cr.App.R. 72, H.L.(E.). D

APPEAL (No. 35 of 1982) by Javan Newbold, the defendant, from a judgment delivered on March 6, 1980, by the Court of Appeal of the Commonwealth of the Bahamas (Blair-Kerr P., Duffus and Luckhoo JJ.A.) dismissing the defendant's appeal against conviction and sentence following his trial on August 3, 1979, before Malone J. and a jury for the murder of Stellman Brown on January 28, 1979. E

The facts are stated in the judgment.

Swinton Thomas Q.C. and *Jonathan Marks* for the defendant.
Mark Strachan for the Crown.

Cur. adv. vult. F

June 21. The judgment of their Lordships was delivered by LORD BRIDGE OF HARWICH.

This is an appeal from the Commonwealth of the Bahamas and references to courts and statutes in this judgment are to those of the Bahamas. The defendant was tried before Malone J. and a jury in the Supreme Court and convicted on August 3, 1979, of the murder of Stellman Brown. He was sentenced to death. His appeal against conviction was dismissed by the Court of Appeal on March 6, 1980. Special leave to appeal to Her Majesty in Council was granted on June 23, 1982. G

The sole ground of appeal is that the trial judge wrongly admitted in evidence the report of the pathologist, Dr. Joan Read, who, on January 29, 1979, performed an autopsy on the body of the deceased, Brown, but who was not available to give evidence at the trial in July and August, having then left the Bahamas. The Court of Appeal held by a majority (Blair-Kerr P. and Duffus J.A., Luckhoo J.A. dissenting) that the autopsy report was admissible. The court, however, decided unanimously that, if the report had been wrongly admitted, the appeal should nevertheless be dismissed under the proviso to section 12 (1) of the Court of Appeal Act, on the ground that no substantial miscarriage of justice had actually occurred. H

3 W.L.R.

Newbold v. The Queen (P.C.)

A The issue as to the admissibility of the autopsy report turns on the true construction of section 42 (5) of the Evidence Act as applied to certain provisions of the Coroners Act. The Evidence Act provides:

B “42. Hearsay evidence may not be admitted, except in the following cases:— . . . (5) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept.”

The provisions of the Coroners Act of primary relevance are the following:

C “14. On receiving such report [sc. a report of any death calling for inquiry or inquest] . . . the coroner shall, whenever it is practicable so to do, cause the body to be examined by a duly qualified medical practitioner, with or without a post mortem examination or analysis of the contents of the stomach and intestines, and a report thereof in writing to be made to him; and shall also cause the facts and circumstances attending the death to be carefully investigated under his direction by the police, and a report thereof in writing to be made to him, or shall himself investigate such facts and circumstances.

D “15. If as the result of the reports and investigations the coroner is of opinion that the cause of death is sufficiently apparent and that no further light would be thrown upon the case by a public inquiry, he shall, in place of holding an inquest, draw up a report of the case, with his opinion and the reasons for it, and forward it forthwith to the Attorney-General, together with the medical report and the information and report furnished by the police or by himself.

E “16. The report, if approved by the Attorney-General, shall be endorsed with his approval and forwarded by him to the registrar of the court, to be kept together with the inquisitions as a public document: . . .”

F A similar issue as to the admissibility of a pathologist's report had been decided in the same sense as by the majority in the instant case by the Court of Appeal (Hogan P., Georges and Duffus JJ.A.) in two cases *Pinder (Kendall) v. The Queen* (unreported), March 20, 1978 and *Cooper and Pinder (Errol) v. The Queen* (unreported), March 21, 1978, respectively. In neither of those cases, nor in the instant case, was there any evidence of a specific request by the coroner, pursuant to section 14, that the pathologist should examine the body. Indeed, in the instant case, G there is nothing to show that the coroner was ever seized of the matter of Brown's death at all or took any action in relation thereto. Section 18 of the Coroners Act provides for the adjournment of an inquest whenever any person is charged before a magistrate with the homicide of the deceased and the section appears to contemplate that a conviction of homicide will obviate the necessity for an inquest verdict. It appears to H their Lordships that a probable implication from this provision, although not spelt out in terms, is that whenever a person is charged with homicide before a magistrate at a time before the coroner has taken any action, as very probably happened here, the coroner's duties under Part III of the Act (which comprises sections 9 to 18) are suspended until conclusion of the trial.

However that may be, the essential reasoning on which the Court of Appeal based its decision in all three cases is sufficiently expressed in a

passage from the judgment of the court in *Cooper and Pinder (Errol)* A
v. The Queen (unreported), March 21, 1978, which the majority judgment
 in the instant case cited and relied on, as follows:

“ There is no direct evidence that the report was made after a specific
 request by the coroner but there is a clear implication that it was
 made in order to satisfy the statutory requirement and, in our
 opinion, it would satisfy that requirement if it was made in pursuance B
 of a well-established practice, the existence of which is recognised and
 has been confirmed by the Solicitor-General, whereby reports of this
 kind are made in anticipation of a specific request from the coroner
 under the provisions of the section. Although it would be desirable
 to have more direct evidence on the point in future, we think the
 implications flowing from the statutory duty and the evidence of what C
 actually occurred in this case are such as to justify a deduction that
 it was made in discharge of the duty enjoined by the provisions of the
 Coroners Act and consequently was admissible under section 42 (5)
 of the Evidence Act . . . ”

Their Lordships feel grave doubt whether an autopsy performed in
 anticipation of a statutory request can properly be treated as if performed
 in response to a statutory request. The argument for the Crown, however, D
 has more formidable obstacles to overcome than this.

In the hope that this judgment may help to clarify the law, their
 Lordships propose to address themselves to the question whether an
 autopsy report, as such, made in response to an undoubted request by a
 coroner under section 14, can ever be admissible as an exception to the
 hearsay rule under section 42 (5) of the Evidence Act. The three relevant E
 conditions precedent to such admissibility are: (1) that the contents of the
 report amount to a “ statement . . . contained in any official record . . .
 kept for the information of the Crown ”; (2) that the statement “ was made
 as the result of inquiry by a public servant ”; (3) that it was so made “ in
 discharge of a duty enjoined by the law . . . ” If the first condition pre-
 cedent is to be satisfied, the autopsy report itself must be treated as falling
 within the words “ official record.” This seems to their Lordships to stretch F
 language to breaking point. But suppose it can be so stretched, it is never-
 theless impossible to say that it is a record “ kept for the information of the
 Crown.” The coroner’s report, if approved by the Attorney-General and
 forwarded to the registrar pursuant to section 16, is undoubtedly an official
 record so kept. It was submitted that the words “ together with the
 inquisitions ” in that section were apt to refer to the medical and police
 reports made in response to requests under section 14. Their Lordships G
 cannot accept this submission. The word “ inquisition ” appears to be
 used elsewhere in the Act to denote the formal conclusion reached at an
 inquest or inquiry: e.g. in section 18 (3) and section 28 (2), (4) and (5).
 Whatever difficulty there may be in applying this meaning to the plural
 “ inquisitions ” in section 16, it is inconceivable that the draftsman should
 have used this word to refer to the medical and police reports which are H
 expressly mentioned in the immediately preceding section.

In the instant case there was no evidence to show that Dr. Read was a
 public servant. Her report is headed “ The ‘ Rand ’ Pathology Laboratory.”
 Their Lordships, in the course of argument, were informed by counsel for
 the Crown on instructions that the “ Rand ” Pathology Laboratory is
 one of two such laboratories maintained by the government. But when
 confronted with the absurdity of holding that the admissibility of a patho-

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- A logist's report made in response to a coroner's request under section 14 depends on whether the "duly qualified medical practitioner" referred to in that section happens to be in government service or in private practice, counsel for the Crown felt constrained to fall back on the submission that any medical practitioner carrying out an examination and making a report in response to a coroner's request under section 14 is performing a public service and therefore becomes a public servant ad hoc. Their Lordships cannot agree.

- Overriding these considerations is the requirement that the "inquiry by a public servant" referred to in condition precedent (2) must be made "in discharge of a duty enjoined by the law" in order to comply with condition precedent (3). It is plain, in their Lordships' opinion, that the "duty enjoined by law" must be a duty which the law imposes directly on the appropriate public servant to make the inquiry in question. The only public servant who has any duty to make inquiry under the relevant provisions of the Act is the coroner himself. The argument advanced that an inquiry made by a third party (the medical practitioner) can operate as a discharge of the duty of the coroner is quite untenable.

- Accordingly, their Lordships reach the conclusion that an autopsy report made to the coroner under section 14 of the Coroners Act fails to satisfy any of the three conditions precedent to admissibility under section 42 (5) of the Evidence Act. It is right to add that a coroner's report forwarded to the Attorney-General under section 15 and approved and forwarded by him to the registrar under section 16 would satisfy those conditions. This is unobjectionable, since the procedure under sections 15 and 16 is evidently intended to apply only to straightforward cases, where both the cause and the circumstances of the death are clear and undisputed. On the other hand, if section 42 (5) were held to render an autopsy report under section 14 admissible, there is no logical reason why it should not have the same effect in relation to a police report under the same section, a result which the legislature cannot conceivably have intended.

- From the instant case and the two earlier cases referred to it would appear that it is not uncommon for a pathologist who has made an autopsy report in a homicide case to have left the Bahamas before trial. It may be the practice, perhaps a necessary one, to engage pathologists from overseas on short term contracts to work in the government pathology laboratories.

In the course of the judgment in *Cooper and Pinder (Errol) v. The Queen* (unreported), March 21, 1978, the Court of Appeal said:

- "We would take the opportunity to stress the desirability of introducing legislation specially suited to meet circumstances now so commonly encountered and which would permit documentary evidence to be tendered at trials when officials who would normally attend to give oral evidence of the facts recorded in these documents are not available. In many jurisdictions there are provisions for reading depositions in such circumstances. Other statutes make special provision for perpetuating evidence where it is anticipated that witnesses may be leaving the country. The matter needs urgent attention."

Their Lordships would respectfully point out that the appropriate legislation is already available. The Criminal Procedure Code (enacted in 1968) provides, by section 129, that, after a person has been charged with an offence not triable summarily, the deposition of a witness about to leave the Bahamas and likely to be absent if and when the accused is tried may

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be taken by any magistrate in advance of the committal proceedings. The accused is to be given notice and to have the opportunity to attend. If the witness is then in fact not in the Bahamas when the accused is tried the deposition is admissible in evidence pursuant to sections 132 and 165 (a) (ii). If this procedure had been followed as soon as it was known that Dr. Read was intending to leave the Bahamas, the present difficulty would not have arisen. A

Their Lordships now turn to the question whether, notwithstanding the wrongful admission in evidence of Dr. Read's report, the appeal against conviction was properly dismissed under the proviso. The Board is always reluctant to differ, on such an issue, from the decision of the local appellate court, which is best qualified to assess the likely effect on the mind of a local jury, in the context of the evidence as a whole, of the particular misdirection, misreception of evidence, or other irregularity which occurred in the course of the trial. It was submitted for the defendant that the Court of Appeal had misunderstood the point at issue and failed to apply their minds to the true ground on which it was contended that the material in Dr. Read's report had prejudiced the appellant's trial. It must be accepted that the very short passage in the judgment of the majority (Luckhoo J.A. delivered no separate judgment) addressed to the proviso issue was less than satisfactory. But it is difficult to suppose that the point, which, as will appear, is a very obvious one, was not fully argued before the Court of Appeal, as it has been before the Board, or that the judges of the Court of Appeal failed to apply their minds to it. B C D

Their Lordships bear in mind that this is a capital case calling for the utmost care in the application of the proviso. The criterion they adopt, for which it is unnecessary to cite authority, is that the appeal should only be dismissed if it is clear that any reasonable jury must inevitably have convicted the defendant even if Dr. Read's report had been excluded from the evidence. E

The defendant and the deceased were both prison officers at H.M. Prison, New Providence. On the night of January 28, 1979, Corporal Brown was in charge of the detail on duty at the first offenders' prison, comprising the defendant, Miller, Cartwright and Smith. Sergeant Bannister was in charge of the main prison. When Corporal Brown's detail paraded, he reprimanded the defendant for being improperly dressed. It was common ground that shortly before 11 p.m. Brown sustained two .38 bullet wounds one of which caused his death. Miller, whose duty it was to patrol the prison, had properly drawn two .38 revolvers and loaded each with five rounds of ammunition. It will be convenient to refer to these as "revolver A" and "revolver B." F G

It is sufficient to summarise in barest outline the direct evidence of Miller, Cartwright, Smith and Bannister, on which the prosecution relied and all of which was disputed by the defendant. Miller, on return from patrol, was sitting at a desk where he had put the two loaded revolvers in a drawer. The defendant came up, took the two revolvers from the drawer and said to Miller: "Suppose I start shooting everybody, what will you do?" Cartwright heard the defendant say to Brown: "You're scheming but I will teach you how to scheme." According to Smith, the defendant said to him: "I am going to shoot Brown." Later Smith saw the defendant holding both revolvers and pointing them at Brown. The defendant said: "Look man, I want to talk to you." Brown replied: "Don't play around with guns like that." Smith then saw the defendant fire two shots at Brown at a range of about seven feet and separated in time by an interval H

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A of less than a minute. Sergeant Bannister, in the main prison, received a telephone call from the defendant, who said: "I have just shot Corporal Brown and used four rounds of ammunition."

B There is no doubt that four shots were in fact fired from revolver A. Four empty cartridge cases, proved by the evidence of a forensic scientist to have been fired from this weapon, were in due course recovered from the floor of Brown's office or nearby. These must have been removed by hand by someone after the shooting as the revolver did not automatically eject them. The empty revolver was also found in the office. Only two bullets fired from revolver A were found. One was not far from where the body of Brown was found on some open ground. The other was handed to the detective who attended the autopsy by Dr. Read, inferentially having been extracted from Brown's body. Both Miller and Cartwright said they C heard four shots fired with an interval after the first and the other three in quick succession. Cartwright heard a sharp scream of pain after the second shot. Smith, after the two shots which he saw fired, heard one further shot.

D After the shooting it was not disputed that revolver B was handed by the defendant to one Jordan, who was not present at the time of the shooting. It was then fully loaded and was in due course handed to the police. The evidence of the forensic scientist established that an attempt had been made to fire this weapon. Each of the five live rounds taken from revolver B bore the mark of the firing pin, which owing to some fault in the mechanism, had failed to strike the cartridge case centrally.

E Photographs of the body of Brown were in evidence. Their Lordships have seen them. They clearly show three bullet holes in the body. One is in the right hand side of the lower abdomen. The other two are in the left rear quadrant of the body above the left buttock and hip. The two holes are separated by no more than two inches. It is obvious even to a layman's eye that these are an entry and exit wound caused by a bullet passing through the body just beneath the surface of the flesh. It would no doubt require an expert to determine which was the entry and which was the exit wound.

F The defendant's account, outlined in a statement to the police on the night of the shooting and amplified in evidence, was that he had taken the loaded revolver B when he went on duty at the gate. Brown came up to him with revolver A, demanding a cigarette from him, poking him in the side and threatening him with the revolver. The defendant tried to grab the revolver from Brown. A struggle ensued in the course of which the G revolver went off accidentally twice. One of the defendant's answers in cross-examination was: "His hand was between us. All I can say is the gun went off between us." After the second shot Brown walked away carrying the revolver. Brown then held his stomach and said: "Oh Lord, Newbold, call the doctor." The defendant denied that at any time after the shooting he had been to the office where the empty revolver A and H the four empty cartridge cases fired from it were later found.

The only factor of significance which the autopsy report of Dr. Read added to the evidence summarised above related to the flesh wound in Brown's back. It was her opinion that the bullet hole nearer to the spine was the entry wound and that in the side of the body above the left hip the exit wound. The report having been admitted in evidence, the impossibility of Brown having accidentally shot himself in the back was understandably stressed both by the Solicitor-General in his final address

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to the jury and by the judge in his summing up. The complaint made on behalf of the defendant is that this may have been the crucial factor in the jury's decision to convict him. It is to be observed that acceptance of the defendant's evidence in preference to that of the prosecution witnesses who gave direct evidence of what they saw and heard predicates an elaborate conspiracy to give false evidence between Miller, Cartwright, Smith and Bannister. But that apart, the direct prosecution evidence was entirely credible and consistent and was substantially corroborated by the circumstantial and objective evidence of the finding of revolver A, the two bullets and the empty cartridge cases fired from it, and the firing pin marks on the live ammunition in revolver B indicating attempts to fire it. The defendant's account, on the other hand, leaves that objective evidence unexplained and indeed inexplicable. Finally whether the bullet which caused the flesh wound in Brown's back passed through the body in one direction or the other, it was quite beyond belief that it could have been caused by the accidental firing of the revolver in Brown's hand in the course of such a struggle as that described by the defendant.

Their Lordships are satisfied that, if Dr. Read's report had not been in evidence, any reasonable jury must nevertheless have returned a verdict of guilty. Any other verdict would indeed have been perverse. Accordingly, their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: *Philip Conway Thomas & Co.; Charles Russell & Co.*

T. J. M.

[HOUSE OF LORDS]

YOUNG APPELLANT

AND

SECRETARY OF STATE FOR
THE ENVIRONMENT FIRST RESPONDENT

AND

BEXLEY LONDON BOROUGH COUNCIL SECOND RESPONDENT

1983 July 5, 6; 27

Lord Fraser of Tullybelton, Lord Elwyn-Jones,
Lord Lowry, Lord Roskill
and Lord Brightman

*Town Planning—Planning permission—Change of use—Material change of use without planning permission—Service of enforcement notice requiring discontinuance of unauthorised use—Whether resumption of any previous lawful use of land possible—Whether only resumption of immediately preceding use possible, if lawful—Town and Country Planning Act 1971 (c. 78), s. 23 (9)*¹

From 1912 until 1969 premises were used as a laundry which was a use as a general industrial building within Class IV of the Schedule to the Town and Country Planning (Use Classes) Order 1972. In 1969 there was a change of use to

¹ Town and Country Planning Act 1971, s. 23 (9): see post, p. 384C-D.

3 W.L.R.

Young v. Env. Sec. (H.L.(E.))

- A use for food processing which was use as a light industrial building within Class III of the Order of 1972, a permitted change by virtue of article 3 (1) of the Town and Country Planning General Development Order 1977, and Schedule 1, Class III and therefore a lawful use. In 1970 the premises reverted to use as a laundry but that change was not lawful as planning permission had not been obtained for it. Since 1977 the premises had been used by the present owner for his business as an insulating contractor, mainly for storing and processing materials and that light industrial user of the premises was itself unlawful because the immediate preceding use as a laundry required planning permission. In February 1980 the local planning authority served an enforcement notice on the owner alleging that the use for carrying on the business of an insulating contractor was a material change of use without planning permission and requiring its discontinuance. The owner appealed to the Secretary of State denying that there had been any breach of planning control. Consequent upon a public inquiry the appeal was dismissed. Appeals therefrom to the High Court and the Court of Appeal were also dismissed.
- B
- C

On appeal by the owner on the ground that, that by virtue of section 23 (9) of the Town and Country Planning Act 1971, it was permissible to revert to using the premises for light industrial use and that therefore the enforcement notice was ineffective:—

- D *Held*, dismissing the appeal, that the effect of section 23 (9) of the Act following upon the service of an enforcement notice was that the only use that could be made of the land without obtaining fresh planning permission was use for which it could have been used immediately before the use complained of in the enforcement notice, provided that use was itself lawful; that in the present case the use of the land as a laundry from 1970 to 1977 was unlawful and therefore the enforcement notice took effect (post, pp. 386C–D, E–F, 388D–G).
- E

LTSS Print and Supply Services Ltd. v. Hackney London Borough Council [1976] Q.B. 663, C.A. applied.

Decision of the Court of Appeal affirmed.

The following cases are referred to in the opinion of Lord Fraser of Tullybelton:

- F *Balco Transport Services Ltd. v. Secretary of State for the Environment* (1981) 45 P. & C.R. 216.
- Blenkinsopp v. Secretary of State for the Environment* (unreported), January 28, 1983, Glidewell J.
- LTSS Print and Supply Services Ltd. v. Hackney London Borough Council* [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.
- G

The following additional cases were cited in argument:

- Kingdon v. Minister of Housing and Local Government* [1968] 1 Q.B. 257; [1967] 3 W.L.R. 990; [1967] 3 All E.R. 614, D.C.
- Lamb (W. T.) & Sons Ltd. v. Secretary of State for the Environment* [1975] 2 All E.R. 1117, D.C.
- H *Mansi v. Elstree Rural District Council* (1964) 16 P. & C.R. 153, D.C.
- Simms v. Registrar of Probates* [1900] A.C. 323, P.C.

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords by the appellant John Anthony Young, from the judgment dated February 2, 1983, of the Court of Appeal (Lord Lane C.J., Watkins L.J. and Sir Roger Ormrod) affirming the judgment dated April 7, 1982, of Forbes J., who had dis-

missed the appeal by the appellant brought under section 246 of the Town and Country Planning Act 1971, against a decision of the first respondent, the Secretary of State for the Environment on an appeal against an enforcement notice served by the second respondents, Bexley London Borough Council in respect of certain property occupied by the appellant. A

The facts are stated in the opinion of Lord Fraser of Tullybelton.

Nigel Macleod Q.C. and *S. W. Bickford-Smith* for the appellant. B
Simon D. Brown and *Andrew Collins* for the first respondent.

The second respondents were not represented.
 Their Lordships took time for consideration.

July 27. LORD FRASER OF TULLYBELTON. My Lords, this appeal C
 raises a question of construction of section 23 (9) of the Town and Country Planning Act 1971. That subsection provides:

“(9) Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if D
 that development had not been carried out.”

The issue raised in the appeal is whether section 23 (9) enables a person, upon whom an enforcement notice has been served alleging a breach of planning control by making a material change in the use of land, to revert to the use to which the land was last lawfully put, or only to revert to the use immediately preceding that enforced against, provided that such use was itself lawful. The appellant contends for the former alternative, the first E
 respondent for the latter. The first respondent was the only respondent who was represented before this House, and I shall refer to him hereafter as “the respondent.”

Part III of the Act of 1971, which includes section 23, deals with general planning control. It provides by section 22 (1) that “development” of land means the making of any material change in the use of any F
 buildings or other land. That general rule is qualified by subsection (2) of section 22 which provides that a change from one use to another use in the same class, as defined in an Order by the Secretary of State, shall not be taken for the purposes of the Act to involve development. Section 23 provides that any development of land, with certain specified exceptions, requires planning permission. Section 23 so far as relevant to this appeal G
 provides as follows:

“(1) Subject to the provisions of this section, planning permission is required for the carrying out of any development of land. (2) Where on July 1, 1948 (in this Act referred to as ‘the appointed day’) land was being temporarily used for a purpose other than the purpose for which it was normally used, planning permission is not required for the resumption of the use of the land for the last-mentioned purpose H
 before December 6, 1968. . . . (5) Where planning permission to develop land has been granted for a limited period, planning permission is not required for the resumption, at the end of that period, of the use of the land for the purpose for which it was normally used before the permission was granted. (6) In determining, for the purposes of subsection (5) of this section, what were the purposes for which land was normally used before the grant of planning permission, no

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- A account shall be taken of any use of the land begun in contravention of the provisions of this Part of this Act or in contravention of previous planning control."

Subsection (9) has already been quoted above.

- B On February 11, 1980, an enforcement notice was issued by the second respondents to the appellant in respect of development of land at Woodside Crescent, Sidcup, Kent. The land in question consists of a large building, which is used by the appellant to process, store and distribute insulating materials. It is surrounded by a residential area. The enforcement notice was issued by the respondents in pursuance of their powers under section 87 (1) of the Act of 1971. It alleged that there had been a breach of planning control in that the land had been developed by the making of a material change of use without the grant of planning permission which was required. The appellant appealed to the Secretary of State, under section 88 (1) of the Act, denying that there had been any breach of planning control. A public inquiry was held and on November 21, 1980, the appellant's appeal to the Secretary of State was dismissed (subject to a slight extension of the time allowed by the enforcement notice for ceasing to use the land and removing his materials from it). Section 88 (7) provides that when such an appeal is brought the appellant is deemed to have applied for planning permission for the development to which the notice relates. This deemed application was refused.

- D The appellant appealed to the High Court under section 246 (1) of the Act, and on April 7, 1982, his appeal was dismissed by Forbes J. On February 2, 1983, the Court of Appeal (Lord Lane C.J., Watkins L.J. and Sir Roger Ormrod) dismissed the appellant's appeal and affirmed the judgment of Forbes J.

- E Before your Lordships' House, counsel for the appellant accepted that the enforcement notice was valid and well founded in fact. His argument was confined to the question of its effect, under section 23 (9), on the footing that it was valid. In order to appreciate the contentions of the parties it is necessary to refer to the planning history of the land. It was as follows.

- F (a) From 1912 until 1969, the building was used as a laundry. This was use as a general industrial building within Class IV of the Schedule to the Town and Country Planning (Use Classes) Order 1972 (S.I. 1972 No. 1385) ("the Use Classes Order 1972").

- G (b) In 1969 there was a change of use to use for food processing. This was use as a light industrial building within Class III of the Schedule to the Use Classes Order 1972. The change from use as a general to use as a light industrial building was a material change of use, but it was a change which was permitted without the need for specific permission from the Local Planning Authority or the Secretary of State: see article 3 (1) of the Town and Country Planning General Development Order 1977 (S.I. 1977 No. 289), and Schedule 1, Class III. Planning permission for such a change is given by the Order. Accordingly the change of use in 1969 was permitted development and the use for food processing was a lawful use.

- H (c) In 1970 there was a change of use back to use as a laundry. This change from food processing (light industrial) to laundry (general industrial) was not lawful because planning permission ought to have been obtained for it but was not. Accordingly the use as a laundry from 1970 onwards was not a lawful use of the building.

(d) Since 1977 the building has been used by the appellant for his business as an insulating contractor, mainly for storing and processing materials. This is use as a light industrial building but it is not a lawful use because the immediately preceding use as a laundry having been unlawful, any change from it required planning permission. But planning permission was not sought or obtained for the change of use in 1977. This change of use was the development in respect of which the enforcement notice was issued.

It is apparent from that history that the purpose for which the land was last lawfully used before the use struck at by the enforcement notice was for food processing (light industrial) from 1969 to 1970. The appellant contends that, by virtue of section 23 (9) of the Act of 1971, he is entitled to revert to using it as a light industrial building. There is no dispute that use for storage for the purposes of his business is use as a light industrial building. The result of that contention, if it is correct, is that the enforcement notice is futile because use of the land as a store, although unlawful in the sense that it was begun without the requisite planning permission, is rendered lawful by section 23 (9).

The respondent contends that the meaning of section 23 (9) is that, following upon the enforcement notice, the only use that can be made of the land without obtaining fresh planning permission is use for the purpose for which it could have been used immediately before the use struck at by the enforcement notice, i.e. as a laundry, provided that use was itself lawful. But it is common ground that the use as a laundry from 1970 to 1977 was not lawful. So, if the respondent is right, there is, in practice, no purpose for which the land can now be used without obtaining planning permission. I say "in practice" because there are some purposes, such as agriculture (see section 22 (2) (e) of the Act of 1971), for which it could lawfully be used without planning permission, but they are unlikely to be practical possibilities.

The argument of the respondent prevailed in the Court of Appeal and in my opinion it is well founded. I reach that opinion upon construction of section 23 (9) itself and especially of the last few words in the subsection. Where an enforcement notice is issued in respect of any development, what the subsection authorises without planning permission is use for the purpose for which the land could lawfully be used "if *that development* had not been carried out." Accordingly one has to assume that the development consisting of the change of use in 1977 had not been carried out, and see what would have been the state of affairs on that assumption. Clearly if that development had not been carried out, the land would have continued to be used as a laundry, as it was from 1970 to 1977. But admittedly it was not "lawfully" so used during that period. The appellant claims to be entitled to follow the planning history of the land further back through its earlier uses until he gets back to the last lawful use, which in this case was use as a light industrial building for food processing in 1969 to 1970. But the process of following the history back would in my view not be consistent with the hypothesis of section 23 (9) which is that only the development of 1977 had not been carried out. The appellant's argument would involve reading the subsection as if it referred to the purpose "for which the land could *last* lawfully have been used *before* that development had been carried out." Such a reading would materially alter the sense of the subsection and is in my view unwarranted. Moreover I agree with Watkins L.J. who said when this case was in the Court of Appeal, that it was

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A "inconceivable that the [recipient] of an enforcement notice was intended to be allowed to search the history of the use of the relevant land and, upon discovery of a . . . lawful use, no matter how long ago . . . claim the benefit of that use without planning permission."

B The construction of the subsection which appears to me correct is consistent with the general scheme of the Act. During the period 1970 to 1977, when the land was being used as a laundry, any change of use back to use for food processing would have required planning permission, because, although it would have been a change from general to light industrial use, the general industrial use was unlawful. That was disputed by the appellant at an earlier stage of the appeal, but he no longer contends that he was entitled to change from general to light industrial use, if the former was unlawful. It would be strange if the appellant was in a better position now, after a further unlawful change of use in 1977 than he, or his author, would have been during the period 1970 to 1977.

C Counsel for the appellant argued that the reference in section 23 (9) to "the use" of the land for the purpose for which it could lawfully have been used etc. suggested that there was a presumption that there probably was a purpose for which it could lawfully have been used, and thus entitled one to look back beyond the immediately preceding use. Even if it be accepted that some such presumption is implied, I do not see why it should entitle one to look back beyond the immediately preceding use, and in any event I do not consider that it could possibly be strong enough to overcome the words later in the subsection to which I have already referred. Counsel also presented a plea ad misericordiam to the effect that, if section 23 (9) was construed in the way for which the respondent contends, it would operate harshly in his case. He pointed out (rightly) that if the enforcement notice had been issued during the period between 1970 and 1977, when the land was being used unlawfully as a laundry, planning permission would not have been required to revert to the immediately preceding use for food processing, because that was a lawful use. It would be harsh, counsel said, if the appellant were to lose that right because, instead of continuing to use the land as a general industrial building (a laundry), he had changed to using it as a light industrial building, which by definition is less objectionable: see Use Classes Order 1972, article 2 (2). Counsel also presented an alternative argument based on hardship to the effect that, had the use as a laundry not been interrupted for the short period of about a year in 1969 to 1970 by the use for food processing, it would have been lawful and he could have reverted to it now under section 23 (9). Finally counsel urged your Lordships to regard the provisions of section 23 (9) as ambiguous, and to construe them in the way that would cause least hardship to the appellant. I have some sympathy for the appellant, but I am unable to accept the submission that the provisions of section 23 (9) are ambiguous, or that their meaning should be distorted in order to mitigate any element of hardship.

H It must in my view be accepted that, in the application of a detailed statutory code such as that in the Act of 1971, or those which are commonly found in fiscal legislation, a measure of hardship may in some cases be unavoidable.

We were referred to *LTSS Print and Supply Services Ltd. v. Hackney London Borough Council* [1976] Q.B. 663, 673 where Cairns L.J. said in the Court of Appeal that the effect of section 23 (9) was that

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“when an enforcement notice had been served reverter should be allowed only to the use which was current immediately before the development the subject of the enforcement notice and if that use was not lawful in accordance with that part of the Act, then planning permission would be required for any use it was proposed to adopt.” A

Glidewell J. in *Balco Transport Services Ltd. v. Secretary of State for the Environment* (1981) 45 P. & C.R. 216, 222, after saying he regarded that observation by Cairns L.J. as obiter, expressed the view that it was not correct. But in a subsequent unreported case (*Blenkinsopp v. Secretary of State for the Environment*, January 28, 1983) Glidewell J. recanted that view. Whether the observation of Cairns L.J. was obiter or not, I am respectfully in agreement with it for the reasons that I have tried to explain. Some reference was made by the learned Lord Justice to the effect of subsections (5) and (6) of section 23 and Mr. MacLeod for the appellant sought to found an argument on a comparison between those subsections and subsection (9) of section 23. Mr. Brown for the respondents did not accept that the meaning attributed to subsections (5) and (6) by Cairns L.J. was correct. The provisions of those subsections are materially different from the provisions of subsection (9) and I do not find them to be of any assistance in construing the latter subsection. I therefore express no opinion upon the meaning of subsections (5) and (6) or upon the correctness or otherwise of anything said about them by Cairns L.J. in the *LTSS* case [1976] Q.B. 663. B C D

I would dismiss this appeal.

LORD ELWYN-JONES. My Lords, I agree with the draft speech prepared by my noble and learned friend Lord Fraser of Tullybelton, and for the reasons he has given I would allow this appeal. E

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton. I agree with his conclusions and, for the reasons which he gives, I would dismiss the appeal. F

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I too would dismiss the appeal.

LORD BRIGHTMAN. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Fraser of Tullybelton. G

Appeal dismissed.

Solicitors: *Ward Bowie for Chancellor & Ridley, Dartford; Treasury Solicitor.* H

J. A. G.

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A [HOUSE OF LORDS]

WAITE APPELLANT

AND

GOVERNMENT COMMUNICATIONS

B HEADQUARTERS RESPONDENTS

1983 June 13, 14; Lord Fraser of Tullybelton, Lord Keith of Kinkel,
July 21 Lord Scarman, Lord Bridge of Harwich
and Lord Templeman

C *Employment—Unfair dismissal—Excluded classes—Retirement—
Civil servant—Minimum retirement age of 60—Discretionary
retention beyond minimum age—Civil servants usually allowed
to complete 20 years' service—Policy in one department to
employ civil servants over 60 in lower grade—Whether claim
for unfair dismissal excluded—Employment Protection (Con-
solidation) Act 1978 (c. 44), s. 64 (1) (b)*

D In 1961, the employee, then aged 44, became a higher
executive officer in the Civil Service when he accepted an offer
“subject to confirmation” and with a “prospect of employment
until age 65, subject to continued satisfactory service.” In 1967
the employment was confirmed and he became subject to the
Civil Service Pay and Conditions of Service Code, under which
he could be retired at the age of 60. In accordance with the
code, it was departmental policy that higher executive officers
who had not completed 20 years' reckonable service at the age
of 60 were to be employed in a lower grade until they had
completed that period or attained the age of 65. In 1978, when
the employee was over 60, the employers terminated his em-
ployment but pursuant to the departmental policy, re-employed
him in the lower grade of clerical officer. On his complaint
of unfair dismissal, an industrial tribunal held that their juris-
diction was not excluded under paragraph 10 (b) of Schedule 1
to the Trade Union and Labour Relations Act 1974, and that
the employee was unfairly dismissed when the employment as
a higher executive officer was terminated. The Employment
Appeal Tribunal allowed the employers' appeal on the ground
that the employee had reached the normal retiring age for the
purposes of paragraph 10 (b), as re-enacted by section 64 (1) (b)
of the Employment Protection (Consolidation) Act 1978,¹ and,
therefore, the industrial tribunal lacked jurisdiction to hear the
complaint. The Court of Appeal dismissed an appeal by the
employee.

On appeal by the employee:—

Held, dismissing the appeal, that “normal retiring age” for
the purposes of section 64 (1) (b) of the Employment Protec-
tion (Consolidation) Act 1978, was *prima facie* the retiring age
laid down in the terms and conditions upon which the employee
was employed (“the contractual retiring age”), but that it might

¹ Employment Protection (Consolidation) Act 1978, s. 54 (1): “In every employ-
ment . . . every employee shall have the right not to be unfairly dismissed by his
employer.”

S. 64: “(1) Subject to subsection (3), section 54 does not apply to the dismissal
of an employee from any employment if the employee— . . . (b) on or before the
effective date of termination attained the age which, in the undertaking in which he
was employed, was the normal retiring age for an employee holding the position
which he held or, if a man, attained the age of 65, or, if a woman, attained the
age of 60.”

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be displaced by evidence that it was regularly departed from in practice; that in the present case the contractual retiring age for those in the employee's grade of higher executive officer was 60, and that the evidence did not establish that there was any practice to the contrary sufficient to displace the contractual retiring age, and that accordingly, the employee had failed to show that the industrial tribunal had jurisdiction to entertain his complaint (post, pp. 394H—395A, C—G, 396G—397B).

Dictum of Bridge L.J. in *Post Office v. Wallser* [1981] 1 All E.R. 668, 673, C.A. applied.

Ord v. Maidstone and District Hospital Management Committee [1974] I.C.R. 369, N.I.R.C. distinguished.

Nothman v. Barnet London Borough Council [1978] 1 W.L.R. 220, C.A. and *Howard v. Department for National Savings* [1981] 1 W.L.R. 542, C.A. overruled.

Decision of the Court of Appeal [1983] I.C.R. 359 affirmed on different grounds.

The following cases are referred to in the opinion of Lord Fraser of Tullybelton:

Duke v. Reliance Systems Ltd. [1982] I.C.R. 449, E.A.T.

Howard v. Department for National Savings [1981] 1 W.L.R. 542; [1981] I.C.R. 208; [1981] 1 All E.R. 674, C.A.

Nothman v. Barnet London Borough Council [1978] 1 W.L.R. 220; [1978] I.C.R. 336; [1978] 1 All E.R. 1243, E.A.T. and C.A.; [1979] 1 W.L.R. 67; [1979] I.C.R. 111; [1979] 1 All E.R. 142, H.L.(E.).

Ord v. Maidstone and District Hospital Management Committee [1974] I.C.R. 369; [1974] 2 All E.R. 343, N.I.R.C.

Post Office v. Wallser [1981] 1 All E.R. 668, C.A.

Secretary of State for Trade v. Douglas [1983] I.R.L.R. 63, E.A.T.(Sc.).

The following additional case was cited in argument:

Smith v. Post Office [1978] I.C.R. 283, E.A.T.

APPEAL from the Court of Appeal.

This was an appeal by the appellant, Lt. Col. (Ret'd) J. A. Waite, from the judgment dated December 20, 1982, of the Court of Appeal (Waller, Ackner and Purchas L.JJ.) dismissing the appellant's appeal from the order dated May 7, 1981, of the Employment Appeal Tribunal (May J. presiding) allowing the appeal of the respondents, Government Communications Headquarters, against the finding by an industrial tribunal on April 10, 1980, and January 22, 1981, that it had jurisdiction to entertain the appellant's claim for unfair dismissal and that the appellant had been unfairly dismissed.

The facts are stated in the opinion of Lord Fraser of Tullybelton.

Eldred Tabachnik Q.C. and *Elizabeth Slade* for the appellant.
Simon D. Brown and *David Blunt* for the respondents.

Their Lordships took time for consideration.

July 21. LORD FRASER OF TULLYBELTON. My Lords, the main question raised in this appeal concerns the proper construction of the expression "the normal retiring age" where it occurs in the Trade Union and Labour Relations Act 1974, Schedule 1, paragraph 10. The expression was used in the same context in section 28 of the Industrial Relations Act 1971, which was repealed, and re-enacted with amendments which are not here

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of Tullybelton

A relevant, by the Act of 1974. The Act of 1974 itself has now been repealed by the Employment Protection (Consolidation) Act 1978. Section 64 of the Act of 1978 re-enacts paragraph 10 of Schedule 1 of the Act of 1974 with further amendments. The Act of 1974 was the legislation in force at the time which is material for this appeal, and I shall refer only to it. A subsidiary question as to the proper construction of certain Civil Service regulations is also raised.

B The appellant, Lieutenant Colonel Waite, was born on October 30, 1917. He had a distinguished career in the army and attained the rank of Lieutenant Colonel in the Royal Signals Regiment. In 1961 he left the army in order to take up employment with the respondent's predecessors, the London Communications Electronic Security Agency, who were then advertising for officers with practical experience of telecommunications.

C His employment with them began on December 4, 1961, when he became a temporary civil servant with the grade of higher executive officer. On March 13, 1967, he became an "established" civil servant with pension rights. The appellant now accepts that the contractual terms and conditions of employment applicable to him from and after March 13, 1967, were those contained in the Civil Service Code, amplified in some respects by the departmental policy of his employing department. Before the Court

D of Appeal the appellant had argued that the age at which he could be compelled to retire depended upon the terms of his original employment as a temporary civil servant but the Court of Appeal, and the tribunals, decided against that contention and he now accepts their decision on that issue.

E On April 30, 1978, the appellant was compulsorily retired. On that date he was aged 60½. He had not completed the 20 years of reckonable service with the respondents and their predecessors necessary to qualify for a full pension. He had in fact completed slightly over 16 years of service reckonable for pension. On his retirement he was immediately re-employed in a lower grade as a clerical officer, in the technical language of the department he "regressed." Thereafter he worked as a clerical officer, without prejudice to his contention that the respondents had had

F no power to compel him to retire on April 30, 1978. In July 1978 the appellant complained to an industrial tribunal that he had been unfairly dismissed. The respondents at first denied that his dismissal had been unfair, but they no longer maintain that denial. They also took, and still maintain, the preliminary point that the industrial tribunal had no jurisdiction to entertain the appellant's application, on the ground that, before

G the date on which his employment was terminated, he had attained the normal retiring age for an employee holding the position which he held. For that point they rely on paragraph 10 (b) of Schedule 1 to the Act of 1974. Paragraph 10 is in Part II of the Schedule which is the Part dealing with "unfair dismissal." Paragraph 4 which is also in Part II provides that in every employment to which it applies every employee shall have the right not to be unfairly dismissed by his employer, and that the remedy

H of an employee who is unfairly dismissed is by way of complaint to an industrial tribunal. Paragraph 10 provides as follows:

"10. Subject to paragraph 11 below, paragraph 4 above does not apply to the dismissal of an employee from any employment if the employee—(a) was not continuously employed for a period of not less than 26 weeks ending with the effective date of termination, or (b) on or before the effective date of termination attained the age which, in

the undertaking in which he was employed, was the normal retiring age for an employee holding the position which he held, or, if a man, attained the age of 65, or, if a woman, attained the age of 60; . . .” A

The “effective date of termination” in relation to an employee whose contract of employment is terminated by notice means the date on which the notice expires: see paragraph 5 (5) (a) of the Schedule. “Position” is defined in section 30 of the Act as follows: B

“‘position,’ in relation to an employee, means the following matters taken as a whole, that is to say, his status as an employee, the nature of his work and his terms and conditions of employment; . . .”

For reasons which I shall explain when I come to consider the subsidiary question, I am of opinion that the retiring age laid down in the terms and conditions of the appellant’s employment (which I shall call the “contractual retiring age”) for a person holding his position was 60. The respondents had power, in their discretion, to retain him in his position after he had attained the age of 60 and until he reached the age of 65, and they did in fact retain him until he was 60½ in order to carry out a particular task, but he had no right under the terms of his employment to be retained after attaining the age of 60. Such retention was entirely a matter for the respondents’ discretion. Nevertheless the appellant contends that on April 30, 1978, when he was dismissed, he had not attained the normal retiring age for an employee in his position, and therefore that the industrial tribunal had jurisdiction to consider his complaint. Mr. Tabachnik, who appeared for the appellant, in opening the appeal naturally put his contention at its highest, and he submitted that the expression “normal retiring age” in paragraph 10 (b) simply meant the usual retiring age, or the age at which persons holding the position generally retired in the normal course of events, and that the contractual retiring age, if any, was irrelevant. He said that, if there is no practice sufficient to establish a usual retiring age, because employees retire at various different ages, then there is no normal retiring age and the alternative provided by paragraph 10 (b), namely the age of 65 for a man or 60 for a woman, will apply, in accordance with the decision of this House in *Nothman v. Barnet London Borough Council* [1979] 1 W.L.R. 67. The respondents’ original contention was that the contractual retiring age for employees holding the appellant’s position conclusively fixed their normal retiring age, and that any departure from the contractual retiring age in practice was irrelevant. Between these extreme contentions, various intermediate positions were explored in the course of argument. C D E F G

Considering that the expression “normal retiring age” in its present legislative context dates only from 1971, it has been the subject of judicial exposition to an extent which is remarkable both in amount and in variety. I must refer to some of the authorities. In *Ord v. Maidstone and District Hospital Management Committee* [1974] I.C.R. 369, a case which Mr. Tabachnik described as the sheet anchor of the appellant’s case, Sir John Donaldson, sitting as President of the National Industrial Relations Court, expressed the opinion at p. 372D that the ordinary meaning of the words “normal retiring age” is “the age at which the employees concerned usually retire.” But that was a case where there was no contractual retiring age for the group of employees to which the appellant belonged—namely mental health officers. In that respect the case is distinguishable from the present. H

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A Sir John Donaldson's definition of "normal retiring age" was disapproved by the Court of Appeal in *Nothman v. Barnet London Borough Council* [1978] 1 W.L.R. 220 where the employee was a woman teacher. The contracts of employment of all teachers, men and women, provided for automatic retiral at age 65, with no power to the employers to grant any extension. The teacher concerned was dismissed when she was aged 61.

B The Court of Appeal (reversing the Employment Appeal Tribunal) held that the normal retiring age in any particular profession was the age at which the employees in that profession "must retire or should retire" in accordance with their contracts—see *per* Lord Denning M.R., at p. 227B. Lawton L.J., at p. 229D, said that counsel for the employers had submitted that there was no normal retiring age for their assistant teachers. The learned Lord Justice then said, at p. 229:

C "[Counsel] alleged before us—but did not call any evidence before the industrial tribunal to establish that this is so—that the council's assistant teachers retire at all ages, some after 65, others well before that time. This submission may have been founded on the definition of 'normal retiring age' which Sir John Donaldson gave in *Ord v. Maidstone and District Hospital Management Committee* [1974] I.C.R. 369.

D Lawton L.J. then quoted the definition and proceeded:

"I do not accept Sir John's definition as being correct. I construe the word 'retiring' in the phrase 'the normal retiring age' as having gerundial qualities so as to give it the sense of 'must' or 'should.' It follows that the normal retiring age of teachers employed by the council is the age at which they would have to retire unless their service was extended by mutual agreement. This age was 65. The conditions of employment said so."

E Accordingly that case is authority for the proposition that the normal retiring age for an employee is to be found by looking exclusively at the conditions of employment applicable to the group of employees holding his position.

F When *Nothman* came on appeal to your Lordships' House [1979] 1 W.L.R. 67 it was decided on another point, and the only reference to the weight to be given to the contractual retirement date was made by Lord Salmon who appears to have assumed that it was made by Lord Salmon who appears to have assumed that it was conclusive: see pp. 69E, 71F, 71H, 72D. But as the point was not argued in this House I do not regard anything said here as indicating the considered view of the House or any of its members.

G The decision of the Court of Appeal in *Nothman* [1978] 1 W.L.R. 220 has stood until the present time though not without some judicial criticism especially in *Howard v. Department for National Savings* [1981] 1 W.L.R. 542 from Ackner L.J. and Griffiths L.J. and *Secretary of State for Trade v. Douglas* [1983] I.R.L.R. 63 from Lord McDonald.

H In *Post Office v. Wallser* [1981] 1 All E.R. 668 the Court of Appeal held that the normal retiring age was a matter of evidence and did not depend exclusively on the relevant contract of employment. Some of the observations in that case are not altogether easy to reconcile with what had been said in *Nothman* [1978] 1 W.L.R. 220 but I respectfully agree with the view expressed by my noble and learned friend Lord Bridge as follows, at p. 673:

"I agree with the broad proposition that the normal retiring age within the meaning of [paragraph 10 of Schedule 1 of the Act of 1974] is not necessarily to be discovered in the contract of employment of the group of workers with whom the court or tribunal is concerned, but it does seem to me that when contractual terms and conditions of employment do govern the age of retirement of the relevant group, those terms provide the best evidence which will prevail to determine what is the normal age of retirement, *unless effectively contradicted by other evidence.*" (Emphasis added.)

In *Howard v. Department for National Savings* [1981] 1 W.L.R. 542 the Court of Appeal reverted to the view that the contractual retiring age, express or implied, conclusively fixed the normal retiring age, and they also said that unless a contractual retiring age is either expressed or to be implied, it is impossible to establish that there is any normal retiring age. But in *Duke v. Reliance Systems Ltd.* [1982] I.C.R. 449, where there was no express contractual retiring age, the Employment Appeal Tribunal took a more flexible view. Browne-Wilkinson J., delivering the judgment of the tribunal, first held that no contractual retiring age could be implied, and then proceeded to consider whether there was evidence of practice which established a normal retiring age. In my opinion that was the correct approach.

I have reached the opinion that the Court of Appeal in *Nothman* [1978] 1 W.L.R. 229 stated the law in terms which were too rigid and inflexible. If the normal retiring age to be ascertained exclusively from the relevant contract of employment, even in cases where the vast majority of employees in the group concerned do not retire at the contractual age, the result would be to give the word "normal" a highly artificial meaning. If Parliament had intended that result, it would surely not have used the word "normal" but would have referred directly to the retirement age specified as a term of the employment. Moreover in a case where, unlike *Nothman*, the contract provides not for an automatic retiral age but for a minimum age at which employees can be obliged to retire, it would be even more artificial to treat the minimum age as fixing the normal age, as the respondents would have us do, even in a case where the minimum age has become a dead letter in practice. By no means all contracts of employment specify the age, or the minimum age, of retirement; indeed outside of large organisations like the civil service it is probably exceptional for the age of retirement to be specified. So, if the normal retiring age can be ascertained only from the terms of the contract, there will be many cases in which there is no normal retiring age and in which the statutory alternatives of 65 for a man and 60 for a woman will automatically apply, although some other age may be well established and recognised in practice. If that were the law it might operate harshly in the case of women employees over the age of 60, as they would never be entitled to complain to the industrial tribunal of unfair dismissal unless they could establish that they were subject to a contractual retiring age higher than 60.

I therefore reject the view that the contractual retiring age conclusively fixes the normal retiring age. I accept that where there is a contractual retiring age, applicable to all, or nearly all, the employees holding the position which the appellant employee held, there is a presumption that the contractual retiring age is the normal retiring age for the group. But it is a presumption which, in my opinion, can be rebutted by evidence

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- A that there is in practice some higher age at which employees holding the position are regularly retired, and which they have reasonably come to regard as their normal retiring age. Having regard to the social policy which seems to underlie the Act—namely the policy of securing fair treatment, as regards compulsory retirement, as between different employees holding the same position—the expression “normal retiring age” conveys the idea of an age at which employees in the group can reasonably expect to be compelled to retire, unless there is some special reason in a particular case for a different age to apply. “Normal” in this context is not a mere synonym for “usual.” The word “usual” suggests a purely statistical approach by ascertaining the age at which the majority of employees actually retire, without regard to whether some of them may have been retained in office until a higher age for special reasons—such as a temporary shortage of employees with a particular skill, or a temporary glut of work, or personal consideration for an employee who has not sufficient reckonable service to qualify for a full pension. The proper test is in my view not merely statistical. It is to ascertain what would be the reasonable expectation or understanding of the employees holding that position at the relevant time. The contractual retiring age will *prima facie* be the normal, but it may be displaced by evidence that it is regularly departed from in practice. The evidence may show that the contractual retirement age has been superseded by some definite higher age, and, if so, that will have become the normal retiring age. Or the evidence may show merely that the contractual retiring age has been abandoned and that employees retire at a variety of higher ages. In that case there will be no normal retiring age and the statutory alternatives of 65 for a man and 60 for a woman will apply.

- E In the present case the evidence does not establish that there was any practice whereby employees holding the position which the appellant held were permitted to retain their office after attaining the minimum retiring age of 60. The figures for the six years 1973 to 1978 inclusive show that a total of 41 officers holding the same position as the appellant retired. I use “retired” to include some who “regressed.” Of that total, 30 retired or regressed at the age of 60. Eleven were retained after they had attained age 60, but we know nothing of the reasons for their retention. The fact that just over one quarter of the relevant group of officers were retained after they had attained age 60 falls far short of showing that the contractual retiring age had been abandoned or departed from. If the case had been a narrow one on its facts, one in which a tribunal might reasonably have taken the view that the contractual age had been abandoned, your Lordships might have thought it right to remit the case to an industrial tribunal to come to a decision on the facts. But in my view no tribunal applying the law correctly could find that the contractual retiring age had been departed from in this case. Accordingly I consider that the appellant has failed to show that the industrial tribunal had jurisdiction to consider his complaint.

- H The subsidiary question which I have already mentioned concerns the meaning of one paragraph, paragraph 10442, of the Civil Service Pay and Conditions of Service Code. In order to appreciate that paragraph it is necessary to refer to some of the other paragraphs on the same subject. Paragraph 8572 provides as follows:

“8572. The minimum retirement age is the earliest possible age at which a civil servant can retire of his own volition and become entitled

to immediate payment of pension benefits; this for most civil servants is age 60. . . . A

"8575. Provided his department is prepared to retain him, it is not necessary for a civil servant to retire at the minimum retirement age. . . .

"Age of retirement.

"10441. An officer may on age grounds retire at his own wish or be retired at the instigation of his department. In either case, retirement may be effected when the officer has reached his minimum retirement age, or at any time thereafter. The date of retirement of any officer who is being retired is a matter entirely within the discretion of the head of each department. B

"10442. An officer who has not completed 20 years' reckonable service on reaching age 60 should, provided he is fit, efficient and willing to remain in service, be allowed to continue until he has completed 20 years' reckonable service or has reached age 65, whichever is the earlier. Officers with short service generally have special claims to retention." C

The argument for the appellant on this part of the case is that the effect of the provision in paragraph 10442 that an officer who has not completed 20 years' reckonable service "should" be allowed to continue, gives him a right to be retained. That involves reading the word "should" as if it were "must" and in my view there is no justification for reading it in that way. The same argument was presented on behalf of the appellant in *Howard v. Department for National Savings* [1981] 1 W.L.R. 542 Lord Denning M.R. said, at p. 545: D

"The word 'should' has been canvassed before us. It was suggested that it means 'must.' I do not agree. I think it means should normally be allowed. It still leaves the compulsory retirement age at 60—with a potential extension." E

I respectfully agree. F

Paragraph 10442 appears to me to be addressed to the officer in each department who has the responsibility of deciding whether to retain officers who attain age 60 or not. It is intended as an instruction to him on the general policy to be applied, and not to create rights in officers who attain age 60. That view is reinforced by the second sentence of paragraph 10442. The reference there to officers with short service generally having "special claims" to retention is in my view entirely inconsistent with the suggestion that they have a contractual right to be retained. G

I am accordingly of opinion that the minimum retirement age, and the contractual retirement age of officers such as the appellant is age 60.

I would dismiss the appeal

As success on the main question of law was divided, and as the appeal was to some extent a test case I would make no order for costs in this House or in the Court of Appeal. H

LORD KEITH OF KINKEL. My Lords, I have had the benefit of reading in advance the speech of my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons he gives I too would dismiss the appeal.

A LORD SCARMAN. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Fraser of Tullybelton, with whom I agree, I too would dismiss this appeal. I also agree that no order should be made as to costs in this House or the Court of Appeal.

B LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Fraser of Tullybelton, with which I entirely agree, I too would dismiss the appeal.

LORD TEMPLEMAN. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Fraser of Tullybelton, I too would dismiss the appeal.

Appeal dismissed.

Solicitors: *Simmonds Church Rackham; Treasury Solicitor.*

J. A. G.

D

[HOUSE OF LORDS]

EASTLEIGH BOROUGH COUNCIL APPELLANTS
AND
BETTS AND ANOTHER RESPONDENTS

[On appeal from REGINA v. EASTLEIGH BOROUGH COUNCIL,
Ex parte BETTS]

F 1983 July 12; 27 Lord Fraser of Tullybelton,
Lord Wilberforce, Lord Edmund-Davies,
Lord Roskill and Lord Brightman

*Local Government—Homeless persons—Local connection—Homeless applicants residing in area for less than six months—Housing authority's determination that applicants having no local connection with area—Determination in accordance with nationally agreed guidelines—Whether applicants had "local connection" with area—Housing (Homeless Persons) Act 1977 (c. 48), ss. 4 (1) (5), 5 (1), 18 (1)*¹

In August 1980 the applicants together with their two children left their home in Leicestershire, within the area of the Blaby District Council where they had lived since 1978, and went to Southampton where the father had acquired

¹ Housing (Homeless Persons) Act 1977, s. 4: "(1) If a housing authority are satisfied, as a result of inquiries under section 3 above, that a person who has applied to them for accommodation or for assistance in obtaining accommodation is homeless or threatened with homelessness, they shall be subject to a duty towards him under this section . . . (5) Where—(a) they are satisfied—(i) that he is homeless, and (ii) that he has a priority need, but (b) they are not satisfied that he became homeless intentionally, their duty, subject to section 5 below, is to secure that accommodation becomes available for his occupation."

S. 5: see post, p. 401D–H.

S. 18: see post, p. 402A-B.

employment. In October 1980 they moved to rented accommodation within the area of the respondent local authority. The following month the father was made redundant and thereafter fell into arrears with his rent. In February 1981 an order for possession was obtained against him by the local authority. On February 6, 1981, the applicants made an application to the local authority for accommodation under the provisions of the Housing (Homeless Persons) Act 1977. They were provided with temporary accommodation in the area but informed that their application was being notified to Blaby District Council because the local authority were of the opinion that for the purpose of section 5 (1) of the Act they had no "local connection" with their area as defined in section 18 (1) of the Act. In so deciding the local authority had applied the guidelines laid down in the Agreement on Procedures for Referrals of the Homeless, an agreement entered into in 1977 by the majority of housing authorities to govern arrangements between them to share the burden of housing the homeless. Paragraph 2.5 of that agreement provided that to determine whether an applicant had a local connection with an area "residence up to six months . . . should be disregarded for the purpose of defining 'normal residence' . . ." in section 18 (1) (a). Initially the applicants agreed that they were willing to return to the Blaby district but subsequently changed their minds and in March 1982 made a further application to the local authority for accommodation. The application was refused by the local authority on the ground that by virtue of the provisions of section 5 (1) of the Act they had discharged their duty to the applicants by transferring their responsibility to provide accommodation to the Blaby District Council. Webster J. dismissed the applicants' application for judicial review that had sought, *inter alia*, an order of mandamus requiring the local authority to carry out their duty under section 4 (5) of the Act to house them. The Court of Appeal allowed the applicants' appeal.

On appeal by the local authority:—

Held, allowing the appeal, that the test to be applied in determining whether a person has a "local connection" with an area within the definition in section 18 (1) (a) of the Act was whether the applicant could show, because the onus rested upon him, that he had built up and established by a period of residence, or by a period of employment, or because of family associations which had endured in the area, or because of other special circumstances, that he had a real connection with the area, and that where the application was based on residence there was nothing wrong in the local authority determining the issue by the guideline laid down in the agreement that residence short of six months in the area during the previous 12 months did not suffice for the purpose; that, accordingly, in the circumstances the applicants had not made out any ground for attacking the validity of the opinion formed by the local authority under section 5 (1), and therefore they were not under a duty under section 4 (5) of the Act to house the applicants (post, pp. 399G—400A, 407F, G—H, 408A—B, G—H, 409A).

Per curiam. There is no objection to the authority operating a policy or establishing guidelines, for reasons which the authority may legitimately entertain, and then applying such policy or guidelines generally to all the applications which come before them, provided that the authority do not close their mind to the particular facts of the individual case (post, p. 408c).

Reg. v. Barnet London Borough Council, Ex parte Nilish Shah [1983] 2 W.L.R. 16, H.L.(E.) considered.

Decision of the Court of Appeal [1983] 1 W.L.R. 774; [1983] 2 All E.R. 481 reversed.

3 W.L.R. Reg. v. Eastleigh Council, Ex p. Betts (H.L.(E.))

- A** The following cases are referred to in the opinion of Lord Brightman:
British Oxygen Co. Ltd. v. Board of Trade [1971] A.C. 610; [1970] 3 W.L.R. 488; [1970] 3 All E.R. 165, H.L.(E.).
Inland Revenue Commissioners v. Lysaght [1928] A.C. 234, H.L.(E.).
Levene v. Inland Revenue Commissioners [1928] A.C. 217, H.L.(E.).
Macrae v. Macrae [1949] P. 397; [1949] 2 All E.R. 34, C.A.
Reg. v. Barnet London Borough Council, Ex parte Nilish Shah [1983] 2 W.L.R. 16; [1983] 1 All E.R. 226, H.L.(E.).

The following additional cases were cited in argument:

- Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
Peak Trailer and Chassis Ltd. v. Jackson [1967] 1 W.L.R. 155; [1967] 1 All E.R. 172, D.C.
C *Reg. v. Bristol City Council, Ex parte Browne* [1979] 1 W.L.R. 1437; [1979] 3 All E.R. 344, D.C.
Reg. v. Slough Borough Council, Ex parte Ealing London Borough Council [1981] Q.B. 801; [1981] 2 W.L.R. 399; [1981] 1 All E.R. 601, C.A.
D *Reg. v. Wyre Borough Council, Ex parte Parr*, The Times, February 4, 1982, C.A.

APPEAL from the Court of Appeal.

- This was an appeal by leave of the House of Lords by the appellants, Eastleigh Borough Council, from the judgment dated March 3, 1983, of the Court of Appeal (Stephenson, Griffiths and Purchas L.JJ.) allowing the appeal of the respondents, Ronald Thomas Betts and Vivien Anne Betts, from the judgment dated October 26, 1982, of Webster J. dismissing the respondents' application for an order, inter alia, of mandamus requiring the appellants to carry out their duty to house them under section 4 (5) of the Housing (Homeless Persons) Act 1977. The appellants had refused the respondents' application for accommodation on the ground that they did not have a "local connection" with their area for the purposes of section 5 (1) of the Act.

The facts are stated in the opinion of Lord Brightman.

Anthony Scrivener Q.C. and *Graham Stoker* for the appellants.
James Black Q.C. and *Barrington Myers* for the respondents.

- G** Their Lordships took time for consideration.

July 27. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brightman. I agree with it, and for the reasons stated in it I would allow this appeal.

- H** LORD WILBERFORCE. My Lords, I have had the advantage of reading in draft the speech by my noble and learned friend, Lord Brightman. I agree with it and for the reasons he gives I would allow the appeal.

LORD EDMUND-DAVIES. My Lords, I have had the advantage of reading in draft form the opinion prepared by my noble and learned friend, Lord Brightman, and I concur in the reasoning which has led him to the conclusion that this appeal should be allowed.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Brightman. For the reasons he gives I too would allow this appeal. A

LORD BRIGHTMAN. My Lords, the Housing (Homeless Persons) Act 1977 entitles a homeless person to apply to a housing authority for accommodation. If the housing authority to whom application is made considers that the applicant has no local connection with the area of that authority, the authority may be in a position to transfer the statutory responsibility to another housing authority with whose area the applicant has a local connection. The respondents to this appeal, Ronald Thomas Betts and Vivien Anne Betts became homeless through no fault of their own at a time when they were living in the area of the appellants the Eastleigh Borough Council ("Eastleigh") in Hampshire. They applied to Eastleigh for accommodation. Mr. and Mrs. Betts had formerly lived in the area of the Blaby District Council ("Blaby") in Leicestershire. Both Eastleigh and Blaby are in agreement that the responsibility for housing Mr. and Mrs. Betts properly belongs to Blaby. Mr. and Mrs. Betts, who wish to remain in the area of Eastleigh, seek to challenge that decision by way of judicial review. They were successful before the Court of Appeal. B C D

Mr. Betts is 37 years of age. He was born in London, and in his early years worked there. In 1973 he lived and worked in Dunstable. In the following year he moved to Milton Keynes and commuted to work in London. Thereafter he lived and worked abroad for a while. In 1978 he secured a job in Leicester and went to live in a council house in the Blaby area. In the meantime Mr. and Mrs. Betts' two daughters had been born, the elder being now aged 9 and the younger nearly 5. E

In August 1980 Mr. Betts left his family temporarily in order to take up employment with Southern Television as a film processor at their studios in Southampton. In October he secured rented accommodation in the Eastleigh area, and Mrs. Betts and their daughters joined him there. He gave up his Blaby council house, regrettably without giving the council any notice and with arrears of rent outstanding. Unfortunately Southern Television lost their franchise shortly afterwards and as a result Mr. Betts lost his employment. He again fell into arrear with his rent. On February 3, 1981, an order for possession was made against him, to take effect on March 3. On February 6 he was given an interview with Mr. Renouf, a senior assistant in the Estates Management Department of Eastleigh, and he applied under the Act for accommodation. F G

The immediate result of that application was that Eastleigh became under a statutory duty to make inquiries to satisfy themselves that Mr. and Mrs. Betts were in fact homeless, and to ascertain whether they had a "priority need" for accommodation by reason of dependent children and whether they had become homeless "intentionally" within the meaning of the Act: section 3 (1) and (2). Furthermore Eastleigh became entitled, if they thought fit, to make inquiries as to whether the applicants had "a local connection with the area of another housing authority": section 3 (3). Eastleigh also became under a duty to secure that temporary accommodation was made available for occupation by Mr. and Mrs. Betts pending any decision which Eastleigh might make as a result of their inquiries: section 3 (4). Eastleigh has performed the duty of H

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A securing temporary accommodation for Mr. and Mrs. Betts by making a dwelling house available for them at 85 High Street, Eastleigh.

B As a result of inquiries, Mr. Grant, the chief housing officer of Eastleigh had satisfied himself by February 25, 1981 (see his letter of that date), that Mr. and Mrs. Betts were homeless, had a priority need for accommodation, and were not homeless intentionally. Eastleigh thereby became under a duty under section 4 (5) of the Act, replacing their previous duty under section 3 (4), to secure that (permanent) accommodation became available for Mr. and Mrs. Betts subject however to section 5. Section 5 defines responsibility as between different housing authorities, and it is with this section that this appeal is concerned. In his letter of February 25, Mr. Grant added

C “your application under the Act has been notified to Blaby District Council because you have lived in this borough for less than 6 months, and are not employed in this borough and do not have any relatives here. Your rehousing is therefore considered to be their responsibility.”

This assessment of the situation is accepted by Blaby, but not by Mr. and Mrs. Betts.

D I turn now to the provisions of section 5. If that section does not apply, Eastleigh accept that the responsibility is theirs under section 4 (5) to secure accommodation for Mr. and Mrs. Betts. So far as relevant, section 5 reads as follows:

E “5. (1) A housing authority are not subject to a duty under section 4 (5) above—(a) if they are of the opinion—(i) that neither the person who applied to them for accommodation or for assistance in obtaining accommodation nor any person who might reasonably be expected to reside with him has a local connection with their area, and (ii) that the person who so applied or a person who might reasonably be expected to reside with him has a local connection with another housing authority’s area and . . . (b) if they

F notify that authority—(i) that the application has been made, and (ii) that they are of the opinion specified in paragraph (a) above. (2) In this Act ‘notifying authority’ means a housing authority who give a notification under subsection (1) above and ‘notified authority’ means a housing authority who receive such a notification. (3) It shall be the duty of the notified authority to secure that accommodation becomes available for occupation by the person to

G whom the notification relates if neither he nor any person who might reasonably be expected to reside with him has a local connection with the area of the notifying authority but the conditions specified in subsection (4) below are satisfied. (4) The conditions mentioned in subsection (3) above are—(a) that the person to whom the notification relates or some person who might reasonably be

H expected to reside with him has a local connection with the area of the notified authority . . . (7) Any question which falls to be determined under this section shall be determined by agreement between the notifying authority and the notified authority or, in default of such agreement, in accordance with the appropriate arrangements. (8) The appropriate arrangements for the purposes of this section are any such arrangements as the Secretary of State may by order direct.”

Section 19 (1) of the Act provides that unless the context otherwise requires "local connection" shall be construed in accordance with section 18, which enacts as follows: A

"18. (1) Any reference in this Act to a person having a local connection with an area is a reference to his having a connection with that area—(a) because he is or in the past was normally resident in it and his residence in it is or was of his own choice; or (b) because he is employed in it, or (c) because of family associations, or (d) because of any special circumstances." B

Subsections (2) and (3), which I need not read, explain when residence is not of a person's own choice, and when a person is not to be considered as employed in an area.

It is obvious that time consuming and expensive disputes might arise between housing authorities as to the existence of a "local connection." C
Such disputes are not in the interest either of housing authorities or of homeless persons. The purposes of the Act demand speedy solutions to questions of doubt. To avoid such disputes, and to settle them quickly and cheaply if they arise, certain steps have been taken on behalf of housing authorities. First, in order to facilitate agreements between notifying authorities and notified authorities as required by section 5 (7) a D
national "Agreement on Procedures for Referrals of the Homeless" was negotiated between the Association of District Councils, the Association of Metropolitan Authorities and the London Boroughs Association at the time when the Bill was being considered by Parliament. This agreement has been adhered to by the majority of housing authorities. Secondly, by the Housing (Homeless Persons) (Appropriate Arrangements) Order 1978 (S.I. 1978 No. 69), the Secretary of State for the Environment, in exercise of his powers under section 5 (8) has established the "Appropriate Arrangements" set out in the schedule to the order for the purpose E
of settling unresolved disputes between housing authorities. These arrangements are in a form which was agreed by the three associations who negotiated the Agreement on Procedures. They provide for any disputed question under section 5 to be determined speedily either by a person F
agreed upon by the authorities concerned or by a person chosen from a panel. These arrangements came into operation on January 21, 1978, that is to say, a few weeks after the Act of 1977 came into force. There is evidence that the Agreement on Procedures has worked well, and that as a result there have only been about 50 references under the order since the Act came into force. G

The Agreement on Procedures does not purport to impose a legally binding code on housing authorities who adhere to it. It is merely a policy document. Its tone is set by paragraph 1.2 which reads as follows:

"With [subsections (7) et seq. of section 5] in mind the three associations have agreed on arrangements for referrals which they recommend to the local authorities who are primarily concerned with providing for homeless households. Section 5 of the Act lays down the general procedure to be followed where it appears that a local authority other than the authority to whom application is made by a homeless household . . . should be made responsible. There are, however, considerable areas of possible disagreement and dispute in the interpretation of the Act, and although in the last resort these can only be decided by the courts, the associations are anxious to avoid H

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A as far as possible legal disputes between local authorities. They therefore issue this agreement on the procedures and criteria to be followed, and recommend it for general adoption by all their members."

B After intermediate paragraphs, the agreement [paragraph 2.5] then picks up the statutory expression "local connection" and gives guidance on "normally resident," "employed," "family associations" and "special circumstances." The guidance on "normal residence" is in the following terms:

C "A local connection may be:—(i) That the household is, or in the past was, normally resident in the area. It is suggested that a working definition of 'normal residence' should be that the household has been residing for at least 6 months in the area during the previous 12 months, or for not less than 3 years during the previous 5 year period. In this connection, residence up to 6 months under one or more tenancies subject to Case 13 of Schedule 15 of the Rent Act 1977 should be disregarded for the purposes of defining 'normal residence.'"

D The exclusion of certain Rent Act lettings relates to winter and holiday lettings.

E With this explanation of the statutory background, I return to the narrative of events. Following upon the chief housing officer's letter of February 25, 1981, informing Mr. and Mrs. Betts that their application had been notified to Blaby, Blaby duly offered accommodation to Mr. and Mrs. Betts within their area. This was not acceptable to Mr. and Mrs. Betts. Eastleigh then obtained an order for possession of 85, High Street, Eastleigh, where Mr. and Mrs. Betts had been provided with temporary accommodation pursuant to section 3 (4). This order is not being enforced pending the result of these proceedings. On April 1, 1982, Mr. and Mrs. Betts' solicitors informed Eastleigh of their clients' intention to apply to the High Court for judicial review of Eastleigh's decision. Later that month Mr. Betts obtained full-time employment as a warehouseman in the F Eastleigh area, and shortly afterwards Mrs. Betts secured contract work with British Rail. On June 2, 1982, Mr. and Mrs. Betts moved for judicial review. There was at that time an assertion on the part of Eastleigh that Mr. and Mrs. Betts were intentionally homeless as a result of their refusal of Blaby's offer of accommodation. This assertion, if correct, would have relieved both housing authorities of the major obligation imposed by the G Act. The relief originally sought by the notice of motion accordingly included a declaration that Mr. and Mrs. Betts were not homeless intentionally. However this point is no longer pursued by Eastleigh, and the only relief outstanding is an order of mandamus requiring Eastleigh to carry out their supposed duty under section 4 (5). As I have already indicated the existence of that duty is not in dispute if Eastleigh are unable to rely on section 5. Accordingly an injunctive order against Eastleigh H would not be appropriate if their reliance on section 5 is misplaced.

The attack on Eastleigh hinges on the chief housing officer's letter of February 25, 1981, and the inference to be drawn from his statement that "your application under the Act has been notified to Blaby District Council because you have lived in this borough for less than 6 months." The evidence in relation to that letter is somewhat brief, but is not challenged by Mr. and Mrs. Betts. Mr. Renouf deposed that after he had

reported to Mr. Grant, the chief housing officer, the result of his preliminary inquiries, Mr. Grant "confirmed that this application should be referred to the Blaby District Council under section 5 of the Act of 1977 because the applicants had no local connection with the respondents but they had a local connection with Blaby District Council." This was elaborated by Mr. Grant in his own affidavit in the following terms:

"The applicants' application for accommodation came before me on February 23, 1981, when I had to give a decision as to whether they should be offered accommodation. After considering a report from Mr. Renouf, my senior assistant (estate management), I decided that the application should be referred to Blaby District Council under section 5 of the Housing (Homeless Persons) Act 1977 as I considered that the responsibility for housing the applicants lay with that council. The decision was taken by me having regard to the wording of the Act together with the recommendations set out in the 'Agreement on Procedures for Referrals of the Homeless—Revised June 6, 1979' issued by the Association of District Councils, Association of Metropolitan Authorities and the London Boroughs Association. . . ."

"Upon considering the report of Mr. Renouf, the crucial factor in my decision was that the applicants did not have a "local connection" with the Borough of Eastleigh, within the meaning of section 5 of the 1977 Act. The phrase 'local connection' is defined in section 18 (1) of the Act of 1977, but as section 18 (1) (b) and section 18 (1) (c) were not applicable, unless the applicants were 'normally resident' in the borough within the meaning of section 19 (1) (a) or unless any special circumstances applied, a local connection with the respondent would not be established. In considering the question of 'normally resident' I had regard to the revised 'Agreement on Procedures for Referrals of the Homeless' which states that a 'working definition of normal residence' should be that the household has been residing 'for at least six months in the (borough) during the previous twelve months' (clause 2.5). The applicants having only resided in the borough for some four months before the date of their application on February 6, 1981, I considered that a 'normal residence' had not been established within the meaning of the Act. The 'Revised Agreement on Procedures for Referrals of the Homeless' is in wide use by housing authorities when considering a referral under section 5 of the Act of 1977, and Blaby District Council fully accepted the working definition of normal residences."

The motion came before Webster J. in October 1982. The decision made by Eastleigh was attacked on three grounds, but two were abandoned. The ground which survived related to the meaning of 'normally resident' in section 18 (1) (a) of the Act. Counsel contended that (1) Eastleigh had misdirected themselves as to the meaning of those words, or (2) they had fettered their discretion in deciding how to apply those words to the facts before them, or (3) their decision as to the question of whether the applicants were normally resident in the Eastleigh area was a decision which no authority properly directing themselves could have reached on the facts before them.

After considering the affidavit evidence the learned judge said that he was not satisfied that the chief housing officer had misdirected himself as to the meaning of normal residence; or that he had confined himself to the suggested working definition of that expression in paragraph 2.5 of the

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A Agreement on Procedures; or that he had regarded the decision which he had to make as being fettered in any way by the terms of that agreement; or that his decision that the applicants were not normally resident in the Eastleigh area was one which could not have been reached on the material before him had he properly directed himself. The motion was accordingly dismissed.

B In December 1982 your Lordships' House gave judgment in *Reg. v. Barnet London Borough Council, Ex parte Nilish Shah* [1983] 2 W.L.R. 16. This case was thought by the applicants to open up new horizons. In *Shah* certain immigrant students who had no right of abode in the United Kingdom claimed to qualify for mandatory awards under the Education Act 1962. Under section 1 of that Act and regulations made thereunder it was the duty of every local authority, in certain circumstances, to bestow awards on persons who "are ordinarily resident in the area of the authority" and had been so resident for the three preceding years, and possessed the requisite educational qualifications.

C

Lord Scarman, with whom all their Lordships agreed, stated the problem and answered it in the following terms, at p. 23:

D "Two questions of statutory interpretation, therefore, arise. The first is: what is the natural and ordinary meaning of 'ordinary residence in the United Kingdom' . . . ? The second is: does the statute in the context of the relevant law against the background of which it was enacted, or in the circumstances of today, including in particular the impact of the [Immigration Act 1971] compel one to substitute a special and, if so, what, meaning to the words 'ordinarily resident in the United Kingdom'?"

E "For the reasons which I shall endeavour to develop I answer the two questions as follows. The natural and ordinary meaning of the words has been authoritatively determined in this House in two tax cases reported in 1928. To the second question my answer is 'No.' The Act of 1962 and the Regulations are to be construed by giving to the words 'ordinarily resident in the United Kingdom' their

F natural and ordinary meaning."

The natural and ordinary meaning of the words "ordinarily resident," as laid down in those tax cases, is explained with complete clarity in the different speeches of your Lordships' predecessors, the key phrases being "residence in a place with some degree of continuity and apart from accidental or temporary absences," Viscount Cave L.C. in *Levene v. Inland Revenue Commissioners* [1928] A.C. 217, 225: "the regular order of a man's life, adopted voluntarily and for settled purposes," Viscount Sumner in *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234, 243; "according to the way in which a man's life is usually ordered," Lord Warrington of Clyffe in *Levene's* case, at p. 232. Lord Scarman's general conclusion therefore ([1983] 2 W.L.R. 16, 26), was that:

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H "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."

The instant case came before the Court of Appeal [1983] 1 W.L.R. 774 in January 1983. The argument there, as also before your Lordships,

was that Eastleigh could not properly transfer their responsibility to Blaby unless they were of the opinion that the applicants were not, on February 6, 1981, normally resident in the Eastleigh area; that they formed that opinion by the rigid application of a guideline that normal residence short of six months was not enough to constitute a local connection with the Eastleigh area; and that the real question for the court was the meaning in the context of the words "normally resident." After reviewing the evidence, Stephenson L.J. [1983] 1 W.L.R. 774, 783 reached the conclusion that the Chief Housing Officer "did fetter the council's decision by a rigid application of the suggested definition of normal residence" in the Agreement on Procedures. Stephenson L.J. then considered the authorities on "ordinary residence" to which he was referred by the applicants' counsel, including not only *Shah* [1983] 2 W.L.R. 16 but also *Macrae v. Macrae* [1949] P. 397, 403 where Somervell L.J. pointed out, in the context of a matrimonial cause, that "Ordinary residence can be changed in a day." These authorities said the learned Lord Justice [1983] 1 W.L.R. 774, 785, showed that "a person may be normally resident where he intends to settle—not necessarily permanently or indefinitely." The judgment of Griffiths L.J. [1983] 1 W.L.R. 774, 788 was to the same effect:

"'Normal residence' within the meaning of this Act is in my opinion to be construed in the same sense as 'ordinarily resident' was construed by the House of Lords in *Reg. v. Barnet London Borough Council, Ex parte Nilish Shah* [1983] 2 W.L.R. 16. It requires a consideration of many features of the residence and is not to be decided solely by the application of a six month rule. It follows that as the housing officer applied the six month rule to decide 'normal residence' he misdirected himself in law when forming his opinion on normal residence and thus on whether the applicants had a local connection with the local authority's area; . . ."

Finally, Purchas L.J. [1983] 1 W.L.R. 774, 790:—

"if the applicants had been asked by an inquirer as to where they were normally living between October 1980 and January 1981 I have little doubt that they would have answered 'in Eastleigh.' In my judgment this would be the normal reaction, as an objective test, of any person in the particular circumstances in which the applicants found themselves at that time. In the light of these authorities, the adherence to an arbitrary period of residential qualification cannot be the correct approach to section 18 (1) (a)."

My Lords, in my respectful view the manner in which the applicants have approached this case, and were successful in persuading the Court of Appeal to approach it, is misconceived. Eastleigh are relieved of their obligations under section 4 (5) if they are "of the opinion" specified in paragraph (a) (i) and (ii) of section 5. The requisite "opinion" is that the applicants do not have (in the present tense) a local connection with the Eastleigh area but do have a local connection with the Blaby area. "Local connection" is not a defined expression in the sense that it means (inter alia) that the applicant "is or in the past was normally resident in [the area] and his residence in it is or was of his own choice." Section 18 (1) does not entitle the reader to construe section 5 (1) (a) by substituting "is or was normally resident in," or "is

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- A employed in," or "has family associations with" for the words "has a local connection with." What section 18 (1) does is to say that a reference to a person having a local connection with an area is a reference to his having such a connection *because* he is, or in the past was normally resident there, or because he is employed there, or because he has family associations with that area or because there are special circumstances. Section 18 specifies those factors alone upon which the local connection
- B is to be founded. A local connection not founded upon any of the four stated factors is irrelevant. The fundamental concept of section 5 (1) (a) is local connection, not any local connection, but a local connection having any of the origins described in section 18 (1). The opinion which has to be formed by a notifying housing authority in a residence case is not whether the homeless person is now or was in the past normally
- C resident in the area of the notifying authority, but whether the applicant has now a local connection with either area based upon the fact that he is now or was in the past normally resident in that area.

- The approach of the respondents is very different. They ask the question, are they now normally resident in the Eastleigh area? They answer that question affirmatively and then claim as a result, by definition, a local connection with Eastleigh which invalidates the opinion reached by
- D Eastleigh under section 5 (1) (a). This erroneous approach emerges with clarity from the terms of their notice of appeal to the Court of Appeal. The first ground of which contains the following:

"The fundamental question was what is meant in section 18 (1) (a) of the said Act by the term 'normally resident'."

- E Stephenson L.J. [1983] 1 W.L.R. 774 accepted that definition of the issue which was thought to be before the court when he said, at p. 780:

"The applicants' case here and below is that the council have not succeeded in transferring their responsibility to Blaby District Council. They can only do that if of opinion that the applicants were not on February 6, 1981, or before that, *normally* resident in their area."

- F My Lords, that is not the fundamental question. The fundamental question is the existence of a "local connection." In construing section 5 it is only to be expected that the emphasis falls on "local connection," and not on past or present residence or current employment, etc. The Act is one which enables a homeless person in certain circumstances to jump over the heads of all other persons on a housing authority's waiting list, to
- G jump the queue. One would not expect any just legislation to permit this to be done unless the applicant has in a real sense a local connection with the area in question. I accept that "residence" may be changed in a day, and that in appropriate circumstances a single day's residence may be enough to enable a person to say that he was normally resident in the area in which he arrived only yesterday. But "local connection" means far more than that. It must be built up and established; by a period of
- H residence; or by a period of employment; or by family associations which have endured in the area; or by other special circumstances which spell out a local connection in real terms.

I return to the Agreement on Procedures. Faced with section 5 of the Act, a housing authority is involved, not with the question whether the applicant is or was normally resident etc. in the area in question, but whether the applicant has a local connection with that area. Has the

normal residence of the applicant in the area been of such a duration as to establish for him a local connection with the area? To answer that question speedily it is sensible for local authorities to have agreed guidelines. I see nothing in the least unreasonable with a norm of six months' residence during the previous twelve months, or three years' residence during the previous five years. Seeing that the section is concerned with a subsisting and not with a past local connection, it is also reasonable to work on the basis that, after five years have gone by, no local connection based on residence is likely to have any relevance. A B

So I start my conclusions on this appeal by expressing the view that paragraph 2.5 of the Agreement on Procedures is eminently sensible and proper to have been included in the agreement. Although "an opinion" formed by a housing authority under section 5 (1) must be concluded by reference to the facts of each individual case, there is no objection to the authority operating a policy or establishing guidelines, for reasons which the authority may legitimately entertain, and then applying such policy or guidelines generally to all the applications which come before them, provided that the authority do not close their mind to the particular facts of the individual case. There is ample authority that a body which is charged with exercising an administrative discretion is entitled to promulgate a policy or guidelines as an indication of a norm which is intended to be followed: see, for example, the speech of Lord Reid in *British Oxygen Co. Ltd. v. Board of Trade* [1971] A.C. 610. C D

As regards the meaning of "normally resident" in the context of section 18 (1) (a), this will take its colour from the fact that residence of any sort will be irrelevant unless and until it has been such as to establish a local connection with the area in which such residence subsists or has subsisted. I doubt whether in these circumstances any elaborate attempt at a definition of "normally resident" will be profitable. They are ordinary English words, which in many contexts will mean what this House said "ordinarily resident" meant in *Shah* [1983] 2 W.L.R. 16. But they are only a subsidiary component of the formula which a housing authority will be applying under section 5 of the Act. If the residence of an applicant has been of a sufficient duration to create a local connection, no difficulty is likely to arise in deciding whether such residence was normal. But if it were necessary to decide such a point in a particular case, I do not think that the housing authority would be wrong if they applied to the words "normally resident" the meaning which in *Shah* was attached to the words "ordinarily resident," remembering that the real exercise will be to decide whether the normal residence has been such as to establish a subsisting local connection. E F G

That leaves me with a single question, which is the ultimate one in this appeal; whether Eastleigh misdirected themselves in reaching the opinion that the applicants did not have a local connection with the Eastleigh area. The onus of establishing this is upon the applicants. They rely principally on the wording of the letter of February 25, 1981, which says that Blaby have been notified "because you have lived in this borough for less than six months." The question before Eastleigh being whether the applicants had a local connection with the Eastleigh area as a result of residence. I see nothing whatever wrong with the decision by Eastleigh that as the applicants had lived in the area for less than six months, it was considered that they did not have a local connection with that area. It is true that the letter does not expressly refer to the absence of a local connection, only H

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A to the briefness of the residence, but it is to be observed that in his affidavit of June 21, 1982, which I have quoted, Mr. Renouf attributes the decision under section 5 to lack of a local connection, which is the correct approach.

In my opinion the applicants have not made out any ground for attacking the validity of the opinion formed by Eastleigh under section 5 (1). Eastleigh therefore are not under a duty under section 4 (5) of the Act to house the applicants. I would allow this appeal.

B

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for R. W. Read, Eastleigh; William Charles Crocker for Christopher Green & Partners, Eastleigh.*

C

J. A. G.

[HOUSE OF LORDS]

D MALLALIEU RESPONDENT

AND

DRUMMOND (INSPECTOR OF TAXES) APPELLANT

1983 June 29, 30;
July 27

Lord Diplock, Lord Elwyn-Jones,
Lord Keith of Kinkel, Lord Roskill
and Lord Brightman

E

Revenue—Income tax—Expenses of trade or profession (Schedule D)—Barrister—Expenditure on replacing and cleaning professional clothes required to be worn in court—Whether incurred wholly and exclusively for purposes of profession—taxpayer's conscious motive at time of incurring expenditure—Whether decisive evidence of object of expenditure—Whether unconscious motive also relevant—Income and Corporation Taxes Act 1970 (c. 10), s. 130 (a)

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The taxpayer, being a practising barrister, was required to comply with the notes for guidance on dress in court issued by the Bar Council in the Annual Statement for 1973–74. In computing the profits of her profession for assessment to income tax she claimed deduction of expenses incurred in the replacement and cleaning of items of clothing which she wore in court and in chambers, and on her way there, as being expenditure wholly and exclusively laid out or expended for the purposes of her profession within the meaning of section 130 (a) of the Income and Corporation Taxes Act 1970.¹ The items of clothing, though subdued, were ordinary articles of apparel which could be worn in everyday life. The inspector of taxes disallowed the deduction and the taxpayer appealed. The general commissioners found, inter alia, that the taxpayer had an ample private wardrobe, that she would not have bought the disputed items but for the requirements of her profession and that the preservation of warmth and decency was not a consideration which crossed her mind when she bought them. However, they concluded that in incurring the expense the taxpayer had a dual purpose, namely to enable her to earn profits in her profession and to enable her to be

¹ Income and Corporation Taxes Act 1970, s. 130: see post, p. 411E.

properly clothed during the time she was engaged in her professional activity and accordingly dismissed the appeal. On the taxpayer's appeal by case stated Slade J. reversed the commissioners' decision on the ground that their conclusion was not consistent with their findings of fact. The Court of Appeal dismissed an appeal by the Crown.

On appeal by the Crown by leave of the House of Lords:—

Held, allowing the appeal (Lord Elwyn-Jones dissenting), that in order to ascertain whether an item of expenditure was incurred exclusively for the purposes of the taxpayer's profession the commissioners had to look into the taxpayer's mind at the moment of expenditure in order to discover her object in making it, but that in doing so they were not confined to the narrow approach of regarding the taxpayer's conscious motive at the relevant moment as being conclusive of her object; that conscious motive, although of vital significance, was not inevitably the only object which the commissioners were entitled to find to exist and therefore they were entitled to conclude that, although the taxpayer's conscious object was to serve her professional purposes, another object, albeit an unconscious one, was that of providing herself with the clothing which she needed as a human being; and that, accordingly, the expense was not a deductible expense under section 130 (a) of the Act of 1970 (post, pp. 411E, 412F–G, 414D–E, 418G–419B).

Hillyer v. Leeke (1976) 51 T.C. 90 approved.

Per curiam. (i) The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes (post, p. 414F).

(ii) The present decision should raise no problems in the "uniform" type of case. Such cases are matters of fact and degree (post, p. 419B, C).

Decision of the Court of Appeal [1983] 1 W.L.R. 252; [1983] 1 All E.R. 801 reversed.

The following cases are referred to in their Lordships' opinions:

Bentleys, Stokes and Lowless v. Beeson [1952] 2 All E.R. 82; 33 T.C. 491, C.A.

Hillyer v. Leeke (1976) 51 T.C. 90.

Morgan v. Tate & Lyle Ltd. [1955] A.C. 21; [1954] 3 W.L.R. 85; [1954] 2 All E.R. 413; 35 T.C. 367, H.L.(E.).

Prince v. Mapp [1970] 1 W.L.R. 260; [1970] 1 All E.R. 519; 46 T.C. 169.

Robinson v. Scott Bader Co. Ltd. [1980] 1 W.L.R. 755; [1980] 2 All E.R. 780; [1981] 1 W.L.R. 1135; [1981] 2 All E.R. 1116, C.A.

Strong & Co. of Romsey Ltd. v. Woodfield [1906] A.C. 448; 5 T.C. 215, H.L.(E.).

The following additional cases were cited in argument:

Caillebotte v. Quinn [1975] 1 W.L.R. 731; [1975] 2 All E.R. 412; 50 T.C. 222.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.).

Newsom v. Robertson [1953] Ch. 7; [1952] 2 All E.R. 728, C.A.

Newton v. Commissioner of Taxation of the Commonwealth of Australia [1958] A.C. 450; [1958] 3 W.L.R. 195; [1958] 2 All E.R. 759, P.C.

Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners [1979] 1 W.L.R. 974; [1979] 3 All E.R. 213, C.A.

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- A *Ward v. Dunn* (1978) 52 T.C. 517.
Woodcock v. Inland Revenue Commissioners (1977) 51 T.C. 698.

APPEAL from the Court of Appeal.

- B This was an appeal by the Crown from a judgment of the Court of Appeal (Sir John Donaldson M.R., Kerr L.J. and Sir Sebag Shaw) [1983] 1 W.L.R. 252 on December 14, 1982, affirming a decision of Slade J. [1981] 1 W.L.R. 908 on March 12, 1981, allowing an appeal by case stated by the taxpayer, Ann Mallalieu, from the Commissioners for the General Purposes of the Income Tax for the Division of the Middle Temple who on April 24, 1980, upheld a determination by Ian Roderick Drummond, one of H.M. Inspectors of Taxes, that in computing her taxable profits the sum of £564.38 expended by the taxpayer on the replacement and laundry of her professional clothes was not deductible as having been expended wholly and exclusively for her professional purposes within the meaning of section 130 of the Income and Corporation Taxes Act 1970. The Court of Appeal refused the Crown leave to appeal. On February 10, 1983, the Appeal Committee of the House of Lords (Lord Diplock, Lord Keith of Kinkel and Lord Brandon of Oakbrook) allowed a petition by the Crown for leave to appeal.
- D The facts are stated in the opinion of Lord Brightman.

Peter Millett Q.C., Robert Carnwath and Michael Hart for the Crown.
Andrew Park Q.C. and David Milne for the taxpayer.

Their Lordships took time for consideration.

- E LORD DIPLOCK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brightman. I agree with it, and for the reasons he gives I would allow this appeal.

- F LORD ELWYN-JONES. My Lords, the issue in this appeal is whether the disbursements of the appellant taxpayer in the relevant years on replacements, laundering and cleaning the clothes she wore during the practice of her profession of barrister were "wholly and exclusively laid out or expended for the purposes of her profession": see section 130 (a) of the Income and Corporation Taxes Act 1970.

- G As stated in paragraph 4 of the case stated, the commissioners found, after hearing oral testimony from the appellant which their findings indicate they accepted, that: (1) the appellant would not have incurred any of the expenditure on the items of clothing in question had it not been for the requirement of her profession that she should comply when appearing in court with the Notes for Guidance on Dress in Court approved by the Bar Council (which are quoted in the speech of my noble and learned friend Lord Brightman); (2) at all material times she had a private wardrobe of clothes and shoes which were amply sufficient to keep her clothed and shod in comfort and decency; (3) the preservation of warmth and decency was not a consideration which crossed her mind when she bought the disputed items; (4) she bought the items only because she would not have been permitted to appear in court if she did not wear them when in court, or other clothes like them.
- H

It was common ground that the relevant time for determining what were the appellant's purposes and what was in her mind when the expenditure was incurred was at the moment the expenditure was made.

The commissioners did look into the appellant's mind (as far as humans can look into the minds of others) and found that A

"when Miss Mallalieu laid out money on clothes for wearing in court her purpose in making that expenditure was to enable her to earn profits in her profession and also to enable her to be properly clothed during the time she was on her way to chambers or to court and while she was thereafter engaged in her professional activity." B

This apparently is in fact what she said and their findings of fact indicate that they believed her.

The test as to why the expenditure was incurred is subjective. As Romer L.J. stated in *Bentleys, Stokes and Lowless v. Beeson* [1952] 2 All E.R. 82, 84-85: "The sole question is . . . what was the motive or object in the mind of the (individual) . . . in question." This proposition was affirmed by Walton J. in *Robinson v. Scott Bader Co. Ltd.* [1980] 1 W.L.R. 755 and by the Court of Appeal [1981] 1 W.L.R. 1135. Applying that test I respectfully agree with the conclusions of Slade J. and the Court of Appeal that the commissioners' findings of fact in this case led inevitably to the conclusion that the appellant's expenditure was expended wholly and exclusively for the purposes of her profession. C

It was in my view not open to the commissioners in view of their findings of fact as the appellant's purposes to conclude that as in this case the clothing was suitable for private as well as for professional use, one of her purposes must have been to spend money on the clothing for her private use. This in my view was to disregard the evidence which they accepted as to her actual motive and purpose. This they have found was to enable her to carry on her profession. Other benefits derived from the expenditure, namely that the clothing also provided her with warmth and decency, were purely incidental to the carrying on of her profession in the compulsory clothing she had to wear. D

I am naturally diffident in disagreeing with my noble and learned brethren but I find the conclusions arrived at by Slade J. and the Court of Appeal inescapable in view of the commissioners' findings of the primary facts in this case. E

I would dismiss the appeal. F

LORD KEITH OF KINKEL. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Brightman, which I have had the opportunity of reading in draft and with which I agree, I too would allow the appeal. G

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Brightman. For the reasons he gives I too would allow this appeal.

LORD BRIGHTMAN. My Lords, the immediate issue in this appeal concerns the right of a female barrister, in computing the profits of her profession, to deduct the cost of upkeep of a wardrobe of clothes of a design and colour suitable to be worn under her gown during court appearances. But during the course of the argument this issue was found to resolve itself into a far more general and fundamental question: whether any person carrying on a trade, profession or vocation on his own account H

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A is entitled to a similar deduction if he chooses to set apart clothes, underclothes and footwear for use only at his place of work, and when proceeding to and from his place of work.

B The taxpayer is a member of the junior Bar with a busy court practice. When appearing in open court she is obliged, with a few exceptions, to wear a gown over her ordinary clothing, and a wig. When not in open court but in the chambers of a judge, master or registrar, she would (or could) appear in her ordinary clothes without wig or gown. What sort of clothes a barrister should wear in court (I include chambers) is a matter of good taste and common sense, the criterion being that they should be appropriate to the dignity of the occasion. However in recent years some brief rules have been laid down or authoritative guidance given as to what is the appropriate clothing to be worn by barristers appearing in court. So far as I am aware no official guidance was ever thought necessary until about 60 years ago. A barrister conformed as a matter of course to the sartorial standards of his colleagues. By 1922 the ranks of the Bar began to be enriched by the entry of women barristers, who had no precedents or comparisons to draw upon. Rules were accordingly issued by the Lord Chief Justice, and amended in 1968. The 1968 rules have now been replaced by brief "Notes for Guidance on Dress in Court," which apply to barristers of both sexes. These notes were formally approved by the Bar Council and received the assent of the Lord Chief Justice. The notes for the most part reflect the requirements of common sense. They are short, and so far as relevant for present purposes provide as follows:

- E "1. The dress of barristers appearing in court should be unobtrusive and compatible with the wearing of robes.
2. Suits and dresses should be of dark colour. Dresses or blouses should be long-sleeved and high to the neck . . . Shirts and blouses should be predominantly white or of other unemphatic appearance. Collars should be white and shoes black."

F There are no other rules relating to the clothes to be worn by a female barrister under her court gown.

G The taxpayer bought clothes in conformity with those requirements. The initial cost of purchase was a capital expense, and therefore not material for present purposes. However, she needed to clean and renew them from time to time and in the accounting period for the 1977/78 year of assessment she spent some £500 on replacements, laundering and cleaning. This sum is claimed as a deduction in computing the profits of her practice chargeable under Schedule D. To qualify as a deduction, the expenditure must fall outside the prohibition contained in section 130 of the Income and Corporation Taxes Act 1970. The relevant paragraph of the section is paragraph (a) but paragraph (b) should perhaps be read with it as it was referred to in argument:

- H "130. Subject to the provisions of the Tax Acts, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation, (b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of the trade, profession or vocation . . ."

The effect of paragraph (a) is to exclude, as a deduction, the money spent by Miss Mallalieu unless she can establish that such money was spent exclusively for the purposes of her profession. The words in the paragraph "expended for the purposes of the trade, profession or vocation" mean in my opinion "expended to serve the purposes of the trade, profession or vocation"; or as elaborated by Lord Davey in *Strong & Co. of Romsey Ltd. v. Woodfield* [1906] A.C. 448, 453 "for the purpose of enabling a person to carry on and earn profits in the trade etc." The particular words emphasised do not refer to "the purposes" of the taxpayer as some of the cases appear to suggest: as an example see the report of this case [1983] 1 W.L.R. 252, 256. They refer to "the purposes" of the business which is a different concept although the "purposes" (i.e. the intentions or objects) of the taxpayer are fundamental to the application of the paragraph.

The effect of the word "exclusively" is to preclude a deduction if it appears that the expenditure was not only to serve the purposes of the trade, profession or vocation of the taxpayer but also to serve some other purposes. Such other purposes, if found to exist, will usually be the private purposes of the taxpayer: see, for example, *Prince v. Mapp* [1970] 1 W.L.R. 260.

To ascertain whether the money was expended to serve the purposes of the taxpayer's business it is necessary to discover the taxpayer's "object" in making the expenditure: see *Morgan v. Tate & Lyle Ltd.* [1955] A.C. 21, 37, 47. As the taxpayer's "object" in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of section 130 except as a reflection of the taxpayer's state of mind at the time of the expenditure.

If it appears that the object of the taxpayer at the time of the expenditure was to serve two purposes, the purposes of his business and other purposes, it is immaterial to the application of section 130 (a) that the business purposes are the predominant purposes intended to be served.

The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home of his friend and attending professionally upon him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was a reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition in section 130.

There is no dispute between the parties as to the true meaning of section 130 (a), and it is common ground that the principles which I have

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A outlined are those which fall to be applied. The appeal before your Lordships is basically concerned with the distinction between object and effect. The inspector of taxes disallowed the deduction claimed by the taxpayer, with the result that she appealed to the general commissioners against the assessment made upon her. The general commissioners, who had themselves been in practice at the Bar, confirmed the assessment subject to a small adjustment on which there was agreement. The taxpayer successfully appealed to the High Court, and the decision of the Chancery judge was upheld on appeal. The inspector of taxes now appeals to this House with the leave of your Lordships.

B The primary facts found by the commissioners are contained in paragraph 4 of the printed case and paragraph 8 of the decision, and are set out in full in the court at first instance: [1981] 1 W.L.R. 908, 910 et seq. The clothes which the taxpayer maintained for professional purposes were, broadly speaking, worn by her only in connection with her work. That is to say, she travelled in them to her chambers or directly to court, wore them throughout the day and changed out of them when she arrived home at the end of her working day. There were odd occasions on which the taxpayer might find it convenient to remain in her working clothes after her work was done. But no point is taken by the Revenue in relation to such occasions nor is any point taken that the clothes were worn not only at work but also when travelling to and from work.

D The critical findings of fact as set out in paragraphs 4 and 8 of the case are these:

“4.—(c) . . . The rules for guidance are . . . normally complied with and it would be virtually impossible for a lady barrister to practice unless she complied with the rules laid down . . .

E “(f) At all material times the taxpayer had a private wardrobe of clothes and shoes which was amply sufficient to keep her clothed and shod in comfort and decency, without having to resort to any of the disputed items. She would not have purchased any of the disputed items had it not been for the requirement of her profession that she should comply with the Notes for Guidance when appearing in court.

F “(j) . . . She bought such items only because she would not have been permitted to appear in court if she did not wear, when in court, them or other clothes like them. Similarly the preservation of warmth and decency was not a consideration which crossed her mind when she bought the disputed items.

G “(k) The white blouses and black clothing bought by the taxpayer were items of ordinary civilian clothing readily available for purchase by anyone at many clothing stores.

“8. We consider that the evidence shows that when she bought the clothes she bought them to wear in court and that she would not have bought them but for the exigencies of her profession.”

H In addition there are certain statements in a proof of evidence of a senior executive of Marks and Spencer Ltd. These were accepted by the taxpayer as accurate statements of fact. They are summarised in the commissioners' decision in the following terms:

“(i) That it is important for a major retail outlet to design garments likely to have a broad popular appeal; (ii) that the colours in which garments are produced must necessarily be what are called safe colours, including black; (iii) that a black velvet jacket is a perennial favourite; and (iv) that black clothing is always acceptable whether

it is a fashion colour or not and always represents a proportion (which he put at over 10 per cent.) of sales in ladies' outer wear." A

I refer to this evidence only to emphasise the point that the clothing in question consists of perfectly ordinary articles of apparel which many ladies wear from choice. On the basis of those findings of fact the commissioners had to draw an inference and decide whether or not the taxpayer had expended money on her professional wardrobe exclusively to serve the purposes of her business, or alternatively to serve both the purposes of her business and her own private purposes. The inference drawn by the commissioners and the determination reached by them are contained in the second part of paragraph 9 of their written decision, which reads as follows:

"We consider, in the present case, that when Miss Mallalieu laid out money on clothes for wearing in court her purpose in making that expenditure was to enable her to earn profits in her profession and also to enable her to be properly clothed during the time she was on her way to chambers or to court and while she was thereafter engaged in her professional activity, and in the other circumstances indicated in paragraph 2 we do not consider that the fact that her sole motive in choosing the particular clothes was to satisfy the requirements of her profession or that if she had been free to do so she would have worn clothes of a different style on such occasions altered the purpose of the expenditure which remained the purpose of purchasing clothes that would keep her warm and clad during the part of the day when she was pursuing her career as well as the purpose of helping her to earn profits in that career. We think, therefore, that the expenditure had a dual purpose, one professional and one non-professional . . ." B C D E

The commissioners accordingly concluded that the taxpayer had two objects in making the expenditure, to serve the purposes of her business, and to serve her own purposes by enabling her properly to be clothed. Since there is no appeal from the commissioners on a question of fact, the only question before your Lordships is whether the findings of primary fact were such as to entitle them to draw that inference. F

It is, I think, clear that Slade J. was, to use his own words [1981] 1 W.L.R. 908, 921F, "driven to the conclusion that the relevant expenditure in the present case was incurred by her solely for the purpose of carrying on her profession" because he took the view that the so-called subjective approach to the application of section 130 (a) led inexorably to the conclusion that the conscious objects or reasons of the taxpayer making the expenditure were decisive. All that mattered was what was actually in her conscious mind when the expenditure was made: G

"it was common ground that, in determining whether these expenses have been wholly and exclusively laid out or expended for the purpose of the taxpayer's profession of a barrister, it is necessary to ascertain what purpose or purposes was or were *in her mind* at the date when they were incurred: . . ." (see p. 912G). H

and again at p. 914D:

"The ultimate question for my decision here will, I think, be whether, having regard to their primary findings of fact as set out in paragraph 4 of the case stated, there was evidence to support the inference ultimately drawn by the commissioners that the expenditure was incurred by the taxpayer with dual purposes *in mind*."

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A As the taxpayer according to the undisputed evidence had nothing in her mind except the etiquette of her profession on the several occasions when she spent money on the upkeep of her wardrobe of working clothes, and "had no thought of warmth and decency," it inevitably followed that the money was spent exclusively to serve the purposes of her business. The provision of clothing as such, it was held, was nothing more than an incidental, although no doubt welcome, effect of her one and only object.

B The approach of the Court of Appeal was similar. After summarising the general commissioners' findings of fact, Sir John Donaldson M.R. continued [1983] 1 W.L.R. 252, 258H:

C "From those findings of fact there is in my judgment only one reasonable conclusion to be drawn, namely, that the taxpayer's sole purpose in incurring the expenditure was a professional purpose, any other benefit being purely incidental."

Kerr L.J. reasoned along the same lines, at p. 261:

D "In the present case, as it seems to me, the primary findings of fact are wholly exceptional in the sense that they are conclusive in the taxpayer's favour. In particular, paragraph 4 (f) and (j) of the case stated and paragraph 8 of the general commissioners' decision contain unqualified findings to the effect that the taxpayer's sole purpose in incurring the expenditure for the clothes in question was that she had to have them in order to exercise her profession and that she had no [other] need for them, nor any other purpose, when she acquired them. . . . By these findings they have, in effect, stated themselves out of court so far as any ultimate conclusion to the contrary is concerned. All that remains can only be incidental effect; there is no room for a conclusion that there was a dual purpose."

E

The brief judgment of the late Sir Sebag Shaw was to the same effect.

I think, with respect, that Kerr L.J.'s paraphrase of paragraphs 4 (f) and (j) and 8 goes further than the findings warrant. The sense of the commissioners' findings of fact is that the taxpayer did not have any object *in her mind*, that is to say, any *conscious* motive, when she incurred the expenditure, except that she needed the clothes in order to exercise her profession.

F

Before I seek to examine the conclusions reached by the High Court and the Court of Appeal, I return to my opening observations that the issue involved in this appeal has inevitably opened up a far wider and more fundamental point, namely the right of any self-employed person to maintain, at the expense of his gross income and therefore partly at the expense of the general body of taxpayers, a wardrobe of everyday clothes which are reserved for work. I find myself at odds with Slade J. when he says in [1981] 1 W.L.R. 908, 922A, "I accordingly emphasise that this is a decision on the particular facts of the present case," a remark which, though accurate, implies that there is something exceptional about the case. In the first place, counsel for the taxpayer disclaimed any reliance on the fact that his client disliked dark clothing, never purchased it for private use, and therefore was not in a position to resort to her private wardrobe to answer the requirements of her profession. This disclaimer was rightly made. It would be absurd to suppose that there exists one law for the blonde barrister who lacks a wardrobe of dark clothes, and another law for the brunette barrister whose wardrobe of everyday clothes contains many dresses suitable for court appearances. It therefore

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inevitably followed, as counsel conceded, that the taxpayer was arguing that if a barrister, male or female, chose to establish a wardrobe of clothes exclusively for working purposes, he or she would be entitled to deduct the cost of its upkeep. The question then arose whether this beneficent state of affairs would apply to other professional persons, such as solicitors, accountants, medical practitioners, trades people and persons in all other walks of self-employed life, and if not why not. The only distinction that could be drawn was that a barrister who wore unacceptable clothes would find himself barred from pleading in court, as well as risking the loss of the goodwill of his clients, while other professional persons might be subject only to the latter sanction. It did not seem logical that the right of deduction should depend on the degree of the sanction which induced the professional person to equip himself with subdued clothing. Furthermore, "necessity" is not part of the formula in section 130 (a), and therefore the existence of a sanction was wholly immaterial. So there was no reason for concluding that the tradesman would be debarred from maintaining his own wardrobe of clothes for working days if the taxpayer's argument were correct. Finally, there could be no distinction between top clothes and underclothes and other articles of wearing apparel. The position was ultimately reached that there was no distinction to be drawn between the position of male and female barristers, or between the position of barristers and practitioners of every other trade, profession and vocation, or between top clothes, underwear and footwear. So, at the end of the day, if the argument for the taxpayer is right, it will be open to every self-employed person to set against his gross income the cost of the upkeep of a complete wardrobe of clothes, so long as he reserves such clothes strictly for use only at work, or when proceeding to and from his work. Counsel for the taxpayer did not shrink from this conclusion. I mention this wider aspect of the problem only to emphasise once again that there is nothing exceptional about the facts of this case.

I return to the question for your Lordships' decision whether there was evidence which entitled the commissioners to reach the conclusion that the object of the taxpayer in spending this money was exclusively to serve the purposes of her profession, or was also to serve her private purposes of providing apparel with which to clothe herself. Slade J. felt driven to answer the question in favour of the taxpayer because he felt constrained by the commissioners' finding that, in effect, the only object present in the mind of the taxpayer was the requirements of her profession. The conscious motive of the taxpayer was decisive. The reasoning of the Court of Appeal was the same. What was present in the taxpayer's mind at the time of the expenditure concluded the case.

My Lords, I find myself totally unable to accept this narrow approach. Of course Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintaining her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is in-

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- A evitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist. In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion.

- B It was inevitable in this sort of case that analogies would be canvassed; for example, the self-employed nurse who equips herself with what is conveniently called a nurse's uniform. Such cases are matters of fact and degree. In the case of the nurse, I am disposed to think, without inviting your Lordships to decide, that the material and design of the uniform may be dictated by the practical requirements of the art of nursing and the maintenance of hygiene. There may be other cases where it is essential that the self-employed person should provide himself with and maintain a particular design of clothing in order to obtain any engagements at all in the business that he conducts. An example is the self-employed waiter, mentioned by Kerr L.J., who needs to wear "tails."
- C In his case the "tails" are an essential part of the equipment of his trade, and it clearly would be open to the commissioners to allow the expense of their upkeep on the basis that the money was spent exclusively to serve the purposes of the business. I do not think that the decision which I urge upon your Lordships should raise any problems in the "uniform" type of case that was so much discussed in argument. As I have said, it is a matter of degree.

- D The case before your Lordships is indistinguishable in principle from *Hillyer v. Leeke* (1976) 51 T.C. 90. That case arose under Schedule E, but the ratio of the first ground of decision is equally applicable to Schedule D. The taxpayer was a computer engineer. His work involved travelling to the establishments of his firm's customers. His employers required him to wear a suit. When present on a customer's premises he might be called upon to assist the customer's engineer at short notice without an opportunity to change into overalls or a boiler suit. The taxpayer therefore maintained two working suits which he wore only for the purposes of his work. He claimed a deduction of £50 for their upkeep. This was disallowed by the inspector. The commissioners confirmed the assessment. I read the following passages from the judgment of Goulding J. at p. 93 which seem to me to be correct and in point:

- G "The truth is that the employee has to wear something, and the nature of his job dictates what that something will be. It cannot be said that the expense of his clothing is wholly or exclusively incurred in the performance of the duties of the employment. . . . In the case of clothing the individual is wearing clothing for his own purposes of cover and comfort concurrently with wearing it in order to have the appearance which the job requires. . . . Does it make any difference if the taxpayer chooses, as apparently Mr. Hillyer did, to keep a suit or suits exclusively for wear when he is at work? Is it possible to say, as Templeman J. said about protective clothing in the case of *Caillebotte v. Quinn* [1975] 1 W.L.R. 731, that the cost of the clothing is deductible because warmth and decency are merely incidental to what is necessary for the carrying on of the occupation? That, of course, was a Schedule D and not a Schedule E case, but

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the problem arises in a similar way. The answer that the Crown makes is that where the clothing worn is not of a special character dictated by the occupation as a matter of physical necessity but is ordinary civilian clothing of a standard required for the occupation, you cannot say that the one purpose is merely incidental to the other. Reference is made to what Lord Greene M.R. said in *Norman v. Golder* (1944) 26 T.C. 293, 299. That was another case under Schedule D, but again, in my judgment, applicable to Schedule E cases, where the learned Master of the Rolls said, referring to the food you eat and the clothes that you wear: 'But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being.' In my judgment, that argument is conclusive of the present case, and the expenditure in question, although on suits that were only worn while at work, had two purposes inextricably intermingled and not severable by any apportionment that the court could undertake."

The learned judge then founded on a second argument turning on the word "necessarily," to which I need not refer as that requirement only exists in the case of a Schedule E computation.

I find myself in complete agreement with Goulding J. and I regard his observations as appropriate in their entirety to the case before your Lordships.

So, my Lords, I respectfully differ from the conclusion reached by Slade J. and by the members of the Court of Appeal. I would allow this appeal.

Appeal allowed.
Decision of Court of Appeal reversed.
Determination of general commissioners restored.

Solicitors: *Solicitor, Inland Revenue; Penningtons.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

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A

[COURT OF APPEAL]

WALKER (D.) v. WALKER (G.)

1983 May 3

Cumming-Bruce and Griffiths L.JJ.
and Sir Roger Ormrod

B

Military Law—Preservation of assets—Army resettlement grant—Husband and wife—Divorce proceedings—Financial provision—Order directing payment of grant into court—Whether payment “to another person”—Whether order valid—Army Act 1955 (3 & 4 Eliz. 2, c. 18), s. 203 (1) (2)

C

The wife petitioned for dissolution of the marriage while her husband was a serving soldier. Before the decree was made absolute, the husband was discharged from the Army with an entitlement to a resettlement grant of £2,436. The wife applied pursuant to section 37 of the Matrimonial Causes Act 1973 for the preservation of the grant. The registrar made an order, *inter alia*, that the Paymaster General pay into court the moneys due to the husband by way of resettlement grant and the money remain in court until the trial of the issues relating to ancillary relief for the wife and children of the family or further order. On an application by the Ministry of Defence the judge set aside the order as being an indirect method of ordering a soldier's pay to be paid to another person contrary to the provisions of section 203 of the Army Act 1955.¹

D

On appeal by the wife:—

E

Held, dismissing the appeal, that, since the order for payment of moneys into court required a cheque or draft to be made payable to the Accountant General, it was an order for payment of the husband's resettlement grant “to another person” and as such was contrary to the express provisions of section 203 (2) of the Army Act 1955; that, alternatively, the order had the effect of keeping the money intact until the wife could apply for the money to be used to enforce an order made in her favour in the ancillary proceedings and, therefore, it was invalid as being a device to create a charge on the moneys and to obtain indirect payment to the wife contrary to section 203 (1) and (2) of the Act (*post*, pp. 427C–F, H—428A, A–B, D).

F

Per Sir Roger Ormrod. Nothing in the judgments in the present case affects the question that may have to be decided some day of whether there is jurisdiction under section 37 of the Matrimonial Causes Act 1973 to order payment of money into court (*post*, p. 428D–E).

G

Order of Sheldon J. affirmed.

The following case is referred to in the judgment of Cumming-Bruce L.J.:
Lucas v. Harris (1886) 18 Q.B.D. 127, C.A.

The following additional cases were cited in argument:

H

Ford, In re, Ex parte The Trustee [1900] 2 Q.B. 211.
Z Ltd. v. A-Z and AA-LL [1982] Q.B. 558; [1982] 2 W.L.R. 288; [1982] 1 All E.R. 556, C.A.

APPEAL from Sheldon J.

By notice of appeal dated November 18, 1982, pursuant to leave of the Court of Appeal granted on November 1, 1982, the wife applied to

¹ Army Act 1955, s. 203 (1) and (2): see *post*, p. 425D–E.

set aside and discharge an order made by Sheldon J. in chambers on September 10, 1982, that the wife's application by way of summons dated April 23, 1982, seeking to enforce the order dated April 5, 1982, of Mr. Registrar Elliott in the Bedford County Court and amended by Mr. Registrar Le Mesurier on April 6, 1982, whereby it was ordered that (1) in the event of Her Majesty's Paymaster General and/or the regimental paymaster not having accounted and paid to the husband or his agents or otherwise such moneys as were due to him by way of a resettlement grant or otherwise following upon his service with Her Majesty's Armed Forces or any moneys due to him, he do pay such sum or sums into that court to remain in court until the trial of the issues relating to ancillary relief for the wife and the children of the family or further order; and (2) in the event of Her Majesty's Paymaster General and/or the regimental paymaster having paid such sum or sums set out in clause (1) to the husband or his agent at the date of service upon Her Majesty's Paymaster General and/or the regimental paymaster, the husband do pay such sum or sums into that court until the trial of the issues relating to ancillary relief for the wife and the children of the family or further order, be not granted, and further that the order be discharged and that an order be granted to the wife whereby (1) upon payment by Her Majesty's Paymaster General and/or the regimental paymaster of such moneys as were due to the husband by way of resettlement grant or otherwise, following upon his service with Her Majesty's Armed Forces or any moneys due to him, he do pay such sum or sums into the Bedford County Court until the trial of the issues relating to ancillary relief for the wife and the children of the family or further order, and that it be ordered that the costs of the appeal and the costs below be paid by the husband and/or the Minister of Defence to the wife and for such other relief as to the Court of Appeal may seem just.

The grounds of the appeal were (1) that the judge erred in holding that clause (2) of the order of April 6, 1982, was an order that could not be made by virtue of section 203 (2) of the Army Act 1955 and that therefore the registrar had no jurisdiction so to order in that, inter alia, the clause did not and could not "direct payment . . . to another person," being an essential requirement of section 203 (2); (2) that the judge erred in holding that there was no jurisdiction in the court whether pursuant to section 37 of the Matrimonial Causes Act 1973 or otherwise to order a third party to pay money into court or otherwise to dispose of assets due to one of the parties to the suit and in holding that there was no jurisdiction to appoint a receiver to receive moneys on the husband's behalf; (3) that the judge erred in holding that there was no evidence that the husband intended to dispose of any such moneys upon receipt and that accordingly no order would be made under section 37 of the Act of 1973; and (4) that in any event the judge erred in finding that the moneys due to the husband from Her Majesty's Paymaster General and/or the regimental paymaster amounted to a gratuity payable to the husband and therefore subject to section 203 (1) of the Act of 1955.

The facts are stated in the judgment of Cumming-Bruce L.J.

Joseph Jackson Q.C. and *Nicholas Mostyn* for the wife.

E. James Holman for the Ministry of Defence.

CUMMING-BRUCE L.J. This is an appeal by the petitioner wife in matrimonial proceedings against the order of Sheldon J. when he discharged

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Cumming-Bruce L.J.

- A two parts of an order made by Mr. Registrar Elliott in the Bedford County Court, dated April 5, 1982, and amended by another registrar the next day. This appeal is only concerned with those orders made by the registrar in so far as orders were made imposing the duty of compliance upon the Paymaster General for the regimental payments. The short point raised on the appeal is the question whether the judge was right in his view that the effect of section 203 of the Army Act 1955 was to put it outside the powers of the court to make the orders that the registrars made on April 5 and 6, 1982.
- B

I begin by turning to the order of Mr. Registrar Elliott dated April 5, 1982. The orders sought were pursuant to an ex parte application on behalf of the petitioner wife, supported by the affidavit of the petitioner dated April 2, 1982, and that affidavit in terms stated that the application was made under section 37 of the Matrimonial Causes Act 1973. On April 5, Mr. Registrar Elliott made the following orders:

- C “1. In the event of Her Majesty’s Paymaster General not having accounted and paid to the respondent or his agents or otherwise such moneys as are due to him by way of a resettlement grant or otherwise following upon his service with Her Majesty’s Armed Forces or any moneys due to him he do pay such sum or sums into this court to remain in court until the trial of the issues relating to ancillary relief for the petitioner and the children of the family or further order.
- D “2. In the event of Her Majesty’s Paymaster General having paid such sum or sums as set out in clause 1 hereof to the respondent or his agent at the date of service upon Her Majesty’s Paymaster General the respondent do pay such sum or sums into this court until the trial of the issues relating to ancillary relief for the petitioner and the children of the family or further order.”
- E

The amendment made the following day added to the registrar’s order, after the words “Her Majesty’s Paymaster General” which appeared in both orders, the words “and/or the regimental paymaster.”

- F The judge, for the reasons which he stated in his judgment, decided that by virtue of the provisions of section 203 of the Army Act 1955, there was no power in the court to make the order made by the registrar in so far as it sought to bind the Paymaster General to deal with moneys payable to the husband in the ways stated.

- G In this court there is no appeal on behalf of the husband personally against that part of the orders made by the judge and the registrar which imposed upon the husband a duty to pay the moneys into court. The only appeal with which this court is concerned is the appeal by the wife whereby Mr. Jackson, on her behalf, submits that the judge was wrong in discharging the order made by Mr. Registrar Elliott, as amended the next day by the addition to which I have referred, imposing upon the Paymaster General that, in the event of his not having accounted and paid to the husband moneys due by way of a resettlement grant or otherwise, such moneys should be paid into court and stay in court until the trial of the issue. In those circumstances it is unnecessary for this court to make any observation upon that part of the order made by the judge against which there is no appeal and it is important that I should make it plain that nothing in this judgment relates in any way to that part of the judge’s order which is not before this court as an order subject to appeal. I am careful to say nothing about that order and I will not mention it again in
- H

the course of this judgment. I address myself to the only order subject to the jurisdiction of this court on the notice of appeal. A

It is only necessary, in order to make this judgment intelligible, to make a brief extract of certain dates because, in so far as the facts are material, they are all sufficiently to be found in the judgment of the judge and as this court is concerned only with the question of construction, the reasoning of the judgment will not be clarified by reference to examination of the detailed facts. B

The skeleton facts to which I refer are these. On April 3, 1976, the husband and wife were married. There were three children of the family. On May 22, 1981, there was a separation. On June 26, 1981, the wife petitioned for dissolution, in reliance upon section 1 (2) (b) of the Act of 1973. On October 26, 1981, the wife filed her form giving notice of application for financial provision and the relevant applications for the purposes of the instant proceedings are her applications for periodical payments and for a lump sum. The wife inquired on October 26, 1981, while her husband was still a serving soldier, whether his prospective resettlement grant could be preserved by consent. On January 4, 1982, the registrar gave directions in the ancillary proceedings, including a direction that the husband should file an affidavit of means. He did not comply. On March 4, 1982, the husband left the Army on terminal leave. On March 24, 1982, there was a decree nisi. On April 1, 1982, the husband was discharged from the Army with an entitlement, by way of resettlement grant, of £2,436. His entitlement arose under the provisions of the Royal Warrant and not otherwise. C D

On April 2, 1982, as I have earlier stated, the wife applied under section 37 of the Matrimonial Causes Act 1973, for preservation of the fund, to wit the £2,436 to which her husband was entitled pursuant to the Royal Warrant. On April 5, 1982, the registrar made a further direction and made the injunctions to which I have already referred, including the injunction against the Paymaster General and the regimental paymaster. E

On April 13, 1982, the Ministry of Defence on behalf of the Crown raised objection to the order in so far as it affected them. The registrar transferred the application to the High Court and in his judgment the judge deals with the machinery of that matter, which is not material for the purposes of this appeal. F

On May 6, 1982, there was a decree absolute, the wife having issued a summons under section 37 of the Matrimonial Causes Act 1973 a fortnight before. On May 21, 1982, the husband's solicitors took themselves off the record and the order of the judge was made on July 29, 1982. Since the husband's solicitors were taken off the record, he has taken no part in these proceedings. G

The judge, for reasons stated in his judgment, decided that section 203 of the Army Act 1955 precluded the court from making the order which the registrar had made, ordering the Paymaster General to pay the resettlement grant moneys into court in the event of their not already having been paid to the husband personally. In the part of his judgment which dealt with that issue, he was satisfied that the resettlement grant was a grant, and though there was at one time an issue about it, Mr. Jackson takes no point about it now that he knows the accurate facts about the entitlement of the respondent to the moneys. H

The judge expressed the view that the proposed order would not in itself have the affect of directing payment of the gratuity to another person, because the money while in court would legally become the husband's,

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Cumming-Bruce L.J.

A although subject to a restraint on his power to dispose of it. But the judge went on to say that clearly the sole purpose of such an order is to enable the court, if it could do so, to order that some part or all of the money thus paid into court should, in due course, be paid to the wife. The judge said:

B “in my opinion, it would be wholly unrealistic and incorrect to treat that second order as distinct from the first and to suggest (if I have correctly understood Mr. Jackson’s argument) that the whole is unimpeachable because the first part did not direct payment of the gratuity to another person and because the second part, although not a direction for the payment of the sum in question to ‘another person’ was a direction which related to a sum which had been ‘paid’ (albeit into court) and therefore was no longer ‘payable’ within section 203.

C The same objection, moreover, in my opinion, applies to a further submission made by Mr. Jackson that the court should order that the gratuity should be paid to a receiver who, although holding it as the respondent’s agent, would do so upon the terms that he did not part with it otherwise than in accordance with some further order of the court.”

D The judge referred to *Lucas v. Harris* (1886) 18 Q.B.D. 127 and relied upon it.

When one comes to section 203 of the Act of 1955 it is necessary to examine the first two subsections in order to determine the intention of the legislature:

E “(1) Every assignment of or charge on, and every agreement to assign or charge, any pay, military award, grant, pension or allowance payable to any person in respect of his or any other person’s service in Her Majesty’s military forces shall be void. (2) Save as expressly provided by this Act, no order shall be made by any court the effect of which would be to restrain any person from receiving anything which by virtue of this section he is precluded from assigning and to direct payment thereof to another person.”

F Subsections (3) and (4) are not in point.

It is clear that the mischief against which section 203 (1) was directed was to prevent the potential recipients of moneys to which they were entitled, having the character of moneys specified in the subsection, from losing the benefit thereof in advance by way of any assignment or charge.

G This was consistent with those provisions of the Army Act 1955 which have been re-enacted over a period of nearly a century, which provided that there should be a strict control over military pay, and by this section also, over grants, pensions or allowances. It is expressly provided that any agreement to the charge, such moneys shall be void.

H Then when one comes to section 203 (2) in my judgment, the words “anything which by virtue of this section he is precluded from assigning” have been included by the draftsman simply in order to identify the particular moneys and property to which section 203 (2) applies. The effect of those words is to identify the moneys which come within the ambit of section 203 (2) and have no other effect. The further words of the subsection, “and to direct payment thereof to another person,” have to be given their full force and effect so that section 203 (2) prohibits the making of an order, the effect of which will restrain any person from receiving anything and to direct payment to another person.

Mr. Jackson's first submission is that, when section 203 (2) is considered, an order for payment of money into court (which is the order in question) is not an order which directs payment to another person. The court is not a person, he submits, and it would be an unusual draftsman's technique to include in the phrase "to direct payment . . . to another person," an order for payment into court. When one looks at the provisions of rule 22 of the Supreme Court Funds Rules 1975 (S.I. 1975 No. 1803 (L. 24)), one finds that, when a payment into court is ordered, the banker's draft or the cheque shall be made payable to the Accountant General. Looking at it from the point of view of a person subject to an order for payment into court, he is thereby ordered to make out a cheque, or other payable order, to the Accountant General. At that stage the payer is paying another person, namely, the Accountant General. Mr. Jackson submits that that is not enough to bring the payment within section 203 (2), because when money is paid into court no other person immediately has the right to claim beneficial enjoyment of that money. Until some other order is made, on the facts of this case, as between the wife and the husband, the money is the money of the husband. It certainly is not the money of the wife until some other order is made, and so, he submits, it would be an unusual technique of drafting to interpret the words "to direct payment thereof to another person" as contemplating the particular and special kind of payment which takes place when an order is made that money is to be paid into court. Mr. Jackson submits that that would be to stretch the words of the section much further than they should go.

The judge accepted Mr. Jackson's submission, but by the husband's notice filed in this court pursuant to leave given, Mr. Holman on behalf of the Ministry of Defence raises the additional ground that the judge was wrong in holding that the proposed order would not in itself have the effect of directing payment of the gratuity to another person and that the money, while in court, would legally become the husband's.

That ground was a different ground to the judge's ground. The judge held that the court ought not to attempt to circumvent the express provisions of section 203 by making an order whether for payment into court or for the appointment of a receiver, of which the only purpose could be the alienation of a sum of money to which the husband, by statute, is entitled.

In relation to that ground of the judge, I think it is useful to consider the machinery of the payment into court which was necessary in order to complete the operation of the exercise of payment into court in order to give it any effect. The only effect of the order for payment of money into court must have been to enable the wife, if successful on her application for financial provision, then to obtain payment out to her, or to her solicitor, of the whole or such part of the moneys in court as were necessary in order to satisfy the court's order for financial provision in her favour. But this was not a payment into court of the kind contemplated by the Rules of the Supreme Court, whereby money is paid into court stating on the face of the notice of payment in that it is paid in respect of satisfaction, or part satisfaction, of moneys claimed in an action. There could be no such notice in the instant case and I am not at present satisfied that, upon the wife successfully obtaining judgment in her ancillary proceedings for a sum equal to or greater than the sum of the resettlement grant, she would simply by producing that judgment be able to obtain an order for payment out of the moneys in court. I cannot see that there is any rule that would enable her to do so. What she would be able to do would be to obtain

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- A a charging order, charging any moneys of the husband, including moneys of the husband presently in court, pursuant to an order of the court or otherwise. Upon the presentation and proof of such charging order, she would then have established a right to payment out of the moneys held in court as being moneys otherwise to be credited to the husband personally. But how would that fit with the scheme on section 203? Section 203 (1) in terms makes void any charge upon, or any agreement to charge
- B any moneys having the character of the moneys with which the instant appeal is concerned, so that if the wife succeeded in obtaining an order equal to or greater than the amount of the resettlement grant, and if she then obtained or sought to obtain a charging order on such money, such charging order would be void by virtue of the provision of section 203 (1). Therefore, in so far as the order for payment into court can only be given
- C a rational effect, i.e. by preserving the fund in court pending the wife obtaining a charging order upon it, any such charging order would be void and any such procedure by way of payment into court designed to facilitate such a charging order would itself, in my view, be clearly contrary to the intention of the statute.

- This leads me to my conclusion, and I prefer to put my reasoning on two grounds. Either a cheque payable by the Ministry of Defence to the
- D Accountant General by way of payment into court of the sum representing the entitlement of the former soldier to his resettlement grant was payable to another person pursuant to the order of the court that the money be paid into court, in which case such order for payment into court would be contrary to the express terms of section 203 (2), or alternatively, if that is wrong, the order for payment into court is itself bad, because the
- E only explanation or reason for such an order would be to circumvent the prohibition in section 203 (1) which prohibits any charge on the grant in question. I am content to hold that the order for payment into court made by the county court, making the order against the Paymaster General, was bad, either because the Paymaster General, on paying this cheque to the Accountant General was paying to another person, which is prohibited, or if he was not, then what he was ordered to do was to take the step which,
- F to have any valid or useful effect for the benefit of the wife, must involve at some stage a restraint or charge on the grant, which itself it prohibited by section 203 (1) and (2).

On these grounds I would uphold the judge's order and move that the appeal be dismissed.

- G GRIFFITHS L.J. The object of section 203 (1) of the Army Act 1955 is to ensure that a soldier will receive in his hands his pay or the other analogous sums payable by the Crown such as pensions, grants, and so forth, so that he can then dispose of them as he wishes, and to this end it is expressly provided that any previous assignment or charge upon the pay or other emolument is void. I read section 203 (2) as directed towards the same end. It is to provide that no court shall make any order which
- H would impose a restraint on his pay, or other emolument, which would prevent him receiving it into his hand to be disposed of as he then wishes. It is, however, subject to certain statutory exceptions which are not relevant to this appeal. I would construe an order to the Paymaster General by a court to pay a soldier's emolument into court as an order directing the Paymaster General to make payment to another person. I think the words "another person" are wide enough to cover the making of a cheque payable to the appropriate official when money is paid into court, or in the

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somewhat exceptional circumstances when money is paid in over the counter, the payment of actual cash to the counter clerk who receives it into court. In my view the direction to the court in section 203 (2) that it must not make any order to restrain the soldier from receiving his pay must be read together with the direction to the court that it must not direct payment to any other person, because if the court can direct payment into court, it renders meaningless the protection prohibiting it from restraining the soldier from receiving his pay. Accordingly, in my view, a direction to make this payment into court is a direction to make a payment to another person within the meaning of section 203 (2).

If I were wrong in this view, I would still follow the judge's line of reasoning. It is manifest that the judge could not, under section 203 (2), make an order that this money should be paid direct to the wife because on any view that would be an order directing payment to another person, which he is not entitled to do. It seems to me that it would be quite wrong to construe the subsection as enabling him to achieve this same end in two steps, namely, by first ordering the money to be brought into court and then, by a further order, seeing that it fell into the hands of the wife. That was the judge's approach and, as I say, if I were wrong in my first approach, I would fall back and adopt the judge's approach.

For these reasons, I would dismiss this appeal.

SIR ROGER ORMROD. I agree and I agree in terms with the judgments which have just been delivered. I only wish to add my caveat to what Cumming-Bruce L.J. said in the course of his judgment. Nothing in our judgments in this case can be used in argument on the applicability, or otherwise, of section 37 of the Matrimonial Causes Act 1973 to the facts of this case, or as to the practice, as we understand it to be, in the Bedford County Court of ordering payments into court in certain circumstances in cases arising under the Matrimonial Causes Act 1973. Whether there is in fact jurisdiction to make those orders may have to be considered some day. I only wish to make it clear that we are not deciding that the order made against the husband in this case by the judge was, or was not, a valid order.

*Appeal dismissed.
No order for costs save
legal aid taxation.*

Solicitors: *Giffen Couch & Archer, Leighton Buzzard; Treasury Solicitor.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

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A [HOUSE OF LORDS^g]WESTERN HERITABLE
INVESTMENT CO. LTD. RESPONDENTS
AND

B HUSBAND APPELLANT

1983 June 27, 28;
July 27Lord Fraser of Tullybelton,
Lord Keith of Kinkel, Lord Roskill,
Lord Brightman and Lord TemplemanC *Landlord and Tenant—Rent restriction—Rent assessment—"Fair rent"—Excess of demand for accommodation over supply—Comparison with similar property for which fair rent assessed after making deduction for scarcity from capital value—Whether deduction proper—Rent (Scotland) Act 1971 (c. 28), s. 42 (2)*D In fixing the fair rent of the house occupied by the tenant under a regulated tenancy, a rent assessment committee relied on the comparative method, using for comparison the fair rents determined for 80 similar houses by a previous committee, the Kennedy Committee, who made their determination by applying to the vacant possession capital value of each house a rate of 6 per cent. to represent a reasonable return to the landlord and deducting 40 per cent. from the resulting figure because the houses were in an area where there was a relatively high scarcity of accommodation created by the demand exceeding the supply. The landlords appealed, submitting, inter alia, that the making of a deduction for scarcity was contrary to section 42 of the Rent (Scotland) Act 1971¹ and that accordingly the committee should not have relied upon the Kennedy Committee's computation. The Extra Division of the Court of Session (by a majority) allowed the appeal.E On the tenant's appeal by leave of the House of Lords:—
F *Held*, allowing the appeal, that the clear intention of section 42 of the Act of 1971 was to protect tenants from having to bear the burden of increased market rents caused by a shortage of houses for letting in the area; that section 42 (2) required that a fair rent be determined upon the assumption that the demand for houses for letting did not substantially exceed their supply, and when using actual comparables in determining a fair rent, it was proper to apply a discounting procedure to eliminate the element of scarcity value; that whether such a deduction should be made and if so what the actual amount of it should be were questions of fact to be determined by the evidence; and that, accordingly, it could not be said that either committee had erred in law or that they had made determinations which on the evidence before them they were not entitled to make (post, pp. 431F–H—432A, 433B–F, 435A–D, E–F, 436H—437A–D).

G Decision of the Extra Division of Court of Session reversed.

H The following case is referred to in the opinion of Lord Keith of Kinkel: *Skilling v. Arcari's Executors*, 1974 S.C.(H.L.) 42, H.L.(Sc.).

The following additional cases were cited in argument:

Anglo Italian Properties Ltd. v. London Rent Assessment Panel [1969] 1 W.L.R. 730; [1969] 2 All E.R. 1128, D.C.¹ Rent (Scotland) Act 1971, s. 42 (1) and (2): see post, p. 432B–D.

- Crofton Investment Trust Ltd. v. Greater London Rent Assessment Committee* [1967] 2 Q.B. 955; [1967] 3 W.L.R. 256; [1967] 2 All E.R. 1103, D.C. A
- Learmouth Property Investment Co. Ltd. v. Aitken*, 1970 S.C. 223.
- Metropolitan Property Holdings Ltd. v. Finegold* [1975] 1 W.L.R. 349; [1975] 1 All E.R. 389, D.C.

APPEAL from an Extra Division of the Court of Session. B

This was an appeal by the tenant, Janet Boyd Husband, from the Extra Division of the Court of Session (Lord Avonside and Lord Kincaig, Lord Dunpark dissenting), who by interlocutor dated November 18, 1982, sustained an appeal under section 13 of the Tribunals and Inquiries Act 1958 by the landlords, the Western Heritable Investment Co. Ltd. of 62, Bath Street, Glasgow, from a decision dated October 29, 1980, of a rent assessment committee sitting at 141, West Nile Street, Glasgow, whereby they fixed at £725 per annum the fair rent of a dwelling house at 49, Burnfoot Drive, Glasgow, by comparison with similar property for which a fair rent was determined after making a "scarcity deduction" from its capital value. C

The court refused the tenant leave to appeal to the House of Lords. On February 24, 1983, the Appeal Committee of the House of Lords (Lord Fraser of Tullybelton, Lord Brandon of Oakbrook and Lord Templeman) allowed a petition by the tenant for leave to appeal. D

The facts are set out in their Lordships' opinions.

Brian Gill Q.C. and *Jonathan Mitchell* (both of the Scottish Bar) for the tenant.

Peter K. Vandore Q.C. and *D. I. Mackay* (both of the Scottish Bar) for the landlords. E

Their Lordships took time for consideration.

July 27. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in advance the speeches prepared by my noble and learned friends, Lord Keith of Kinkel and Lord Brightman, and I entirely agree with them. I add a few comments of my own only because we are differing from the majority of the court below. F

The rent assessment committee in the present case determined the fair rent of the house occupied by the appellant, by relying on the comparative method, using for comparison the rents determined for 80 similar houses on July 28, 1980, by another committee, the chairman of which was a Mr. Kennedy. The Kennedy Committee made their determination by first finding the capital values of the houses, with vacant possession. They then applied to the capital value a rate of 6 per cent. to represent a return to the landlord. From the resulting figure they made deductions for repairs and other expenses, and also a deduction of 40 per cent. because the houses were in an area of relatively high scarcity. The question at issue in the present appeal is whether that deduction of 40 per cent. for scarcity was one that the Kennedy Committee were entitled to make in accordance with section 42 of the Rent (Scotland) Act 1971 or not. The majority of the Extra Division of the Court of Session (Lord Avonside and Lord Kincaig, with Lord Dunpark dissenting) held that the scarcity deduction ought not to have been made, and that the Kennedy Committee's computation of fair rents was vitiated by their error in making the deduction, and ought not to G H

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Lord Fraser
of Tullybelton

A have been relied upon by the committee in the present case. Section 42 of the Act of 1971 is quoted by Lord Keith of Kinkel and I need not repeat it.

B Lord Avonside expressed the view that to make a deduction for scarcity in a calculation such as that made by the Kennedy Committee was "plainly wrong and ignores the provision of section 42 (2) of the Act." The final words of his opinion were that the case should be sent back to the committee to proceed as accords "under direction that their use of a 'scarcity' element in their determination is *wrong in law*" (emphasis added). His Lordship thus reached his decision on the basis that the issue was one of law, not depending on evidence. Lord Kincaig reached the same conclusion as Lord Avonside, partly on the same ground. Thus, Lord Kincaig said that the assessment committee, by making a deduction because of the scarcity of houses to let, had "made an assumption which is not warranted by section 42 (2) of the Act. Indeed, the subsection requires them to make the very opposite assumption, that there is no scarcity of houses to let." Lord Kincaig relied also on a second ground, which was that, in his view, there was no evidence that the capital value of houses was influenced by any scarcity of houses to let. I shall return to that point in a moment.

D With regard to the issue of law, on which both Lord Avonside and Lord Kincaig relied, they seem to have read the proviso in section 42 (2) that "it shall be assumed that the number of persons seeking to become tenants—is not substantially greater than the number of—dwelling houses" as creating an irrebuttable presumption of fact that there is no scarcity, whatever the true facts may be. With the utmost respect that impresses me as a most improbable construction of the subsection, especially considering that the main reason why the Act of 1971, and the various Acts thereby consolidated, were passed, was the notorious shortage of accommodation to let, particularly by private landlords. If the effect of subsection 42 (2) was to create such an irrebuttable presumption, I do not understand why the fair rent should be different from the market rent, or why the system of registration of rents, introduced by the Rent Act 1965, and now contained in Part IV of the Act of 1971 was necessary at all.

F In my opinion, the effect of section 42 (2) is to direct that the fair rent is to be determined upon the assumption that there is no scarcity of accommodation to let. Accordingly, if there is such scarcity in fact, some allowance or deduction may have to be made for it when actual rents (or the return on actual capital values) are used for determining fair rents.

G Whether any allowance or deduction should be made, and, if so, how much it should be, are questions of fact to be determined upon the evidence, mainly of experts in valuation. Lord Kincaig, in the second ground of his opinion, accepted that proposition but he held that in none of the appeals before the court was there "any evidence" that the capital value of the houses taken for the purposes of comparison had been influenced "at all" by any shortage of houses to let within the area. I infer from that if he had been satisfied on the evidence that the capital value of the houses was influenced by the shortage of houses to let, he would have thought it right to make some allowance for the effect of such influence. That appears to me to be the correct approach although I am, with respect, unable to agree that there is no evidence to show that the capital value was affected by the shortage of houses let. On that matter I am in full agreement with

the views expressed by Lord Keith of Kinkel. I agree also with the opinion of Lord Dunpark. A

I would allow the appeal and restore the finding of the committee.

LORD KEITH OF KINKEL. My Lords, this appeal arises out of a determination by a rent assessment committee sitting in Glasgow, dealing with a reference by a rent officer at the instance of the landlords relating to the fair rents for certain dwelling houses subject to regulated tenancies under the Rent (Scotland) Act 1971. The issue in the appeal is concerned with the provisions of section 42 (1) and (2) of the Act of 1971 which at the material time were in these terms: B

“ 42. (1) In determining for the purposes of this Part of this Act what rent is or would be a fair rent under a regulated tenancy of a dwelling-house, regard shall be had, subject to the following provisions of this section, to all the circumstances (other than personal circumstances) and in particular to the age, character and locality of the dwelling-house and to its state of repair. (2) For the purposes of the determination it shall be assumed that the number of persons seeking to become tenants of similar dwelling-houses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the number of such dwelling-houses in the locality which are available for letting on such terms.” C D

Before the committee the landlords put forward, through the evidence of a surveyor, certain figures of fair rent based upon the decision of another committee made as at mid-1976, adjusted to take into account an allowance for insurance and management and also for the increase in the cost of repairs and the effect of inflation since that time. This brought out a rent of £855 for a four-apartment house and one of £950 for a five-apartment house. In support of these figures the surveyor submitted a calculation based on a fair return on capital value. He estimated the capital value of a typical house at £15,200, and a fair return at 6 per cent., bringing out £593. From this he deducted 35 per cent. for scarcity, while maintaining that no such deduction ought properly to be made, and added to the resultant figure certain sums for repairs, insurance and management, making a total of £905 for a four-apartment house. E F

The committee did not accept the surveyor's computation based on the mid-1976 registered rents, nor his estimate of £15,200 for capital value. They took the view that there was insufficient evidence to enable them to proceed on the basis of present day market rents, and preferred to rely upon the fair rents fixed for 80 comparable houses by the determination of another committee (the Kennedy Committee) given about three months previously. In the result, they fixed the fair rent for a four-apartment house at £725 and for a five-apartment at £750, which represented a modest increase on those fixed by the rent officer. G

Before the Kennedy Committee, the landlords' witness had put forward a computation of fair rent based on a vacant possession capital value for a four-apartment house of £15,500, reduced by 33½ per cent. in respect of “scarcity,” a fair return of 7 per cent., and additions in respect of repairs, insurance and management, bringing out a final figure of £946. The committee took the view that the vacant possession capital value was properly to be estimated at £14,000, that a figure of 6 per cent. was appropriate for a fair return, and that 40 per cent. should be deducted as being what they regarded as appropriate for an area of “relatively high scarcity.” They H

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A accepted the landlords' figures for repairs etc., and in the result brought out a figure of £727.

The landlords appealed to the Court of Session under section 13 of the Tribunals and Inquiries Act 1958, their principal contention being that the committee had erred in law by failing to form any conclusion on the propriety of making a deduction in respect of "scarcity" from vacant possession capital value, and in relying on the decision of the Kennedy Committee, which was arrived at by making a deduction of that character.

B The appeal came before an Extra Division of the Inner House which by a majority (Lord Avonside and Lord Kincaid, Lord Dunpark dissenting) allowed the appeal and remitted back to the committee to re-assess the fair rents in the light of their opinions.

C The first matter for consideration is the true intendment of section 42 (2) of the Act of 1971. In my opinion it is clear that on a proper construction the subsection requires fair rents to be determined on the hypothetical basis that the house-letting market in the locality is in a state of equilibrium, in respect that the number of comparable houses available for letting does not substantially exceed the number of persons seeking to become tenants. If the actual state of affairs is that the market is unbalanced, in respect that the demand for houses to let substantially exceeds the supply, then D the rents actually paid in the market will reflect the imbalance, being higher than they would be in a balanced market. In that situation it will be necessary for the rent officer and the rent assessment committee, in so far as in striking a fair rent they rely on the rents actually being paid in the market, to apply to these rents a discounting procedure in order to eliminate from them the element which is attributable to the relative E scarcity of houses available for letting. Where some method of valuation other than comparison with market rents is adopted, the exercise will be less straightforward. But it will be necessary to proceed in such a way that the resultant figure of fair rent accords with the statutory hypothesis. The purpose of the enactment is plain. It is to secure that when market rents have been pushed up by a shortage of houses to let, tenants do not have to bear the burden of the increase over what would otherwise be fair F which is attributable to that shortage.

In the opinions of the majority of the Extra Division there are indications of a view that what section 42 (2) requires is that, whatever the actual state of the house letting market, it must be assumed to be in balance, so that the rents actually being paid in the market represent what would be expected to be paid in such a balanced market. If that is what the majority intended to hold, it is clearly incorrect, and indeed counsel G for the respondent landlords did not seek to support it.

What the respondents did seek to argue was that, since there was no evidence before the committee whose determination was the subject of appeal, or before the Kennedy Committee upon whose decision the former relied, tending to show that a shortage of houses to let had the effect of inflating the prices paid for houses for sale, it was erroneous to make any H "scarcity" deduction from vacant possession capital values in the process of determining fair rents on the basis of a fair return to the landlord. It was not disputed that both the present committee and the Kennedy Committee had before them cogent evidence of a serious scarcity of houses to let in the relevant locality.

As Lord Dunpark said in the course of his dissenting opinion, there would appear to be three main guidelines available in the calculation of a fair rent under the Act. The first is to have regard to fair market rents

for similar properties. The second is to compare registered rents for other similar protected tenancy properties. The third is to ascertain what would be a fair return to the landlord on the capital value of his house. I would observe that the third method, which represents some sort of application of what is known as the contractor's principle of valuation, seems to have gained considerable currency before Glasgow rent assessment committees. The contractor's principle is a notoriously unreliable method of valuation, normally used only as a last resort. It is also to be observed that not only in this case, but also in the Kennedy Committee's case and others which have been drawn to our attention, the valuer appearing for the landlords did not seek to support a figure of fair rent derived from a straight application of a suitable percentage return to his estimate of vacant possession capital value. A deduction of at least 33½ per cent. was invariably made. This tends to suggest that in the valuer's professional opinion the resultant figure would be unreasonably high if such a deduction was not made. The figure which would have resulted from the valuer's calculations in the present case would, in the absence of such a deduction, have amounted to about £1200, as against the figure of £855 which he actually put forward as being a proper estimate of the fair rent.

Whether or not a shortage of houses for letting has the effect of inflating the price paid for houses with vacant possession may not be capable of being precisely demonstrated, though it would appear not unreasonable to infer that such an effect is a likely one. Inability to find a house to let might well turn many persons seeking accommodation onto the house purchase market, and thus tend to create an upward trend in prices. However that may be, it would, in my opinion, be bad valuation practice to proceed upon a rigid rule of thumb basis of applying an assumed fair rate of return to vacant possession capital value. There are many factors which the valuer should keep in mind in order to arrive at a reasonable result. In *Skilling v. Arcari's Executors*, 1974 S.C.(H.L.) 42, Lord Morris of Borth-y-Gest said, at p. 53:

"A purchaser might be willing to pay a high price in order to have a house for his own personal occupation. That would be a personal circumstance which would have to be disregarded. Alternatively, a purchaser might have bought with vacant possession and with the intention of letting. He would know that, whatever was the sum that he had paid, a tenant under a regulated tenancy could seek a determination as to what, having regard to all the circumstances (except personal ones), was the fair rent. On the other hand, a purchaser might have bought a house with a sitting tenant and have paid a purchase price based upon his hope or expectation of receiving some particular sum (being either the then existing rent or some other sum) by way of rent. He would, however, always have to contemplate that under a regulated tenancy an assessment as to the fair rent could be sought."

This passage is of importance as illustrating the need, where the art of valuation is being exercised in the present context, to avoid rigidity of approach and have regard to all relevant circumstances. A list of prices paid for comparable houses with vacant possession may, without more, be an uncertain guide. There is no evidence either in this case or in the Kennedy Committee's case, to indicate whether the houses, the purchase prices of which were adduced in evidence, were bought for personal occupation or for investment purposes. The former may well be regarded

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- A as the more probable. The material must be handled with caution. As has been mentioned, it is apparent that many professional valuers acting for landlords have, in their application of this variant of the contractor's principle to the exercise of determining a fair rent, consistently made a substantial deduction from their estimates of vacant possession capital values. This shows that in practice they have indeed treated the raw material with caution. These deductions have been made because the
- B valuers concerned considered them necessary, in the exercise of their professional skill, in order to arrive at a figure of fair rent which corresponded to the statutory requirements of section 42 (1) and (2) of the Act of 1971. The deductions have been described as having been made to discount the "scarcity" element. It seems to me that this is no more than a compendious manner of describing the valuer's recognition that his
- C figure of fair rent had to take into account the statutory hypothesis postulated by section 42 (2). The attempt to erect this recognition into a breach of some supposed rule of law is misconceived. We are here concerned not with any rule of law but with an exercise of the valuer's professional skill.

- In all the circumstances I consider it to be clear that neither the committee in the present case nor the Kennedy Committee fell into any
- D error of law, and that both committees had evidence before them upon which they were entitled to reach the determinations they did. The committees were well qualified to assess the effect of the evidence, including among their membership, as each of them did, a chartered surveyor. I am of opinion, for the reasons I have indicated, that there are no grounds, upon which a court of law could properly interfere with the determinations.

- E I would therefore allow the appeal and sustain the determinations of the rent assessment committee. The appellants are entitled to their expenses before this House and in the Court of Session.

- LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Fraser of Tullybelton, Lord Keith of Kinkel and Lord Brightman. I entirely
- F agree with them and for the reasons therein given I too would allow this appeal and restore the finding of the committee.

- LORD BRIGHTMAN. My Lords, I am in entire agreement with the views expressed by my noble and learned friends, Lord Fraser of Tullybelton and Lord Keith of Kinkel.

- G The appeal before your Lordships is concerned with an application dated August 17, 1979, by the landlords for the registration of the rent of an unfurnished house, 49, Burnfoot Drive, Glasgow, which is let under a regulated tenancy to the appellant, Janet Boyd Husband. At the date of the application the rent payable was the equivalent of £420 a year. The new rent proposed by the landlords was £900. On January 14, 1980, the rent officer determined a fair rent of £680 a year, following which there was a reference
- H to the Rent Assessment Committee at the instance of the landlords. At the hearing, which took place before the committee in September 1980, the landlords' surveyor, Mr. McNeill, submitted, in a written proof of his evidence, that "having in regard to all the circumstances I consider that the fair rent as at August and September 1979 can be fairly stated at £855. . . ." In fact, the proof had originally specified £900 as in the application, but Mr. McNeill deleted this and inserted £855 after, no doubt, more mature consideration. The committee did not accept the rent officer's

determination, and raised the rent of number 49, Burnfoot Drive (and other similar houses comprised in concurrent applications) to £725. In reaching that conclusion, the committee expressed themselves as determining the fair rent by reference to 80 comparables which had been the subject matter of a decision of another rent assessment committee (the Kennedy Committee) on July 28, 1980, to which I shall refer as the Kennedy comparables. A

The landlords appealed to the Court of Session on three grounds (shortly stated): (1) The committee erred by "failing to take into account consideration of a fair return on capital, basing their decision exclusively upon comparison with a previous determination." (2) The committee erred by "failing to come to any concluded view on the appellants' argument as to the propriety of making a deduction for scarcity from capital value with vacant possession for the purposes of assessing a fair return on capital." (3) "That in any event the committee was not entitled to rely upon a comparison with the said previous determination. . . . The said previous determinations were criticised for making a scarcity deduction." B C

There is, I think, implicit in grounds (1) and (2), the proposition that the requirement in subsection (1) of section 42 to have regard to "all the circumstances" imposes on an assessment committee the duty to take into consideration "a fair return on capital" as one of "the circumstances." I disagree. I accept that there may be the exceptional case in which a committee are justified in taking into consideration what would be a "fair return on capital," leaving aside the precise definition of "capital" in this context. I do not accept that a committee's decision can be challenged as erroneous in law merely because the committee have failed to take into consideration a "fair return on capital" but have based their decision exclusively upon comparables. The Act is concerned with the determination of a "fair rent," that is to say, a rent which is fair to the landlord and fair to the tenant, and yield on invested capital is not an essential ingredient of that determination. If comparables are available which do not reflect or are discounted so as not to reflect, scarcity value, such comparables are the best guide to a fair rent. D E

Ground (3) appears to be that to which argument in the Court of Session was principally directed; the argument being that the Kennedy comparables were not true comparables because they were based upon a "fair return on capital" from which a deduction of 40 per cent. was made for "scarcity value." Lord Avonside, with whom Lord Kincaid concurred, expressed the opinion that (at least in the context of a "capital value" approach) such a deduction F

"is plainly wrong and ignores the provision of section 42 (2) of the Act. . . . My understanding [of the argument of counsel] was that it was said that the Act was designed to favour tenants. That suggestion is insupportable, looking to the provisions of the Act." G

Lord Avonside concluded his opinion by recommending that the five cases before the Court of Session

"should be sent back to the committees to proceed as accords, under direction that their use of a 'scarcity' element in their determination is wrong in law." H

One matter which seems to me to be clear beyond peradventure is that the Act was designed to favour tenants by protecting them from any increase of rent which would otherwise have been caused by demand exceeding supply. The Act requires the rent to be determined on the hypothetical

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Western Heritable Ltd. v. Husband (H.L.(Sc.)) Lord Brightman

- A basis of an equilibrium, i.e., there are x dwelling houses of the particular sort in question which landlords are desirous of letting, and there are x tenants who are desirous of renting accommodation of that sort; what in those circumstances is the "fair rent" for the landlords to demand and for the tenants to pay? In an area of scarcity that hypothesis inevitably favours tenants and disadvantages landlords, as section 42 of the Act of 1971 intended, as also did its predecessor section 27 of the Rent Act 1965.
- B If scarcity of accommodation causes the sale value of dwelling houses with vacant possession to be inflated, it seems to me that the use of that inflated value as a touchstone for a "fair rent" which has to be determined as if no scarcity of accommodation existed, would deprive section 42 (2) of its obvious purpose. I find myself in complete agreement with the reasoning of Lord Dunpark.
- C In so far as Lord Kincaid rested his opinion on the alternative ground that there was no evidence in the Kennedy case that the "capital value" of the Kennedy comparables was enhanced by scarcity of accommodation and that therefore the Kennedy comparables were not true comparables, I think that there was ample such evidence.

I would allow this appeal.

- D LORD TEMPLEMAN. My Lords, for the reasons given by my noble and learned friends, Lord Fraser of Tullybelton, Lord Keith of Kinkaid and Lord Brightman, I agree that this appeal must be allowed.

Appeal allowed with costs.

- E Solicitors: *Denton, Hall & Burgin for Baljour & Manson, Edinburgh for Bird Semple & Crawford Herron, Glasgow; Nabarro Nathanson for Breeze, Paterson & Chapman, Glasgow.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

F

[QUEEN'S BENCH DIVISION]

ADSETT v. WEST

G

1983 Jan. 20, 21, 24, 25, 26, 27;
Feb. 18

McCullough J.

Damages—Earnings, loss of—Loss of expectation of life—Death of young man—Single man's prospect of marriage—Likelihood of inheriting from rich father—Administrator's claim on behalf of estate—Calculation of compensation for lost years

H

The deceased was single and aged 26 when he was killed in an accident for which the defendant admitted liability. His father, the plaintiff, was a rich businessman and he and W. had been in partnership for many years in a successful furniture business. They were also partners in a hotel and restaurant business and they had started a third business that ran a health food restaurant but that business had ceased trading after the deceased's death. The deceased, like other members of the plaintiff's and W.'s families, held shares in the three businesses.

He had originally worked in the furniture business but at the time of his death he was dividing his time between the other two businesses. His capital interest in the businesses was £33,000 and his gross annual income from earnings and capital would have averaged over the past five years, £12,000. He lived with his parents without contributing to his keep and spent most of his income on sporting pursuits and in the company of a friend to whom he might have become engaged. She was working and had an earning potential. The plaintiff, who was 70, had intended to transfer his interest in the businesses to the deceased at some stage.

On the plaintiff's claim on behalf of the deceased's estate under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934:—

Held, (1) that, although it was well established that the deceased's estate was entitled to damages for the surplus of his income in the lost years after deduction of the sums the deceased would have spent on living expenses and his pleasures, he was a single man spending most of his income and any surplus in those years would have been no more than 15 per cent. of his net income; that he was a man that was likely to marry and probably to a woman that had her own income, and, therefore, the surplus should be increased by a moderate amount to 25 per cent. (post, pp. 441H—442B, H—443B, 451B—C, 463B—C, F—464A).

Pickett v. British Rail Engineering Ltd. [1980] A.C. 136, H.L.(E.); *Gammell v. Wilson* [1982] A.C. 27, H.L.(E.); *Kandalla v. British European Airways Corporation* [1981] Q.B. 158 and *White v. London Transport Executive* [1982] Q.B. 489 applied.

(2) That the prospects of inheritance in the lost years was a factor to be taken into account as the loss of the enjoyment of the income from that benefit was no different from that of income received from other sources; that the sum awarded for the loss of the prospect of an inheritance should be a moderate one and in the present case the sum should be assessed on the basis that the plaintiff would not have transferred all his shares in the partnership to the deceased but only a proportion thereof and that transfer would be in about 10 years from the date of trial (post, pp. 457E—F, 458D, F, 461B—D).

(3) That, since under section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 it was the deceased's cause of action that survived for the benefit of his estate, the loss that had to be quantified was the loss to the deceased and not the loss to the estate consequent on his death; that, although the deceased lost his earning capacity immediately before his death his capital remained intact; that, since the capital did not lose its capacity to earn income, such income was not to be taken into account in assessing the deceased's loss of income but should be balanced against that loss in assessing the damages to be awarded under the Act for the lost years; that, accordingly, since the loss of surplus income during the lost years was £31,800 and the income from the capital would be £44,698, there were no damages to be awarded for the lost years under the Act (post, pp. 451G, 452D—G, 456D—E, H—457A, 464A—B, C—D).

The following cases are referred to in the judgment:

Ashley v. Vickers, *The Times*, January 18, 1983.

Benson v. Biggs Wall & Co. Ltd. (Note) [1983] 1 W.L.R. 72; [1982] 3 All E.R. 300.

Cattle v. Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453.

Clay v. Pooler [1982] 3 All E.R. 570.

Domsalla v. Barr [1969] 1 W.L.R. 630; [1969] 3 All E.R. 487, C.A.

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- A** *Gammell v. Wilson; Furness v. B. & S. Massey Ltd.* [1982] A.C. 27; [1980] 3 W.L.R. 591; [1980] 2 All E.R. 557, C.A.; [1982] A.C. 27; [1981] 2 W.L.R. 248; [1981] 1 All E.R. 578, H.L.(E.).
Harris v. Empress Motors Ltd. [1983] 1 W.L.R. 65; [1982] 3 All E.R. 306.
Kandalla v. British European Airways Corporation [1981] Q.B. 158; [1980] 2 W.L.R. 730; [1980] 1 All E.R. 341.
- B** *Lawrence v. John Laing Ltd.* (unreported), May 5, 1982, Cantley J.
Liesbosch, The [1933] A.C. 449, H.L.(E.).
Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1978] 3 W.L.R. 955; [1979] 1 All E.R. 774, H.L.(E.).
Rooke v. Higgins (unreported), July 4, 1980, Chapman J.
Skelton v. Collins (1966) 115 C.L.R. 94.
Solomon v. D. & A. Transport Ltd. (unreported), February 26, 1981, McNeill J.
- C** *White v. London Transport Executive* [1982] Q.B. 489; [1982] 2 W.L.R. 791; [1982] 1 All E.R. 410.
Willshire v. Gardner (unreported), December 6, 1979, Griffiths J.

The following additional cases were cited in argument:

- D** *Bishop v. Cunard White Star Co. Ltd.* [1950] P. 240; [1950] 2 All E.R. 22.
Davies and Howland v. Shepherd (unreported), December 18, 1981, Stocker J.
Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601; [1942] 1 All E.R. 657, H.L.(E.).
Gavin v. Wilmot Breeden Ltd. [1973] 1 W.L.R. 1117; [1973] 3 All E.R. 935, C.A.
- E** *Heatley v. Steel Company of Wales Ltd.* [1953] 1 W.L.R. 405; [1953] 1 All E.R. 489, C.A.
Lavery v. Philpott (unreported), March 11, 1982, Park J.
Martin v. Darlington Insulation (unreported), July 29, 1980, Smith J.
Nutbrown v. Rosier, The Times, March 1, 1982, Aubrey Myerson Q.C. sitting as a deputy High Court judge.
Perestrello e Companhia Limitada v. United Paint Co. Ltd. [1969] 1 W.L.R. 570; [1969] 3 All E.R. 479, C.A.
- F** *Sullivan v. West Yorkshire Passenger Transport Executive* (unreported), December 17, 1980, Mustill J.
Thompson v. National Coal Board (unreported), March 29, 1982, Michael Davies J.

ACTION

- G** The following facts are taken from the judgment of McCullough J.
 Richard Stanley Adsett was killed in a road accident on March 8, 1980, at the age of 26. His father, the plaintiff Stanley Arthur Adsett, as the administrator of the deceased's estate, brought an action against the defendant, Ian Edward West, for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934. The defendant admitted liability.
- H** The plaintiff, who was now aged 70, was a successful businessman with interests in three partnerships in which the deceased had held shares. Much the most successful of the three partnerships was a business that the plaintiff had begun with Mr. Leonard Watts called Lenleys. It consisted of a number of shops selling furniture and soft furnishings. The net profit for the last four years had averaged £140,000 after charging depreciation but before payment of partners' salaries. Members of the plaintiff's and Mr. Watts' families had been taken into partnership and

recently two partners unconnected with the families had been appointed. A
 The deceased's share had been approximately a twelfth. A second partner-
 ship known as the Cathedral Gate Hotel and Restaurant mainly catered
 for tourists who visited Canterbury for the day. Since the 1970's, when
 it had enjoyed a boom in the tourist trade, moneys had been spent on
 improving the hotel and restaurant facilities and its profits for the last
 four years had been modest. The deceased's interest in that partnership
 had been a twelfth. The third partnership under the name Stanards had
 consisted of a furniture business, a health food shop and restaurant. It
 did not prosper. The furniture side was discontinued and Mr. Watts
 withdrew from the partnership. The shop was sublet and only the
 restaurant continued until the partnership ceased trading in July 1982.
 The deceased's share had been a quarter. At the time of his death on
 March 8, 1980, the deceased's capital in the three partnerships was valued
 at £33,000. C

The deceased had left school at 16 without passing any examinations
 at "O" level. He was at once taken into Lenleys where he worked until
 about 1976. He then started to help in the hotel. Although he was able
 in the field of hotel management, he did not bear any great responsibility
 for running the hotel. When the plaintiff and Mr. Watts were considering
 closing Stanards, he thought he could make a success of the health food
 restaurant and he was permitted to make the attempt. From about 1979
 until his death, he divided his time between the hotel and the health food
 restaurant. D

All the important decisions were taken by the plaintiff and Mr. Watts
 and all the partners were rewarded either as salary or profits sums which
 were most advantageous for the purposes of taxation. Salaries were not
 necessarily related to the amount of work done and the plaintiff and Mr.
 Watts' children received a share in the residual profits resulting from their
 fathers foregoing their salaries. In the last three years of his life, the
 deceased's income before tax from the partnerships was respectively, £7,884,
 £10,042 and £16,279. He also drew from the partnerships cash, cheques
 and motoring expenses at the rate of £5,500 per annum. E

The deceased had lived with his parents and contributed nothing to his
 keep. There were plans to convert a stable to a bungalow in the large
 garden of the parents' house so that the deceased could have a place of
 his own and perhaps in due course he and his parents might exchange
 homes. He was used to spending a great deal of money and the impression
 was of a man whose work was less important to him than his pleasure.
 He was a keen yachtsman and had a half share in a £10,000 yacht. He
 rode and was fond of skiing and he spent a lot of time with his friend, Miss
 Pope. There were indications that they might have become engaged. She
 was working and her earning capacity was assumed to have been £5,000
 to £6,000 a year. G

Lenleys, which had proved its stability over the years, was in the
 process of embarking on a large investment in a new shop and warehouse.
 That required long term borrowing arrangements and it was impossible
 to predict either its future profitability or the date when its profitability would
 be restored to the average of the last few years. The plaintiff's and Mr.
 Watts' management ability was proven but they were 70 and had reduced
 their activities to three days a week. Even if the time had come when the
 deceased had held one third of the families shares, it was doubtful if
 members of the families, except a son of Mr. Watts, would continue to
 retain as high a proportion of the shares in Lenleys as they did at present; H

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- A the deceased's future earnings would derive from the capital that he invested in the business. The hotel, in which a Mr. Shingler now worked in place of the deceased, was likely to continue to make a modest profit.

*Anthony Machin Q.C. and Christopher Sumner for the plaintiff.
Piers Ashworth Q.C. and Andrew Prynne for the defendant.*

B

Cur. adv. vult.

- February 18. McCULLOUGH J. read the following judgment. The plaintiff is the administrator of the estate of Richard Stanley Adsett, his only son, who was killed in a road traffic accident on March 8, 1980, as a result of the admitted negligence of the defendant. The action is brought for the benefit of his estate under the Law Reform (Miscellaneous Provisions) Act 1934.

Richard Adsett was 26, unmarried and without dependants. No claim is made under the Fatal Accidents Act 1976. There is a claim for funeral expenses of £399.34 (which is admitted) and for loss of expectation of life for which I award the conventional sum of £1,250.

- D The plaintiff is a successful businessman and from the age of 17, Richard Adsett worked in one or other of his three businesses, each of which was run as a partnership. Over the years Richard Adsett acquired a capital share in each partnership. His not inconsiderable income derived in part from his work and in part from this investment. It is said that had he lived his father would have been likely to pass to him, either in his lifetime or on his death, his own much larger share in the two businesses which survive.

Although not engaged to be married, he had a close friendship with a Miss Pope, who was a year or two younger and it is possible that they would have married. Richard Adsett spent a good deal of time with her and must have spent a certain amount of money on her. He had various other interests, mostly sporting and these took much of his income.

- F The case is unusual in that it calls for a decision not just as to the damages to be awarded on account of the deceased's inability to earn money by working in the "lost" years but as to whether any, and if so what, damages are to be awarded on account of his inability to enjoy the interest on the capital which he had already acquired in his lifetime and on such further capital as he might have acquired from his father.

- G There are other issues. Some are fact and figures. The principles upon which damages in cases of this type should be assessed are the subject of contention in three respects in particular: (a) what is the correct interpretation to be put on the word "surplus" which is used in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136 and *Gammell v. Wilson; Furness v. B. & S. Massey Ltd.* [1982] A.C. 27; (b) what is the relevance of the degree of probability that the deceased would have married; and (c) when does a matter for legitimate forecasting on the basis of probabilities shade into something involving a degree of speculation which the court ought not to embark upon?

H It is well established that in a case such as this the deceased's estate is entitled to damages on account of the loss of his earnings in the "lost" years. This loss is not to be awarded in full. There must be deducted a sum to represent what was variously described in the House of Lords in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136 as the victim's "living expenses" (Lord Wilberforce, p. 151A, Lord Salmon, p. 154C and

Lord Scarman, p. 171B) and as "the total sum which [he] would have been likely to expend upon himself" (Lord Edmund-Davies, p. 163D) and in *Gammell v. Wilson* [1982] A.C. 27 as "the amount he would have spent . . . upon his own living expenses and pleasures" (Lord Diplock, p. 65A); "the cost of maintaining himself" (Lord Fraser of Tullybelton, p. 71H) and "the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve" (Lord Scarman, p. 78H).

There can be no doubt that the cost of the victim's pleasures must also be deducted. This follows from the decision in *Gammell v. Wilson* [1982] A.C. 27. Although Lord Diplock was alone in referring to the victim's pleasures (p. 65A) Tudor Evans J. had at first instance deducted what he estimated the deceased would have spent both in maintaining himself and upon enjoying life and in the House of Lords he was held to have made no error of principle (Lord Edmund-Davies, p. 71D, Lord Fraser of Tullybelton, p. 72B, Lord Scarman, p. 80B).

Nor I think can it any longer be doubted that, in the case of a married man with dependants, the calculation is to be made according to the same principles as would apply to a claim under the Fatal Accidents Act 1976: see *Benson v. Biggs Wall & Co. Ltd.* (Note) [1983] 1 W.L.R. 72, Peter Pain J.; *Clay v. Pooler* [1982] 3 All E.R. 570, Hodgson J.; *Harris v. Empress Motors Ltd.* [1983] 1 W.L.R. 65, McCowan J.; and *Lawrence v. John Laing Ltd.* (unreported), February 5, 1982, Cantley J.

Mr. B. A. Hytner Q.C., sitting as a deputy judge in the Queen's Bench Division in *Gammell v. Wilson* had said as much:

"What then has to be considered where a man has dependants? It seems to be, as in Fatal Accidents Act cases, the net earnings after tax and the sum, as it were, saved by the death. In practical terms this means those sums spent solely by the deceased on himself, whereas sums spent on the family—such as rent, rates and so on—are not deducted from the net wage. However personal living expenses, that is: his own food, clothing and entertainment are deducted."

(*Kemp & Kemp, The Quantum of Damages*, vol. 1, Law and Practice, Fatal Accident Acts, rev. ed. (1982) (Loose leaf reprint), p. 26009.)

Mr. Hytner's judgment came under close scrutiny both in the Court of Appeal and the House of Lords and, although these remarks were not essential to his decision, it seems unlikely that none of the eight judges who read them would have said so had they believed them to be wrong. Megaw L.J. (whose dissent was on a different and more fundamental point) took the same view as Mr. Hytner ([1982] A.C. 27, 40F–G) and said that he had made no error of principle (p. 41E). Brandon L.J. agreed in terms (p. 44D) Lord Fraser of Tullybelton said the same (p. 72B) and Lord Scarman said that he had directed himself correctly in law (p. 79C). His assessment was upheld by all eight judges.

In general the bulk of a married man's income benefits his dependants and the proportion spent for his own benefit alone is small. In the case of the ordinary wage earner the customary calculations and estimations which have been made for many years in Fatal Accidents Acts cases generally reveal that the deceased would have spent only about a quarter or a third of his income on himself alone. If it be right (and it generally is) to assume that any money he would have saved would have been for the benefit of his dependants as much as his, the element of savings will be part of the dependency. These, as I understand them, are the reasons why

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A the "surplus" for Law Reform Act purposes will in the case of a married man generally be the same as the dependency for Fatal Accidents Acts purposes and will usually be of the order of two-thirds or three-quarters.

B Where, however, the court is considering a "lost years" claim in respect of a single man (particularly if he is without dependants) the "surplus" will be very much smaller because the cost of maintaining his house, like the cost of his food, clothes, motoring, holidays and other pleasures, must first be deducted. All that will remain will be that which would have been saved and that which he would have spent on, or given to, others. Even then there is room for argument as to whether the full amount of these sums should be regarded as "surplus"; if a young man takes a girl out for the evening is not this a pleasure, and if he saves for his retirement is he not, to an extent at least, setting aside money for his future living expenses?

C These considerations demonstrate why in the present case Mr. Machin submits that I ought to treat as "surplus" whatever the deceased spent on his girlfriend, and why Mr. Ashworth submits that much of it should not be so regarded. There is a similar difference between them over the approach which I should adopt to such income as he would have been likely to leave in the business over and above that which he would have been likely to draw out.

D But the major and much the most important difference between the parties is, understandably, over the assumption which I should make as to whether or not he would have married. Mr. Machin invites me to hold he probably would have married Miss Pope in the summer of 1981 and that, for the reasons I have already given, I should find that there would have been a "surplus" of two-thirds or three-quarters. Mr. Ashworth submits that the question is conjectural, that the assumption should not be made and that decided cases establish that I should not make it. He relies in addition on the statements of principle to the effect that the damages to be awarded in this type of case should be moderate and he points to the generally low level of awards which have been made in cases covering men who were single.

F To some extent these questions overlap and in considering the authorities it is convenient to take them together. This will involve looking at the statements of general principle in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136 and the eight cases to which my attention has been drawn which concerned unmarried victims, namely, *Gammell v. Wilson*; *Furness v. B. & S. Massey Ltd.* [1982] A.C. 27; *Kandalla v. British European Airways Corporation* [1981] Q.B. 158; *Willshire v. Gardner* (unreported), December 6, 1979, Griffiths J.; *Rooke v. Higgins* (unreported) July 4, 1980, Chapman J., noted in *Kemp & Kemp, The Quantum of Damages*, vol. 1, p. 26018, *Solomon v. D. & A. Transport Ltd.* (unreported), February 26, 1981, McNeill J., noted in *Kemp & Kemp*, vol. 1, p. 26015; *White v. London Transport Executive* [1982] Q.B. 489, Webster J. and *Ashley v. Vickers*, *The Times*, January 18, 1983, Croom-Johnson J.

H In *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136 Lord Wilberforce said, at p. 150:

"My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the 'lost years' to be taken account of comes closer to the ordinary man's expectations than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not

saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated—a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases. In that of a young child (cf. *Benham v. Gambling* [1941] A.C. 157), neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf. *Skelton v. Collins* (1966) 115 C.L.R. 94) the value of 'lost' earnings might be real but would probably be assessable as small." A B

Lord Salmon said, at p. 153-154:

"Damages for the loss of earnings during the 'lost years' should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering, can be naturally measured in money. The amount awarded will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration." C D E

The first claim under the Law Reform (Miscellaneous Provisions) Act 1934 which called for the application of these principles was *Gammell v. Wilson* [1982] A.C. 27 which was tried by Mr. Hytner Q.C. in July 1979. The facts are important; and so is his judgment as a whole because, as I have already said, his assessment of the damages was upheld both in the Court of Appeal and the House of Lords and he was said to have made no error of principle. His judgment appears in *Kemp & Kemp*, vol. 1, p. 26004. F

The case concerned a 15-year-old gypsy boy who had been working for a year. Prior to his death he was earning £20 per week, out of which he paid his mother £5 for his keep. He wanted to become an antique dealer and was saving up for a van. His father who was 54 was in poor health and did not work; he had a short expectation of life. The possibility that the son would have helped his father financially in future years led Mr. Hytner to assess his Fatal Accidents Act dependency at £250. Although the deputy judge recognised that there would have been a substantial risk of the son meeting with financial disaster if he had embarked on his intended career and that he would probably have become an itinerant worker doing a variety of unskilled labouring jobs, there was some chance of his being reasonably financially successful and he had no doubt that if his mother had fallen on hard times he would have supported her. He assessed the mother's dependency at £1,750. In reaching this figure he took account of the fact that the boy would probably have married and have had children of his own to keep. G H

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A Turning to the question of the "lost years" he said, at p. 26010:

"If the principle of deducting from the net wage only the living expenses solely referable to the earner himself were to be applied to this claim the sum awarded would be very considerable. The probability, as I find, is that this young man would have married in his early 20's and had children. This is statistically so and there were no contra indications given in evidence to undermine it. Thus, projecting forward, it is hardly vague speculation to assume that only the smaller portion of his future earnings over the years would have been attributable to his own sole personal expenditure. Such an assessment in the case of this youth who had just embarked on his working life seems, however, to be out of line and in conflict with other observations in *Pickett*, which it seems to me I ought, if possible to follow."

C He then cited the passages from the speeches of Lords Wilberforce and Salmon which I have already set out and he continued, at p. 26011:

"It is possible to reconcile the need to restore the dependants' position to a realistic level with the clear indication given by Lord Wilberforce and Lord Salmon, that in cases such as the instant one the damages should be moderate. In my judgment the reconciliation lies in what I would call the joint expenses. In the case of a youth, unmarried at the time of his death, it seems to me that I ought initially to regard all of his true living expenses as deductible, and that I ought not to speculate at all as to whether in the lost years others might have had joint use of part of those expenses and part of the remainder. Taking a multiplier of 16 for the lost years and an overall average surplus of £8 per week over that period, which is, in fact, but a small proportion of the net national average wage and bearing in mind, as I do, that the early years weigh more heavily in the average than the later years, I assess the capital value of this claim at £6,656."

F The £8 must have included an appropriate figure to represent what the boy would have devoted to his parents' dependency on him. The remainder must have been a very small proportion indeed of what he would have been likely to earn in adult life. Even so, to one of their Lordships (Lord Fraser of Tullybelton) the award seemed high.

Since this approach was approved it must follow that the House of Lords approved the calculation of the surplus on the assumption that the boy would have remained single, despite the finding that it was possible that he would have married.

G The facts of *Furness v. B. & S. Massey Ltd.* [1982] A.C. 27 and the judgment of the trial judge, Tudor Evans J., are important for the same reasons, for, as I have already said, he too was held to have made no error of principle. Mr. Furness was a 22-year-old miller who would have been earning £4,063 per annum net by the date of trial. He lived at home and did not go out with girls. He had many other interests and the judge found that his pleasures probably used up a fair proportion of his income.

H Both counsel agreed that the fact that he would probably have married should be disregarded when assessing the Law Reform Act claim.

The judge valued his surplus at one-third while he was at home and one-quarter thereafter. These figures must have taken account of the fact that at the date of his death he was contributing to the support of his parents and would have done so to the extent of £468 a year between the date of the trial and his leaving home. If this is taken out of the one-third,

the remaining surplus in that period is reduced to rather less than one-quarter of his assumed net income, that is, roughly the same proportion as in the later period. A

Although the award was not upset, all four members of the House of Lords who commented on its size thought it was high: (Lord Diplock, p. 62E; Lord Edmund-Davies, p. 71D; Lord Fraser of Tullybelton, p. 72B; Lord Scarman, p. 80B).

Two further cases concerning single victims had been decided before *Gammell v. Wilson* [1982] A.C. 27 reached the Court of Appeal and it is convenient to consider them now. The first was *Kandalla v. British European Airways Corporation* [1981] Q.B. 158 in which Griffiths J. decisively rejected the submission that he should assume that two female doctors of 27 and 31 would have married and that their "surplus" would then have risen to 40 per cent. of their incomes. He said, at p. 173: B

"If I did this it would mean that I was speculating as to whether they would marry, speculating as to whether they would have children and then awarding a sum of money the only social justification of which is to provide support for husbands and children when in fact no such dependants do or can exist. This seems to me an absurdity." C

In *Willshire v. Gardner* (unreported), December 6, 1979, Griffiths J. was considering the claim of a man of 23 who died in January 1978. For two years he had been engaged to a Miss Brooker, a fully qualified midwife who gave evidence. They had planned to marry on April 1, 1978. They had both been saving and had contributed equally to a building society account. They had already bought a house in their joint names and had taken possession of it the day before the accident. The judge calculated the "surplus" in the way I believe he would have done had the marriage already taken place. It is significant that, while he assumed that the marriage would have taken place, he made only the smallest allowance for the fact that the couple might have had children. And this despite Miss Brooker's evidence (which there is no indication that he doubted) that they were anxious to have children as soon as they could. D

He said: E

"Had children been born to them no doubt some of the money which was currently being spent on themselves would have been applied to caring for and bringing up the children. However, there is no certainty that they would have had children, although one hopes of course they would. It is therefore an unrealistic exercise to calculate the damages on the basis that they might have had children who would have needed support, when, unhappily, such an event can never take place." F

Having arrived at a figure of £21,700 he said: G

"I increase that sum by a modest amount for the speculative possibility of children and increased earnings by the deceased. I do not think it is right, particularly in this class of case, to make any great increase and I round the figure up to £23,000." H

He then added a further £1,950 which I think must have been on account of the period between death and trial.

In the case of a married man the effect of his having children is usually to increase the dependency upon him from about two-thirds to about three-quarters of his net income. This is a modest amount—about 8 per cent. of his net income.

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- A In *Willshire v. Gardner* (unreported), December 6, 1979, the dependency of the deceased's wife was assumed to have been lower than it otherwise would have been because of her own earning capacity. To have children she would have had to give up work, at any rate for some time, and may only thereafter have worked part time. Thus, in her case, had children been assumed, one would have expected them to have made a greater increase in the dependency. Griffiths J.'s increase of £1,300 (or
- B £93 per annum) represented only about 2 per cent. of the deceased's assumed net income of £5,600 per annum—a modest increase indeed, particularly when it is remembered that it also took account of the possibility that the deceased's earnings would have increased.

- This, like *Gammell v. Wilson* [1982] A.C. 27 is another instance where an occurrence, which must have been probable, and indeed very probable,
- C was regarded as speculative and was almost wholly discounted.

One further case was decided before *Gammell v. Wilson* reached the House of Lords and, although it was not there referred to, I mention it now. This was *Rooke v. Higgins* (unreported), noted in *Kemp & Kemp*, vol. 1, p. 26018, a decision of Chapman J. in July 1980.

- The deceased was 19; he would have become engaged in three months and would have married within two years. Mr. Ashworth, reading from
- D a transcript of the judgment, which I have not seen, tells me that the young woman whom he would have married gave evidence and that the judge found that he had no doubt that he could accept that marriage on her 18th birthday in May 1978 was “on the balance of probability pretty well a forgone conclusion.” By the date of the trial the deceased would have been earning £5,000 net per annum. A post trial multiplier of 12 was
- E applied to £1,250 (that is, to 25 per cent. of the net income) and then £5,600 was deducted for uncertainties. This would have had the effect of reducing the £1,250 to £783 per annum (just over 15 per cent. of the net income). Such a figure cannot have included the cost of a house in the surplus and I can only assume that, despite his findings about the likelihood of marriage, Chapman J. assessed the loss on the basis that the deceased stayed single.

- F When *Gammell v. Wilson*; *Furness v. B. & S. Massey Ltd.* [1982] A.C. 27 were heard in the House of Lords, Lord Scarman, speaking of the principles to be applied in the assessment of damages in lost years cases, said, at p. 78:

- “The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself
- G often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellant in *Gammell's* case was disposed to argue by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a ‘conventional’ award in a case of
- H alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere

speculation. No estimate being possible, no award—not even a ‘conventional’ award—should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim: it would depend on the evidence. A teenage boy or girl, however, as in *Gammell's* case may well be able to show either actual employment or real prospects, in either of which situations there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence upon which a fair estimate of loss can be made. A man, well established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based upon it.”

Thus there is a band of possible circumstances. At one end lie those where the making of forecasts would be pure speculation and must therefore be avoided. At the other end a fair estimate of loss can be made. In between are cases where a claim is, at any rate, assessable; *Gammell* was such a case. Where does the assessable shade into the purely speculative? The question is incapable of any more satisfactory answer than that it must be a matter for the judgment of the tribunal of fact.

In the field of personal injury litigation one quickly becomes used to making estimates of what would probably have happened had a man not been injured and what will probably happen now that he has been. His wages might have risen for one reason or another; they might have fallen for other reasons, the likelihood of which is neither more nor less capable of estimation. It may be impossible to say to what extent they would have fallen, if they had, or to what extent they would have risen, if they had. So one assumes that they would have remained the same, and goes on to consider the next set of imponderables. He may or may not develop osteo-arthritis. What are the chances? 30 per cent. So that is built into the forecasting. If it does develop will he need an operation? If so, when? How long would he be away? What work could he do afterwards? What would he earn? And so on. It is, in a sense, all speculation; yet it is done all the time. The most complimentary description of it is a process of imprecise averaging.

Almost all of the important aspects of life can be forecast on the basis of probability: that a child will reach maturity, that he will be fit enough to work, that he will probably obtain employment, probably marry and probably have children. Where the range of options is wide resort can be had to averages, such perhaps as an 88 per cent. chance of being in employment and a national average wage of so much per year.

But, because it *can* be done, is it the sort of exercise that *should* be done in cases of this kind? This, essentially, was the question Mr. Hytner asked himself in the passage which I first quoted from his judgment. Basing himself on what Lord Wilberforce and Lord Salmon had said in *Pickett* he decided not; and his approach was upheld.

I have carefully considered whether the passage which I have last cited from Lord Scarman's speech in *Gammell* requires me to adopt a less restrictive approach. I have come to the conclusion that it does not. Had Lord Scarman thought that it was unreasonable to ignore what Mr. Hytner had found to be the probability of marriage, he would surely have said so. He did not; on the contrary he regarded Mr. Hytner's approach as reasonable.

Lord Diplock clearly regarded the exercises which both Mr. Hytner

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A and Tudor Evans J. had had to conduct as containing a great deal of speculation as the following passage shows, at p. 65:

B “My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a well-settled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the lost years may not involve what can only be matters of purest speculation. But as the instant appeals demonstrate and so do other unreported cases which have been drawn to the attention of this House, in cases where there is no such settled pattern—and this must be so in a high proportion of cases of fatal injuries—the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by C different judges are likely to differ widely—yet no-one can say that one is right and another wrong.”

Lord Edmund-Davies, who perhaps came nearer to Lord Scarman in this, said, at p. 71:

D “More cogent is the further criticism that ‘any assessment is at best speculative, usually pure guesswork, and where there is any basis for making a calculation such a basis is frequently unreal.’ It is true that the task confronting Tudor Evans J. was difficult, but, even so, there was available to him the sort of exiguous material which frequently has to be dealt with in the courts.”

Lord Fraser of Tullybelton, said, at pp. 71–72:

E “It is particularly difficult to justify the law in cases such as the present, in each of which the deceased was a young man with no established earning capacity or settled pattern of life. In such cases it is hardly possible to make a reasonable estimate of his probable earnings during the ‘lost years’ and it is, I think, quite impossible to take the further step of making a reasonable estimate of the free balance that would have been available above the cost of main- F taining himself throughout the ‘lost years.’ The amount of that free balance is the relevant figure for calculating damages. The process of assessing damages in such cases is so extremely uncertain that it can hardly be dignified with the name of calculation; it is little more than speculation. Yet that is the process which the courts are obliged to carry out at present.”

G Lord Russell of Killowen said at p. 74F that what was involved in cases like *Gammell* and *Furness* was the “almost grotesque embodiment of estimates, or rather guesses.”

H There are, of course, variations in emphasis in these passages. What is constant is that no member of the House thought that Mr. Hytner had either departed from the spirit of the *Pickett* case [1980] A.C. 136 or erred in the principles to be applied in a case where the victim had died. I regard myself as bound to adopt a similar approach, making due allowance, of course, for the fact that each case depends on its own facts.

This accords with the approach of Griffiths J. in *Kandalla v. British European Airways Corporation* [1981] Q.B. 158 in relation to the possibility of marriage and, more significantly, with his approach to the possibility of children in *Willshire v. Gardner* (unreported), December 6, 1979. The same can be said of the next two cases to which I must refer.

The first is *Solomon v. D. & A. Transport Ltd.* (unreported), February 26, 1981, noted in *Kemp & Kemp*, vol. 1, p. 26015, where McNeill J. was considering the case of a 22-year-old driver who lived with his mother, who was dependent on him. The judge adopted a "just and moderate" approach and said that caution should be used. He divided the total multiplier of 16 into three periods of 2, 3 and 11 years in respect of which he assessed the "surplus" at 40 per cent., 30 per cent. and 20 per cent. respectively. The third period represented the time after he would have left home for marriage or other reasons. In the first two periods he was assumed to be living at home and during this time it must be assumed that the surplus would have included his mother's dependency upon him.

So here again is a case where statistically there must have been a high probability of marriage; yet a figure of only 20 per cent. was taken. The probability must have been ignored.

In *White v. London Transport Executive* [1982] Q.B. 489, Webster J. was dealing with a claim in respect of a single man of 25. Having reviewed the speeches in detail in both *Pickett* and *Gammell* he said, at p. 499:

"Although it seems to me in some ways artificial to do so, for reasons I have already given it appears that he is to be treated for this purpose as an eternally single man, on the principle, I suppose, that the money he in fact spends on his family, if he has one, or if it is likely that he will have one, is money which would be available, after making provision for all the matters I have referred to, to be spent in other ways if he so desired; that is to say, if he were to prefer to spend it in other ways rather than to have a family. If he is to be treated in this way it must follow that, although the House of Lords, as I have mentioned, said that the award of damages should be moderate, his notional surplus must be large enough to cover at least a not insubstantial part of the cost of maintaining a family, for although in the case of a man in the deceased's circumstances it can be regarded as probable in normal circumstances that his wife, if he were to marry, would do some paid work from time to time, it cannot be supposed that she alone would pay for the housing and maintenance of the children."

Mr. Machin is critical of this passage. He submits that Webster J. was wrong to treat the deceased as an eternally single man, and he submits that the judge fell into further error in equating the situation of a man who left home to live on his own with that of a man who left home to live with a wife: see p. 500H.

I do not accept these criticisms. As to the first, *Gammell's* case [1982] A.C. 27 establishes that Webster J. was right. The same had been done in *Rooke v. Higgins* (unreported), July 4, 1980 (which was cited to him) and in *Solomon v. D. & A. Transport Ltd.* (which was not cited to him), and it had been conceded (by Mr. T. P. Russell Q.C. for the plaintiff) in *Furness v. B. & S. Massey Ltd.* [1982] A.C. 27. If this passage signifies any departure from what had gone before, it was to give rather more, not less, recognition to the factor of marriage by saying that it was to be borne in mind when quantifying the surplus. The second passage was not, I think, meant to be read in isolation. It comes in the middle of a section containing arithmetical calculations, not all of which I follow, and I will say no more about it.

The last case is the most recent, *Ashley v. Vickers*, *The Times*,

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- A January 18, 1983, a decision of Croom-Johnson J. It is so briefly reported that I do not think I can usefully draw any conclusion from it, though it is right to note that it was said:

"The prospect of marriage of the deceased had to be taken into account, as on marriage many of a bachelor's expenses were directed into supporting the wife and family."

- B To what extent the judge took it into account does not appear.

Having considered the authorities as a whole, I am satisfied that I must be moderate in my approach and that, because the deceased was single at the date of his death, I should regard him as such for the purposes of the lost years except in so far as there are compelling reasons to do otherwise. While each case depends on its own facts, it is useful to bear in mind the generally low percentages of lost income which have been

- C treated as surpluses in the decided cases relating to single men.

I turn next to the question of what attention is to be paid to the fact that a proportion of the income which the deceased would have enjoyed in the lost years would have been earned by capital of which he died possessed. Mr. Machin submits that no distinction can be drawn between it and the income which he would have earned by work; he lost the opportunity to deal with and dispose of the one as much as the other. The fact that it is now in the hands of his estate, which happens to be suing in his place, is immaterial. Mr. Ashworth submits that to take it into account would be to compensate for a loss which has not occurred; the deceased is dead; his earning capacity died with him, but his capital lives on; it has been earning interest ever since, and will continue to do so, just as if he had lived. The deceased and his estate are one and the same.

- E There is no authority on the point and the matter must be considered on general principles. I start with section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934. So far as material, it says:

"Subject to the provisions of this section, on the death of any person . . . all causes of action . . . vested in him shall survive . . . for the benefit of, his estate."

- F Section 1 (2) and in particular section 1 (2) (c), which fell for consideration in *Gammell* has, as the parties agree, no application to this question. The loss for which the plaintiff claims damages is not a "loss" within the meaning of section 1 (2) (c); nor are the damages he claims a "gain."

- G When Mr. Ashworth says that the deceased and his estate are one and the same, he may be right, but this entices one on to dangerous ground. I have no doubt that Mr. Machin is right in saying that the loss must be considered as it would have been in the assumed moments between the commission of the tort and the occurrence of death. What has to be quantified is not the loss to the estate consequent on the death; it is the loss to the deceased. It is his cause of action which survives.

- H Mr. Machin submits that it follows from the decisions in *Pickett* and *Gammell* that loss of investment income must be taken into account. In particular he relies on the following passages from the speech of Lord Wilberforce in *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136. The first one is, at p. 150A: "Future earnings are of value to him in order that he may satisfy legitimate desires . . ." The next is at p. 149:

"To the argument that 'they are of no value because you will not be there to enjoy them' can he not reply, 'yes they are: what is of value to me is not only my opportunity to spend them enjoyably, but to use

such part of them as I do not need for my dependants, or for other persons or causes which I wish to support. If I cannot do this, I have been deprived of something on which a value—a present value—can be placed ’? ” A

The third passage is, at p. 150:

“ My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the ‘lost years’ to be taken account of comes closer to the ordinary man’s expectations than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated—a man denied it would not.” B C

The fourth passage is, at p. 151:

“ . . . the amount to be recovered in respect of earnings in the ‘lost’ years should be after deduction of an estimated sum to represent the victim’s probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus.” D

Although Lord Wilberforce in each passage confined himself to “earnings,” all these passages, submits Mr. Machin, are as true of investment income as of earned income.

To my mind there is a clear factual distinction, which the “ordinary man” would at once appreciate, between earned income and investment income. Immediately before he dies the deceased has lost his earning capacity, but his capital remains and with it its capacity (not his) to produce investment income. All that is common to the two is that he has lost the opportunity to use each *as and when they accrue* and he has lost the enjoyment of doing so. E

As I read Lord Wilberforce’s remarks in the last of the passages that I cited, what he thought significant was the victim’s loss of opportunity to use his earnings. In his opinion “the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others.” (p. 151) F

By dying, a man loses the opportunity to provide for his dependants and others out of future earnings from work, but he does not lose the opportunity to provide for them out of income earned by capital of which he dies possessed. This he can achieve by suitable testamentary disposition, if this is required. The only opportunity which has gone is the opportunity to change his will—or to make one if he has not done so already. G

Lord Wilberforce, like Lord Salmon and Lord Edmund-Davies, referred throughout to loss of earnings, never to loss of income or loss of financial expectation. In the light of Lord Russell of Killowen’s dissenting opinion which dealt with financial expectations other than earnings, and of which I assume they had advance intimation, it must follow that none of the three wished his opinion to be taken as extending beyond loss of earnings. H

I see nothing in Lord Wilberforce’s speech which requires me to hold that Mr. Machin’s submission is correct; on the contrary the indications are the other way.

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A Lord Salmon said that it would be grossly unjust to the plaintiff and his dependants if the law were to deprive him from recovering for the loss of his earnings during his lost years. But there is no such injustice in excluding a claim of the type which Mr. Machin makes here, for a man can, as I have said, provide for his dependants from the capital of which he dies possessed. It is no answer that he may devise it elsewhere; so may he his Law Reform Act damages.

B Lord Salmon's conclusion was reinforced by the judgments in *Skelton v. Collins* (1966) 115 C.L.R. 94, the Australian case, and he selected for citation that part of the judgment of Windeyer J. which said that a man should be compensated for the destruction or diminution in his *capacity* to earn money ([1980] A.C. 136, 158F). The same passage appealed to and was cited by Lord Edmund-Davies (p. 162F-G). I can detect nothing

C in the speeches of either Lord Salmon or Lord Edmund-Davies to suggest that they would not have regarded the capacity of a man's capital to earn money after his death, particularly when allied with his testamentary capacity, as constituting an important distinction.

Lord Russell of Killowen, who dissented, dealt expressly with consequential problems which he foresaw in cases involving victims who had lost the opportunity to enjoy unearned income.

D Mr. Machin submits that his argument is supported by this passage in Lord Russell of Killowen's speech. He said, at p. 165:

"I have stated the problem without confining it to earnings in the lost years. Suppose a plaintiff injured tortiously in a motoring accident, aged 25 at trial, with a resultant life expectation then of only one year. Suppose him to be a life tenant of substantial settled funds. If the lost years are to be brought into assessment of damages presumably allowances must be made for that part of the life interest which he would have received but will not receive. So also if he had a reversionary interest contingent upon surviving a life in being then aged 60: he will have been deprived of the probability of the funds coming to him during the lost years. Again he might at the trial be shown to be the sole beneficiary under the will of a rich relation whose age made it probable that the testator would die during the lost years, and whose testimony at the trial was that he had no intention of altering his will: in such cases presumably an allowance in damages would require to be made for the lost, and may be valuable, *spes successionis*: unless the testator was an ancestor of the plaintiff and the plaintiff was likely to have children surviving him (section 32, Wills Act 1837)."

G I am grateful to Mr. Ashworth for pointing out that the reference to section 32 of the Wills Act 1837 (7 Will. 4 & 1 Vict. c. 26) should have been printed as a reference to section 33.

H Mr. Machin argues that the passage indicates that Lord Russell of Killowen could see no distinction between loss of private income and loss of earnings. However, as Mr. Ashworth has shown, in each of the three examples chosen by Lord Russell of Killowen no capital sum would pass to the estate. Hence the all important exception of the situation covered by section 33 of the Wills Act 1837. I infer that he specifically chose examples of this type because it never occurred to him that, even if the view of the majority were accepted, it would follow that damages might be recovered for loss of income from capital which had passed from the deceased to his estate. Contrary to Mr. Machin's submission, I think that Lord Russell of Killowen also supports Mr. Ashworth.

Lord Scarman agreed with Lord Wilberforce, Lord Salmon and Lord Edmund-Davies. Dealing, at p. 169G, with what he called Lord Russell of Killowen's fourth objection, namely:

"if damages are recoverable for the loss of the prospect of earnings during the lost years, must it not follow that they are also recoverable for loss of other reasonable expectations, e.g. a life interest or an inheritance?"

He said, at p. 170C, that he did not regard this consequence as objectionable. After reciting part of paragraph 90 from the Law Commission Report on Personal Injury Litigation Assessment of Damages (1973) (Law Com. No. 56) he said, at p. 170E:

"For myself, as at present advised (for the point does not arise for decision and has not been argued), I would allow a plaintiff to recover damages for the loss of his financial expectations during the lost years provided always the loss was not too remote."

Paragraph 90 (in full) and paragraph 91 read:

"90. We are also of the opinion that, in line with the reasoning of the Australian High Court in *Skelton v. Collins*, the plaintiff should be entitled to compensation for other kinds of economic loss referable to the lost period. A person entitled by will to receive an annuity for his life would, if his life were shortened by the defendant's fault, lose the capacity to receive the annuity during the lost period, no less than he would lose his earning capacity. There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits. The loss must be regarded as a loss of the plaintiff; and it is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test."

"91. A plaintiff's income may, however, come from dividends paid on capital assets and, as these assets will themselves, subject to death duties, be able to pass, on his death, to his dependants, we consider the court must have a discretion to ignore such lost income in the lost period in its assessment of damages (see the proviso to clause 2 (2) (b))."

Each party seeks to interpret Lord Scarman's speech favourably to him after reference to these paragraphs. Mr. Ashworth draws attention to the fact that the words immediately before the part of paragraph 90 which Lord Scarman cited were a further example of a situation where the capital would not pass to the estate; it is therefore to be inferred that he was not contemplating a situation such as the present. For the plaintiff it is argued that, in the light of what Lord Russell of Killowen had said, it is remarkable that, if Lord Scarman disagreed with paragraph 91, he did not go on to say so. I am therefore asked to infer that he did agree with paragraph 91. I do not think it would be right to draw either inference. What is clear is that Lord Scarman was deliberately leaving the whole question of unearned financial benefits for another day.

Before leaving Lord Scarman's speech I should cite a further passage [1980] A.C. 136, 170:

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- A "The plaintiff has lost the earnings and the opportunity, which, while he was living, he valued, of employing them as he would have thought best. Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his money upon good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss. The logical and philosophical difficulties of compensating a man for a loss arising after his death emerge only if one treats the loss as a non-pecuniary loss—which to some extent it is. But it is also a pecuniary loss—the money would have been his to deal with as he chose, had he lived."
- B

- C This passage starts with a reference to loss of earnings, not to loss of financial benefits in general, and it may well be that in it Lord Scarman was considering only loss of earnings. But, whether this be so or not, the last sentence does not, I believe, lend the support to Mr. Machin which might at first appear. Once dead it would no longer be open to a victim to deal as he chose with the income which accrued after his death from the capital of which he died possessed, but he could, before death, choose how he wished it to be used after his death. And I note that Lord Scarman too cited the same passage from the judgment of Windeyer J. in *Skelton v. Collins*, 115 C.L.R. 94, 129 which referred to the capacity to earn (see p. 169B–C).
- D

- E There is little in the speeches in *Gammell v. Wilson* [1982] A.C. 27 which touches on this part of the case. Lord Fraser of Tullybelton, at p. 71G, referred in passing to "loss of earnings, or other income," but that is all and I draw no conclusion from it. Lord Scarman, at p. 77E, indicated that loss of an annuity ceasing on death would be recoverable. I have already said that this is another example, like the three of Lord Russell of Killowen, where the victim would have been unable to provide in his will how the financial benefits, which he would have enjoyed had he lived, were to be used after his death. I do not regard this passage as conflicting with the view which I have formed, which is that there is nothing in either *Pickett* [1980] A.C. 136 or *Gammell* which suggests that I should accept
- F Mr. Machin's submission and that there is a good deal which suggests I should not.

Mr. Machin submits that there is a passage in *Kandalla v. British European Airways Corporation* [1981] Q.B. 158, 169 which indicates that Griffiths J. must have been of the view which he submits is correct. It is:

- G "consider the position of a very high earner of 38 years of age who is also possessed of a large fortune. Suppose he is contributing £10,000 per annum to the support of his wife and family during his lifetime and on his death leaves them an estate of, say, £500,000. The interest on the estate is more than adequate to replace the dependency of £10,000 per annum and so the accelerated benefit from the estate extinguishes any Fatal Accidents Acts claim. But if the estate can bring a claim for the 'lost years' the family will in fact recover a further large sum, say £150,000, being 15 years' purchase of £10,000 per annum. Perhaps in this illustration it will be truer to say that the defendant will have to pay the extra £150,000 rather than the family will recover it, for a large slice of it may be destined to the revenue via capital transfer tax."
- H

I do not believe that in choosing the figures for the point he wanted to make, Griffiths J. was assuming that the £10,000 per annum dependency

was being provided by the £500,000 worth of capital. He was speaking of a "very high earner." A dependency of £10,000 per annum for the wife and family of such a man is the sort of sum that one would have expected to come from his earnings A

Finally Mr. Machin relies on the fact that in claims brought under the Law Reform (Miscellaneous Provisions) Act 1934, unlike those under the Fatal Accidents Act for the benefit of dependants, deductions for what passed from the deceased to his estate are never made when damages are calculated. Almost anything, he argues, has a value. Take the deceased's half share in his boat. It could have been sold and the proceeds invested in income-bearing stock. B

But there is a simple answer to this. The value of the boat in such a case is not taken into account because, at the moment before the death of the victim, it has lost none of its value. To deny that there has been a loss is not to set a gain to the estate against a loss to the deceased. The deceased has suffered no loss other than that of enjoying his boat, which is taken into account in the award of damages for loss of expectation of life, the £1,250. C

Mr. Machin would have been on firmer ground if he had been able to show that where a man died owning a boat, or indeed a house, it was the practice for the Law Reform Act claim for the lost years to include the assumed rental value of the boat and the assumed rental value of the house, for these are benefits capable of evaluation in pecuniary terms which the deceased would have enjoyed in the lost years had he lived, just as much as he would have enjoyed the dividends from his shares. D

The reason why all these claims do not lie, and why they have not, so far as I know, been made before this case, is the same; they involve no loss to the deceased. E

Accordingly I reject Mr. Machin's submissions on this part of the case and in approaching the loss of income for the lost years I shall ignore the income which would have resulted from the capital which the deceased already owned at death.

This decision leads to two consequential questions. The first is best explained by illustration. Suppose that during the lost years a deceased would have earned £5,000 per annum net from work and £5,000 per annum net from investments and would have had a surplus of £3,000 per annum. Does the £5,000 which survives extinguish the lost £3,000 per annum as Mr. Ashworth submits? Or, as Mr. Machin submits, is only half to be extinguished, on the argument that his surplus would have derived (so far as one can tell) as much from his earned as from his unearned income? F G

In my judgment, the answer is to be obtained not by asking which part of his income enabled him to save, but by considering the position of the deceased immediately before he died. He would then be deprived of his ability to earn £5,000 per annum from work. And he would be deprived of the need for £7,000 per annum to enable him to live and have his pleasures. Since £5,000 per annum would remain, and since this would more than provide for his surplus, his surplus would remain intact. The tort would not have taken it away. Therefore, I conclude the £5,000 per annum should be deducted in full. H

The next question is: when comparing the surplus with the investment income which remains, does one strike a balance year by year or once overall, so that any excess in one year may be offset by a deficiency in another?

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A I have come to the conclusion that, since an award of damages is an award of one sum, the balance should be struck once. I see no logical reason why a gain in one year should not be used to offset a loss in another.

B I come now to the final point of law in contention. What, if any, attention is to be paid to the fact that the deceased, had he lived, may have inherited some or all of his father's share in the two surviving partnerships?

Mr. Machin has expressly made no claim for the loss of the opportunity to inherit the capital value of these shares. He limits his claim to the loss of income which they would have produced. Nor does he make any claim in respect of any other asset which the deceased might have inherited from his father.

C This presents a different problem from that which I have just been considering, because, whereas he had the opportunity during his lifetime to make provision after his death for his dependants and others out of the capital which he already possessed, the same is not true of the capital which he had not yet inherited.

D [His Lordship then stated his reasons for a decision on which he had already ruled, namely, that it was open to the plaintiff to rely on the evidence, that he would, either on his death or earlier, have passed his interest in the two remaining partnerships to his son, thereby increasing substantially his income, and continued:] Mr. Machin submits that there can be no difference between the loss of the prospect of earnings from work in the lost years and the loss of the prospect of income from an inheritance likely to be acquired in the lost years. On the face of it and in the light of the reasons I have given for rejecting his submission about income from capital already acquired, I think this submission is good. I can see no distinction between being deprived of the opportunity to use the income from the one and being deprived of the opportunity to use the income from the other. And I see nothing in *Pickett* or *Gammell* which suggests that Mr. Machin is wrong.

F Mr. Machine submits that there can be no difference between the loss of the prospect of earnings from work in the lost years and the loss of the prospect of income from an inheritance likely to be acquired in the lost years. On the face of it and in the light of the reasons I have given for rejecting his submission about income from capital already acquired, I think this submission is good. I can see no distinction between being deprived of the opportunity to use the income from one and being deprived of the opportunity to use the income from the other. And I see nothing in *Pickett* or *Gammell* which suggests that Mr. Machin is wrong.

G Against this Mr. Ashworth advances four arguments. His first is that there are two causes of the loss of inheritance: the death, and the fact that the deceased had a rich father; and the loss of the inheritance he attributes to the latter. That cannot be right. One might as well say that if a young plaintiff is given a car by his father and a defendant negligently collides with it, the loss of the car was caused by the fact that the plaintiff had a father who could afford to give him a car.

H Secondly he submits that this type of damage was not foreseeable. I see no reason why it should be any less foreseeable than that the plaintiff whose finger is permanently stiffened as a result of a minor road accident occasioned by the defendant's negligence is a concert pianist.

Thirdly he submits that this head of damage is too remote. It can never be recovered. Clearly there will be some circumstances in which

the loss of the prospect of an inheritance would depend on one or more occurrences which are so improbable that the loss should be left out of account, but Mr. Ashworth has advanced no reason which satisfies me that every loss of inheritance should be ruled irrecoverable. A

Fourthly he relies on the wording of section 4 of the Administration of Justice Act 1982. This substitutes (with effect from a date too late to affect this claim) a new paragraph for section 1 (2) (a) of the Law Reform (Miscellaneous Provisions) Act 1934, which has the effect of preventing the recovery of any damages for loss of income in respect of any period after a person's death. (The Act preserves the right of a living plaintiff to recover such damages.) B

It would be anomalous if the right to recover damages for loss of income in the lost years were to be abolished, but the right to recover for the loss of the inheritance of capital were to be maintained. This tends to suggest that Parliament did not think that there was any right to recover for loss of the inheritance of capital or it would have been abolished too. Of Mr. Ashworth's various arguments this has attracted me most. Although the plaintiff's claim is not described as a loss of a prospect of the inheritance of capital, that effectively is what it is; he claims for the loss of income over a period of about half a lifetime, which income would have been derived from the inheritance of capital. C However, I am driven back on my inability to see any fundamental difference between the loss of the opportunity to earn income by work in the lost years and the loss of the opportunity to receive income by way of interest on an inheritance expected in the lost years. D

That any award should be made in this case is repugnant to one's overall sense of justice, because the person from whom the inheritance would have come is the plaintiff and the persons to whom any damages awarded will go are the plaintiff and his wife, who will take under the rules of intestacy. But I am satisfied that this coincidence must, on principle, be ignored. The destination of the deceased's estate is irrelevant. E

I derive no assistance from either *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453 or *The Liesbosch* [1933] A.C. 449 to which Mr. Ashworth referred me and I reject his submission. F

I shall therefore take the loss of the prospect of this inheritance into account but will do so with moderation.

I can now turn to my consideration of the extent to which forecasts for the future can realistically, and should properly, be made in this case. This, inevitably, involves making assessments about the personality, character, abilities, life-style, and relationships of a man whom I have not seen, a man who through no fault of his own was tragically killed at the age of 26. Not only is the exercise difficult, it is invidious and I approach it with a sense of its impropriety. G

[His Lordship considered the facts, stated that the deceased's gross income in the last three years of his life was £7,884, £10,042 and £16,279 respectively. The likely gross income for the years ending April 1981 and 1982 was £14,084 and £12,376 but because of reservations about those figures, the average income over the five year period of £12,133 would be rounded down to £12,000. His Lordship continued:] I am quite unable to predict whether the profits of the businesses as a whole are likely in the immediate future to be better or worse or much the same as the average of the last five years. In forecasting the deceased's likely gross income in the years immediately after April 30, 1982, I can do no better than assume that it would have been the same as the average for the last five H

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A years, that is, £12,000 per annum. Even this is an assumption which I only make because I recognise that had the deceased been married to a dependant wife I should have had to make some assumption, and this is the one that I would have made.

B The accountant, Mr. Wood, produced various figures showing income tax paid in various years. I did not find these representative enough to enable me to reach a realistic figure for the incidence of future income tax. In the periods which he considered artificially low figures were produced on account of stock relief, loss relief, and so on. The profits varied from year to year and tax is not paid in the year in which the income is earned. Looking at a man's whole working life these variations iron out, and, in any event, I am assuming, at any rate initially, a constant income of £12,000 per annum. For the future, therefore, I propose to do what Mr. Wood did in one of his schedules, namely, assume a personal allowance of £1,375 which would reduce the £12,000 to £10,625 and tax the remainder at 30 per cent., that is £3,187 of tax, thus leaving a net income of £8,813 per annum. National health insurance contributions reduce this by roughly £400, leaving a figure which I propose to call £8,400 per annum as the assumed net income for the future.

C I have studied the accounts which have been put in, in an attempt to see if a realistic estimate can be made of the proportion of the deceased's earnings (actual and assumed) to April 30, 1982, which were (or would have been) attributable to his work and the proportion attributable to the capital which he held. Various comparisons have been made by counsel, but the results are so contradictory, pointing sometimes to the greater proportion being earned and sometimes to it being unearned, that I can do no better than apportion the £12,000 equally between work and capital. I think the same assumption should be made about the net income in this period. I think the personal allowance of £1,375 can fairly be treated as applying in equal proportions to the earned and unearned income during the deceased's assumed life. I propose therefore to regard £4,200 per annum of the assumed net income as attributable to work and £4,200 per annum to capital.

F There are actual figures for the years ending April 30, 1981, and April 30, 1982, in the sense that the profits for these years are known. Although the incidence of tax was unusually low in those years, the deceased, like the other partners, would have benefited from this, and I propose to take Mr. Wood's net figures after the deduction of tax and national health insurance. His gross figures of £14,084 and £12,376 thus become £12,556 and £8,240 nett. Again I propose to regard half of each as earned and half as unearned.

G For the period from March 8, 1980, to February 18, 1983 (that is, today's date), I shall ignore the slight variations in dates and take net incomes after tax of £12,556, £8,240 and £8,400 respectively. And for the immediate future £8,400 per annum. I will assume that all these figures derived half from work and half from capital.

H I think I should assume that for some five years from today the profits from the businesses will be such as will, on average, maintain this last figure. I envisage the plaintiff's still steady hand on the tiller for about this time. This is the limit of the extent to which I think such an assumption should be made. Who can tell what will happen thereafter? The uncertainties are such and the degree of speculation so great that it would not be right for the purposes of the exercise on which I am engaged to assume that the deceased's capital would have continued to

earn him as high a rate of interest as it had done hitherto. The courts are frequently faced with the task of forecasting what a man would have earned had he not been killed or disabled, but a man may move from one employer to another and this is a much less speculative exercise than is involved in forecasting the success of a particular business enterprise.

I regard 16 as a suitable multiplier in this case. Three years have already passed, leaving 13 to represent the future. To reflect the lower level of income from capital which I think it is right to assume in later years, I propose to divide the 13 years into three periods (A, B and C) to represent respectively the first five years, the next five years and the remainder of the deceased's working life. I shall discount them respectively to 3, $2\frac{1}{2}$ and $7\frac{1}{2}$. The latter will include retirement.

Having assumed a true earning capacity of £6,000 per annum for period A, I shall make the same assumption for the whole of the deceased's working life. In doing so I recognise that neither his abilities nor his earning capacity had been tested in the open market; he had worked only for his father. On the other hand it is likely that if he had survived he would have acquired some measure of experience in the hotel business. I shall take lower figures in periods B and C for the income attributable to his capital. Were Lenleys to prosper the deceased, had he lived, would, like other partners, probably have been required to leave a proportion of his future earnings in the business. This would have increased his capital and in turn would have increased his earnings. However, I propose to ignore this feature in my calculations. Future inflation and the need to finance future expansion are probably the chief reasons why the partners might not have been allowed to withdraw all of their emoluments. I must ignore the first and I am not prepared to assume the second. When, in this part of my judgment, I speak of capital or of unearned (or private) income, I mean such capital as the deceased possessed in his lifetime and the interest it would have earned in the lost years.

In period B I reduce this gross unearned income from £6,000 to £4,000 per annum, and in period C to £2,000 per annum. Even this is speculative, but I think it would be too harsh to assume that it simply disappeared, particularly when one bears in mind that even if Lenleys were to cease to trade there would presumably be some sort of surplus which the deceased could have re-invested.

The gross income for periods A, B and C thus become £12,000, £10,000 and £8,000 respectively per annum. The equivalent net figures are £8,400, £7,000 and £5,600 respectively. Since the net income attributable to work in period A is £4,200 per annum, I shall assume this to be so in periods B and C. Thus the net income attributable to capital in periods A, B and C respectively is £4,200, £2,800 and £1,400 per annum.

It may be useful to set this out in tabular form.

Yrs.	Gross Earned	Gross Unearned	Gross Total	Net Total	Net Earned	Net Unearned	H
1.			14,084	12,556	6,278	6,278	
2.			12,376	8,240	4,120	4,120	
3.	6,000	6,000	12,000	8,400	4,200	4,200	
A	6,000	6,000	12,000	8,400	4,200	4,200	
B	6,000	4,000	10,000	7,000	4,200	2,800	
C	6,000	2,000	8,000	5,600	4,200	1,400	

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A The plaintiff told me that he would have left his son his share of his house (which his counsel agrees I am to ignore) and his share in Lenleys and Cathedral Gate and that he might well have given him a proportion somewhat earlier, for example on his marriage. I have already said that I expect the plaintiff might have found himself somewhat more reluctant than he believes to release his control over Lenleys, particularly when, as I think likely, his son would have been playing no part in its management. I think that whatever he left to his son by way of his share in Lenleys would have come later rather than sooner. The plaintiff is at an age when the average expectation of life of a man is about 10 years and, although I think it somewhat more likely that he would have been prepared to release his interest in Cathedral Gate a little earlier, this was the less important business, and I propose to assume that any inheritance would have come in about 10 years' time, i.e., at the start of period C.

D What would the plaintiff's testamentary wishes have been then? Who can say? Circumstances may have changed. It may very well have become more desirable to divide his interest in Lenleys equally between his three children. In my judgment there is an insufficient basis for making any other assumption.

Death, at least, is inevitable and I am satisfied that had the deceased survived his father, he would have inherited some of his father's share in Lenleys, if it then survived, or of some other investment if it did not.

E I have already assumed that after the tenth year (that is, in period C) the son's investment income should be taken as £2,000 per annum. This would derive from his one-twelfth share in Lenleys and his one-quarter share in Cathedral Gate or, if he withdrew his money from these, from some other investment. His father presently has a one-quarter share in Lenleys and a one-quarter share in Cathedral Gate. (I am ignoring the effect of the advent of the partner, Mr. Chapman, on these proportions.) I will assume that the deceased would have received the other quarter in Cathedral Gate but only one-third of his father's share in Lenleys, in other words, one-twelfth. This would, on the assumptions I am making, roughly double his private income in period C. I propose to ignore any slight alterations to the figures attributable to the possibility that the share in Cathedral Gate might have been passed on before that in Lenleys.

G For these reasons I will increase the income figures in period C to those in period B.

H What would the deceased's "surplus" have been in these various periods, first on the assumption that he remained single throughout? Mr. Machin submitted that I should find that the deceased generally left in the business a substantial proportion of his emoluments and that his personal surplus was therefore relatively high, even before his death. Mr. Ashworth submitted that he was drawing out as much as he could and spending it all.

There is no doubt that the deceased was drawing cash and benefiting from motoring expenses to an extent which I have already said should be taken as £5,500 per annum. Nor I think is there any doubt that he spent all he drew. He had borrowed £2,500 from the bank, no doubt to help with the cost of his half share in the boat, and £500 of this was outstanding at the date of his death. It is difficult to see why anyone

should want to borrow from a bank if there were partnership profits standing to his credit which he was entitled to draw. A

Further, as Mr. Ashworth points out, in the year ending April 30, 1979, it had been necessary to transfer £667 from his Cathedral Gate loan account to his Lenley's capital account "to maintain the ratio of capital account balance to profit share." Why, one asks, if there were still profits in his current account in Lenleys which could have been transferred to his capital account in the same firm to make good the balance? B

Mr. Machin points to the fact that at death there was £33,000 standing to his credit in Lenleys. £24,000 of this represented his capital and the other £9,000 was in his current account. This, Mr. Machin argues, shows that the deceased was not drawing out all that he could. There was a further £6,000 in the other two businesses. Mr. Wood has prepared a table which compares his drawings and his income in each of the last three years of his life and this, it is submitted, demonstrates that he left a surplus in the business of £3,373, £2,778 and £9,017 respectively in these three years. C

I am unable to accept the argument based on Mr. Wood's figures. It seems to me to ignore the fact that "salary" and profits for one year were credited to a partner after the year was over. A more realistic exercise would be to compare one year's drawings with the previous year's emoluments. It must also be remembered that credited to the deceased after his death was £10,275, representing his share of the profits in Lenleys for the year ending April 30, 1980. Yet the Inland Revenue affidavit declared that the balance of profits standing to his credit in Lenleys (over and above his capital account) was £9,089. In the absence of any explanation to the contrary, I am not prepared to assume that this £9,089 would have been there had it not been for the credit of £10,275 after death. D

The further £24,000 may not have been in a "capital" account but it was treated as if it were and I have reason to believe that by that date this was the minimum sum a partner with a one-twelfth share had to maintain. A year earlier the minimum figure seems to have been £20,000. I expect therefore that £4,000 of his emoluments had been retained for this purpose. Whether that be so or not, there is no doubt that from time to time a partner was required to leave a proportion of his emoluments (or more likely a particular sum) in the business in order to increase its capital. I find therefore that, although Mr. Ashworth is probably right in saying that the deceased drew out all that he could, Mr. Machin is also right in saying that he left a certain amount in the business, but, on my findings, not because he chose to; it was because he had to. E

It is not necessary to reach any more definite conclusion than this for the years during which the deceased was alive. The point is only material to a consideration of how much he would have been likely to leave in the business had he lived on and received the emoluments which I have assumed. I cannot judge this other than in the most general way. F

Bearing in mind the size of the net income after tax in the three pre-trial years and the need for additional capital to finance the present expansion, together with my belief that the deceased would have taken out virtually all that he could, I estimate that to date he would have G H

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A left in the business a total of £8,000. This £8,000 would have been in the nature of savings but, for reasons I have given elsewhere, it would have had an element of the personal about it as well as of "surplus." So some deduction may be called for. However, I shall not make it because even the most extravagant bachelor will spend some of his drawings on others, and this is a factor which tends the other way. So I find that the "surplus" in the three years to date is £8,000.

B What of the future? I am sure that as a single man he would have continued to draw out all that he could. The acquisition of the boat may have been an exceptional expense, but when a young man is used to spending large sums of money on himself, one exceptional expense is apt to follow another. In any event when he moved into the converted stable his household expenses would have been increased from virtually nil to a significant figure. For reasons which I have already given I ignore the possibility that he would have left further sums in the business in the years ahead. I think the fairest estimate which I can make of the deceased's "surplus" on the assumption that he is to be treated as a single man is 15 per cent. over the whole post-trial period which I have to consider.

D What increase, if any, should I make to this figure, on account of the likelihood of marriage? Mr. Ashworth says none. Mr. Machin says that marriage in 1981 should be assumed. The one relies on the approach in *Gammell v. Wilson* [1982] A.C. 27, the other on that in *Willshire v. Gardner* (unreported), December 6, 1979. The facts of this case lie in between.

E The plaintiff told me that his son and Miss Pope were planning to marry in February 1981. However, the deceased was not formally engaged and I was a little surprised that Mr. and Mrs. Adsett could not tell me more about her. I have no doubt that she was deeply attached to him. After he died she abandoned her intention to take her final examination; and the plaintiff gave her his son's half-share in the boat. But it would not be right to assume that they would necessarily have married, let alone at the time I was told.

F Most, though not all, unmarried men of 26, for much of the time at any rate, have a girlfriend whom they see frequently and for whom they have a strong attachment. But they do not all marry and life shows that they by no means always marry the girl that they have taken out for the longest or with whom they appeared to be the closest.

G That the deceased would probably have married I have no doubt, but whom and when are questions I cannot answer. Would his wife have had an earning capacity? Would she have used it full time? Part time? For how long? People tend to marry those from their own background. Would she have had some private income of her own and the hope or expectation of an inheritance, like the deceased and his sisters? What then would the "surplus" have been? All this is the purest speculation.

H Should I ignore it or should I add some very modest figure to the 15 per cent., as Griffiths J. did, to take account of the speculative possibility that Mr. Willshire would have had children. Having read and re-read the speeches in both *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136 and *Gammell v. Wilson* [1982] A.C. 27 I think I would be wrong if I were to make no increase. I shall add something, but not very much. I shall increase the 15 per cent. to 25 per cent. I find there-

fore the "surplus" to be 25 per cent. of the deceased's total net income in each of the periods A, B and C. A

When the assumed inheritance is taken into account this leads to the following figures; in the first three years from death to trial the surplus is £8,000, as I have already held. In period A, for the future, which is to lead to a multiplier of 3, the total net income is £8,400 per annum; one-quarter of this is £2,100 and when multiplied by 3 for the three years leads to £6,300. In period of B, the total net income is £7,000 per annum. One-quarter, to represent the surplus, is £1,750. I apply a multiplier of $2\frac{1}{2}$; that leads to £4,375. In period C, again the total net income once the inheritance has been taken into account is £7,000 per annum. So once again the surplus is £1,750. I apply a multiplier of $7\frac{1}{2}$ and get £13,125. That makes a total surplus pre-trial and post-trial of £31,800. B

Against this must be set the income which would have been (and will be) earned by the capital of which he died possessed. This would produce very slightly less by way of net income after death than before because the personal allowance would no longer be given. But I ignore this. C

The net income attributable to capital owned at death is as follows: Year 1, £6,278; Year 2, £4,120; Year 3, £4,200; total for the pre-trial period, £14,598. Of the periods ahead, period A, £4,200, multiplied by 3 makes £12,600. Period B, £2,800 multiplied by $2\frac{1}{2}$ makes £7,000. Period C, £1,400 multiplied by $7\frac{1}{2}$ makes £10,500; total £44,698. D

This sum exceeds the £31,800. There will therefore be no award for loss of "surplus" in the lost years. What it comes to is this. At the moment before the deceased died there remained in existence capital which he owned and which would, after his death, continue to earn more money than would have been needed to provide his "surplus" had he lived. His death obviated the expenditure of that part of his total income which he would have devoted to his own living expenses and pleasures; as a result more "surplus" money became available in the "lost years," not less. E

In this judgment I have set out in detail the reasoning and figures which have led me to my conclusion. I have been conscious throughout of Lord Scarman's injunction that mathematical calculations are out of place and that a judge must simply make the best estimates he can. I have, nevertheless, done what I have for three reasons. First, I wanted to check the overall impression which I had formed on the evidence that, looking at the case in the round, there has been no true loss. Second, if I had simply said as much it might have been assumed that I had failed to take account of various aspects of the evidence. Third, if my views about the various matters of law should be held to be wrong, the sum which I would have awarded had I not fallen into error can be discovered. This, I hope, would obviate any need for the case later to be remitted for damages to be assessed on a different basis. F G

In the result there will be damages for the plaintiff for the funeral expenses of £399.40 plus £1,250 for loss of expectation of life, that is, for £1,649.40. H

*Judgment for plaintiff for £1,649.40.
Plaintiff's costs up to date of pay-
ment into court; defendant to have
his costs thereafter.*

Solicitors: *Mawby, Barrie & Scott for Gardner & Croft, Canterbury;
Joynson-Hicks & Co.*

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A [QUEEN'S BENCH DIVISION]

REGINA v. CRIPPS, *Ex parte* MULDOON AND OTHERS1983 April 26, 27;
May 27Robert Goff L.J.
and Mann J.

B

*Judicial Review—Certiorari—Election court—Local government election—Whether election court inferior tribunal—Whether certiorari available**Local Government—Election—Petition—Costs—Petitioners awarded “three-quarters . . . of . . . costs properly incurred” at conclusion of hearing—Court clarifying order for costs at later date—Amendment under “slip rule”—Meaning of order—Whether jurisdiction to amend—Representation of the People Act 1949 (12, 13 & 14 Geo. 6, c. 68), ss. 110, 115—R.S.C., Ord. 20, r. 11*

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The applicants were petitioners in a local election petition brought against the respondent, the successful candidate. The petition was heard by a commissioner, a barrister appointed to hear the petition pursuant to section 115 (1) of the Representation of the People Act 1949. After a 13-day hearing he found that the respondent had made a false expenses return and that one of 13 allegations of overspending on items relating to the election campaign had been established, resulting in a net overspending of less than £1, and on March 23, 1982, he awarded the applicants “three-quarters of their costs properly incurred in relation to the petition.” Upon the respondent’s application, the commissioner sat again on November 3, 1982, to clarify his order prior to taxation. He explained that the words “properly incurred” meant that the applicants were to have three-quarters of their costs only upon those issues on which they had succeeded.

On the applicants’ application for judicial review by way of an order of certiorari to quash the direction of November 3 on the grounds that it was a variation of the original order for costs and was made in excess of the commissioner’s jurisdiction:—

Held, (1) that the question whether a tribunal was a superior court of record or was subject to judicial review by the High Court depended in each case on the precise nature and powers of the tribunal; that notwithstanding that under the Representation of the People Act 1949 an election court for a local government election had, for the purposes of the trial of an election petition, the same powers, jurisdiction and authority as a judge of the High Court, the facts that the court consisted of a barrister and not a High Court judge, that the High Court was empowered by section 126 of the Representation of the People Act 1949 to hear an election petition itself and to deal with questions of law raised by way of case stated by the election court, and that the election court was treated as an inferior court by the statute which created it, led to the conclusion that the election court was an inferior court, and that, accordingly, certiorari lay to quash its decisions (post, pp. 479A–D, H—480D).

(2) Allowing the application and granting an order of certiorari, that on its proper construction the order for costs as originally drawn up meant that the applicants were to have three-quarters of the total of their costs properly incurred on the petition; that although the powers of the High Court, which included the operation of the “slip rule,” were conferred on an election court under section 115 (6) for the purposes of the

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trial, once the commissioner had made his order on March 23, 1982, the election court was functus officio; and that accordingly, and since in any event the directive of November 3 was not merely the correction of a slip within R.S.C., Ord. 20, r. 11, but was a radical departure from the original order, the commissioner had had no jurisdiction to vary his order on November 3, 1982 (post, pp. 471c-G, 472E, H—473D, 480H—481A).

Colonial Bank of Australasia v. Willan (1874) L.R. 5 P.C. 417, P.C.; *Skinner v. Northallerton County Court Judge* [1898] 2 Q.B. 680, C.A. and *Rex v. Justices of the Central Criminal Court, Ex parte London County Council* [1925] 2 K.B. 43, D.C. considered.

The following cases are referred to in the judgment of the court:

Baldwin & Francis Ltd. v. Patents Appeal Tribunal [1959] A.C. 663; [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433, H.L.(E.).

Colonial Bank of Australasia v. Willan (1874) L.R. 5 P.C. 417, P.C.

Peart v. Stewart [1983] 2 W.L.R. 451; [1983] 1 All E.R. 859, H.L.(E.).

Reg. v. Election Court, Ex parte Sheppard [1975] 1 W.L.R. 1319; [1975] 2 All E.R. 723, D.C.

Reg. v. Hurst, Ex parte Smith [1960] 2 Q.B. 133; [1960] 2 W.L.R. 961; [1960] 2 All E.R. 385.

Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White [1948] 1 K.B. 195; [1947] 2 All E.R. 170, C.A.

Rex v. Inhabitants of Glamorganshire (1790) 1 Ld.Raym. 580.

Rex v. Justices of the Central Criminal Court, Ex parte London County Council [1925] 2 K.B. 43, D.C.

Skinner v. Northallerton County Court Judge [1898] 2 Q.B. 680, C.A.; [1899] A.C. 439, H.L.(E.).

The following additional cases were cited in argument:

Bradlaugh, Ex parte (1878) 3 Q.B.D. 509.

Essex Incorporated Congregational Church Union v. Essex County Council [1963] A.C. 808; [1963] 2 W.L.R. 802; [1963] 1 All E.R. 326, H.L.(E.).

Goole Election Petition, In re (1886) 2 T.L.R. 398, D.C.

Inchcape (Earl of), In re [1942] Ch. 394.

Lovering v. Dawson (1875) L.R. 10 C.P. 726.

New Par Consols Ltd. (No. 2), In re [1898] 1 Q.B. 669, C.A.

Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141, C.A.

Reg. v. Mayor of the Borough of Maidenhead (1882) 9 Q.B.D. 494, C.A.

Reg. v. Medical Appeal Tribunal, Ex parte Gilmore [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796, C.A.

Rex v. Postmaster-General, Ex parte Carmichael [1928] 1 K.B. 291, D.C.

Roper, In re (1890) 45 Ch.D. 126, C.A.

West Suffolk County Council (East Ward) Election, In re (1964) 108 S.J. 604, D.C.

APPLICATION for judicial review.

Between March 1 and 19, 1982, Mr. Anthony Cripps Q.C. presided as commissioner over the hearing by a local election court of a petition brought by the applicants, Denis Muldoon, Christopher Nigel Pearson Lewis, Richard Martin Cantor and Solomon Jacques Green, in connection with a local government election for the Greater London Council for the area of Richmond-upon-Thames held on May 7, 1981, at which the respondent, Adrian Carnegie Slade, was elected. The commissioner found that the return and declaration of election expenses made on behalf of the respondent were false, and that expenditure had been incurred in

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- A excess of the amount permitted by the Representation of the People Act 1949, under one of thirteen heads alleged in the petition, and on March 23, 1982, he awarded the applicants "three-quarters . . . of their costs properly incurred in relation to the petition." The applicants lodged their bill of costs, which amounted to £42,000. The respondent applied to adjourn the taxation of the bill of costs to seek a clarification of the commissioner's order, and at a sitting of the election court on November 3, 1982, the
- B commissioner explained that by "properly incurred" in the order he had intended it to be understood that the applicants were to have three-quarters of their costs upon those issues on which they had succeeded. The applicants applied for judicial review by way of an order of certiorari to quash the commissioner's direction of November 3, 1982, and declarations that the taxing master was bound to proceed with the taxation
- C of the applicants' costs in relation to the petition pursuant to the order of the election court dated March 26, 1982, without regard to the direction of November 3, 1982, and that on a true construction of the order dated March 26, 1982, the applicants' costs in relation to the petition were to be taxed on a party and party basis in accordance with R.S.C., Ord. 62, r. 28, and the applicants were to be paid three-quarters of their costs so
- D taxed in accordance with Ord. 62, r. 9 (4) (a).

- The grounds of the application were that (1) on November 3, 1982, Mr. Cripps no longer constituted the election court to whom the trial of the election petition was assigned pursuant to section 115 of the Representation of the People Act 1949, the trial thereof having been concluded in accordance with section 125 of the Act upon its determination on March 23, 1982, or the certification in writing of the determination on
- E March 26, 1982; (2) the direction of November 3, 1982, would, if effective, constitute a variation of the order as to costs made on March 23, 1982. On December 21, 1982, McNeill J. granted the applicants leave to apply for judicial review.

The facts are stated in the judgment of the court.

- F *Michael Tugendhat* for the applicants.
Timothy Barnes for the respondent.

Cur. adv. vult.

- May 27. ROBERT GOFF L.J. read the following judgment of the court. There is before the court an application for judicial review. The
- G matter arises out of an election petition presented by four petitioners, Mr. Muldoon, Mr. Lewis, Mr. Cantor and Mr. Green ("the applicants") against the respondent, Mr. Adrian Slade, who was the candidate elected for the Greater London Council for the area of Richmond-upon-Thames at the election held on May 7, 1981. The petition was tried by an election court, consisting of Mr. Anthony Cripps Q.C. The hearing before Mr. Cripps lasted for no less than 13 days, between March 1 and 19,
- H 1982. He gave his judgment on March 23, 1982. In their petition, the petitioners had alleged that the return and declaration of election expenses made on behalf of Mr. Slade were untrue, and they further alleged overspending under 13 heads. Mr. Cripps upheld the first of these allegations, relating to the return and declaration of election expenses; but of the heads of alleged overspending he held that only one had been established, in an amount of £19 which resulted in a net overspending of less than £1. In his judgment, Mr. Cripps made some severe comments

about the return, stating that no serious attempt had been made to complete the return adequately, and that time, trouble and expense would have been saved if proper records had been kept and retained by Mrs. Wainwright (Mr. Slade's agent). He also criticised the declaration, as failing to comply with section 70 of the Representation of the People Act 1949 in stating that certain sums had been paid by the agent, which were never paid, and in incorrectly stating the return to be correct. Mr. Cripps commented: "The respondent himself and by his agent in this careless conduct has thus been substantially responsible for this petition ever being brought by these obvious errors." He therefore held that illegal practices on the part of the respondent in regard to the return and the declaration were established. However, he concluded that none of these illegal practices could reasonably be supposed to have affected the result of the election, and he therefore granted relief.

After the judgment had been given, there was extensive argument about costs, which were obviously substantial. Leading counsel for the applicants asked for the whole of their costs, relying upon the facts that (1) the petition had succeeded; (2) in so far as there had been adverse findings of fact, they related to matters which the respondent and his agent had brought upon themselves; (3) the respondent had fought a strenuous rearguard action to prevent examination of such documents as there were; and (4) it was reasonable and sensible that all the matters should be investigated. Counsel for the respondent submitted that the bulk of the case had been occupied with issues which had been resolved in the respondent's favour and on that basis it would be right for the respondent to recover at least a part of his costs. Mr. Cripps expressed his conclusion as follows:

"It is clear to me that the respondent ought not to have any costs. The respondent has really brought the case on himself in the manner I have indicated. Therefore, there will be no order for any costs to be paid to the respondent.

"As far as the petition is concerned, I also bear that in mind and I bear in mind the fact that the petitioner has succeeded and has succeeded on matters which were raised and were important, but in my judgment the petitioner has certainly taken up more time than was necessary, even in view of the way in which the respondent has refused at earlier stages to co-operate what appears to be reasonably in producing the documents. The order, therefore, is that the respondent has to pay three-quarters of the petitioner's costs including the re-amendment, to be taxed if not agreed."

The order was then drawn up in the usual way, and included the following order relating to costs:

"It is further ordered that (i) the respondent Adrian Carnegie Slade do pay to the petitioners three-quarters (75 per cent.) of their costs properly incurred in relation to the petition including the costs reserved by this court on March 8, 1982, in dealing with the petitioners' application to re-amend their petition and that such costs be taxed by a taxing master if not agreed. (ii) Adrian Carnegie Slade and Patricia Mary Wainwright the applicants for relief do pay to the petitioners their costs properly incurred in relation to the application for relief and that such costs should be taxed by a taxing master if not agreed."

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A The applicants' solicitors accordingly prepared and lodged their bill for costs, which totalled over £42,000. The taxation was fixed for October 28, 1982. However on October 25 the respondent's solicitors asked for an adjournment because they wished to refer the order for costs back to Mr. Cripps on the ground that the order meant that the bill of costs ought to have been drawn so as to distinguish between those costs incurred in respect of issues on which the applicants had succeeded, B and those incurred in respect of issues on which they had not succeeded. The taxing master (the chief taxing master, Master Matthews) expressed the opinion that the order did not require him to apportion costs to issues, the order being therefore in accordance with the general rule discouraging the making of any such apportionment. However, he adjourned the matter, on the terms that the respondent consent that an C interim certificate be issued in the sum of £10,000 plus V.A.T. of £1,500. The respondent did so consent and that sum has in fact been paid. The master also ordered the costs of the adjournment to be paid by the respondent.

D The parties went before Mr. Cripps on November 3, 1982. The applicants, we were told by counsel, considered that the order was perfectly clear, and that Mr. Cripps had no jurisdiction to vary it; however they also attended by leading and junior counsel, confident that their attendance could not, by waiver, create any jurisdiction where none existed. Having heard submissions from counsel on both sides, Mr. Cripps expressed himself as follows:

E "The application before me raises a point under the order made at the end of the local government election petition heard earlier this year. The point concerns costs. The actual order . . . which is now before me, was 'that the respondent do pay the petitioners three-quarters (75 per cent.) of their costs properly incurred in relation to the petition including the costs reserved by this court on March 8, 1982, in dealing with the petitioners' application to re-amend their petition and that such costs be taxed by a taxing master if not agreed.'

F "I am certainly not going to seek to usurp any of the functions of a taxing master for which I would be unqualified, nor am I going to seek in anyway to vary the order which was made but merely to seek to clarify it.

G "The main points about this lengthy matter were first, that on the petition itself the respondents succeeded technically in the sense that there were illegal but not corrupt practices found. On the subsequent application the petitioner succeeded and it was clear that on any probable result of the evidence as it came out that there would be relief to the respondent on all the matters on which the petitioner succeeded. I therefore regarded the petitioners' result as being a success of what one might call to some extent a technical kind. It was for that reason that the 75 per cent. was imported into H the order. That was one restriction on the costs to be paid. But there was also a completely separate restriction on the costs to be paid, namely those 'properly incurred.' In those properly incurred I intended to be included the costs relevant to the two matters on which the petitioners were successful, namely in relation to the return itself and in relation to the Young Liberals' letter, items 1 and 6 of the 15 headings mentioned in the judgment. I did not intend to be included any costs referable to any of the other

items in those 15 headings—2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15—because it seems to me that on those matters, bearing in mind that there had only been as it were a technical success, on the other matters there was not even a technical success, but complete failure.

“Therefore what the order means is that the taxing master as best he can is to tax the costs which were incurred in relation to the two matters I have mentioned, the return itself and the Young Liberals’ letter, and in addition to that the costs of the petitioners in relation to the application to re-amend the petition. Having arrived at that total sum the order requires 75 per cent. only of that to be paid. In other words there were two restrictions: one, as regards the percentage of the amount, and two, as regards what headings should be included in the amount. . . .”

The matter came again before the chief taxing master on November 5, 1982. We have been told that he expressed astonishment at the judgment or direction given by Mr. Cripps on November 3, but indicated that he would feel bound to follow it and that a new bill would have to be drawn if the taxation was to proceed.

So the applicants found themselves in this position. They considered that Mr. Cripps’s original order was perfectly clear; and that by his “direction” of November 3 he had purported to vary that order, which he had no jurisdiction to do. However, if they took no steps to quash that direction, the taxation of costs would proceed on the basis stated by Mr. Cripps in his direction, and only on a review of the taxation, after considerable further costs had been expended, could they challenge the basis on which the chief taxing master felt, following Mr. Cripps’s direction, that he ought to proceed. They therefore decided to apply for judicial review, which they now do by leave of the single judge. The relief sought by them is:

“(a) an order of certiorari to remove into the High Court and to quash the said direction and (b) judicial review by way of a declaration that the taxing master is bound to proceed with the taxation of the costs of the petitioners pursuant to the order of the election court dated March 26, 1982, without regard to the directions or judgment given on November 3, 1982, and (c) judicial review by way of a declaration that on the true construction of the said order dated March 26, 1982, the petitioners’ costs are to be taxed on a party and party basis in accordance with R.S.C., Ord. 62, r. 28 and the petitioners are to be paid three-quarters of their costs so taxed in accordance with R.S.C., Ord. 62, r. 9 (4) (a).”

The grounds on which they seek relief are these:

(a) that Mr. Cripps was on November 3, 1982, no longer constituting the election court to whom the trial of the said election petition was assigned pursuant to section 115 of the Representation of the People Act 1949, the trial thereof having been concluded in accordance with section 125 of the said Act upon the determination thereof on March 23, 1982, or the certification in writing of the said determination on or about March 26, 1982; (b) that the said directions or judgment of November 3, 1982, would, if effective, constitute a variation of the order as to costs made on March 23, 1982, and drawn up on March 26, 1982.

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A We have to say that the resulting situation is most unfortunate. If the order as drawn up is perfectly clear as the applicants submit it to be, and as the chief taxing master thought, then the petitioners will consider themselves aggrieved if they are deprived of the benefit of that order. On the other hand, if we quash Mr. Cripps' direction of November 3, the respondent will consider himself aggrieved, since he has been told by Mr. Cripps that he intended to order him to pay no more than 75 per cent. of the applicants' costs on the two issues on which they have succeeded. We have, however, simply to consider this application in the ordinary way irrespective of such considerations. We agree with Mr. Tugendhat, who appeared before us on behalf of the applicants; that two questions arise on the application. (1) Did Mr. Cripps have jurisdiction to make his direction of November 3, 1982? That question resolves itself into this form: was the direction a variation of the order drawn up after the hearing on March 26, 1982? (2) If Mr. Cripps did not have jurisdiction to make his direction, has this court jurisdiction to grant relief by way of judicial review, having regard to the fact that this matter relates to an election court?

D We turn then to the first of these questions. In our judgment, it is plain that Mr. Cripps's direction of November 3 was one which, if effective, did indeed operate as a variation of the order as drawn. We look first at the order as drawn. In our judgment the ordinary meaning of the words "three-quarters (75 per cent.) of their costs properly incurred in relation to the petition . . . such costs to be taxed by a taxing master if not agreed," is that the taxing master's task is to ascertain the total amount of the costs properly incurred by the applicants in relation to the petition, and then to ascertain three-quarters of those costs. The words "properly incurred in relation to the petition" mean, on their ordinary meaning, the costs incurred by the applicants in relation to the whole petition, but only such costs as were properly so incurred. We understand that the word "properly" is not ordinarily included in orders for costs drawn up in the High Court, though it is ordinarily included in orders for costs drawn up in election courts—as is evidenced by the fact that, although Mr. Cripps (contrary to his recollection seven months later) did not use the word "properly" when making his order, that word was incorporated as a matter of form when the order was drawn up. Internal evidence in support of this view is to be found in the particular order; the words "properly incurred" appear in both limbs of the order, and there can be no question of those words as used in the second limb of the order bearing any meaning other than that which we have described, because Mr. Cripps cannot possibly have intended that there should be an apportionment of the costs incurred by the applicants in relation to the application for relief, by reference to the issues decided on the petition.

H We reach this conclusion purely as a matter of construction of the order; but the construction which we prefer is, we consider, consistent with certain other matters. First, an award of 75 per cent. of the costs incurred by the applicants, limited to those issues on which they have succeeded, would be a most remarkable order, when there appears to be no material on which Mr. Cripps could properly have limited the costs recoverable by the applicants on those issues. Second, the factual context in which the order is set appears to us to support this construction. It appears from observations which Mr. Cripps made in the course of his judgment that

he considered the respondent himself and his agents in their careless conduct to have been substantially responsible for the petition ever being brought, a view which he repeated when making his order as to costs, saying that the respondent had really brought the case upon himself. Furthermore, Mr. Cripps, when making his order as to costs, stated that he bore in mind that the applicants had succeeded and had succeeded on matters which were raised and were important, though the applicants had certainly taken up more time than was necessary. Lastly, orders for costs related to specific issues are strongly discouraged (see *The Supreme Court Practice* (1982), p. 999), and very much more specific words than those used in this order would be needed to achieve an order in that form. In all the circumstances, we entertain no doubt that the order bears the construction which we have indicated.

Faced with these formidable points, Mr. Barnes for the respondent submitted first that all that Mr. Cripps did was to clarify his order; but he recognised, quite rightly, that if what Mr. Cripps directed was inconsistent with his order it could not amount simply to a clarification. Next he submitted that Mr. Cripps was trying to give effect to what he believed that he had intended to order, and must be regarded as having acted under the slip rule in Ord. 20, r. 11. Now, under section 115 (6) of the Representation of the People Act 1949, the election court consisting of Mr. Cripps had "for the purposes of the trial" the same powers and privileges as a judge on the trial of a parliamentary election petition; the court therefore had, subject to the provisions of the Act of 1949, the same powers, jurisdiction and authority as a judge of the High Court: see section 110 (2) of the Act. We accept that the powers of a judge of the High Court include the power to operate the slip rule. However, there must be doubt whether this power was conferred on Mr. Cripps under section 115 (6) of the Act for the purpose in question. For, once he had made his order, the election court which consisted of him was *functus officio* and had ceased to exist. Of course, where a High Court judge sitting in the High Court exercises his power under the slip rule to correct accidental errors, he can do so because, although his order has been drawn up, the High Court has not ceased to exist. He can therefore exercise the jurisdiction under R.S.C., Ord. 20, r. 11, which is vested in the High Court as such; indeed, it appears to us that, if in any particular case the trial judge was not available (for example, because he had died) after the drawing up of the order, another judge of the High Court could exercise the power of the High Court under the slip rule to correct an accidental error. It appears that when an election court has ceased to exist the exercise of powers under the slip rule to correct accidental errors should be made not by the barrister who formerly constituted the election court, but by the High Court by virtue of its powers under section 137 (3) of the Act of 1949, which provides:

"The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with respect to an election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction."

However, even if we are wrong in that view, we do not consider that what Mr. Cripps purported to do in the present case could be described as falling within the slip rule. Ord. 20, r. 11, provides:

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- A “Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court on motion or summons without an appeal.”

- B Plainly, this is not a case where there was a clerical mistake. Nor do we think that this can be described as a case where there was an error arising in the order from any accidental slip or omission. We appreciate that Mr. Cripps has now said that he intended the order to have a different meaning from that which, on a true construction, it must in our judgment bear. But to vary an order in the fundamental manner now directed by Mr. Cripps cannot be described as the correction of a slip, still less as the correction of an accidental slip, in the ordinary meaning of those words. This is not a case where the error was an error in expressing the manifest intention of the court; on the contrary, the proposed correction was one which was not only disputed, but constituted a radical departure from an order which, when made, appeared to be consistent with the expressed intention of Mr. Cripps when sitting as the election court, in the light of his judgment and of his observations when making his order as to costs. For these reasons, we are unable to accept Mr. Barnes’s submission that Mr. Cripps should be regarded as having acted under the slip rule, even if he had power to do so. It follows that we hold that Mr. Cripps had no jurisdiction to make the direction of November 3, 1982.

- E We turn, therefore, to the question whether this court has jurisdiction to grant the relief for which the applicants now ask. It was common ground, in argument before us, that the answer to that question depends upon whether an election court should, for the purposes of judicial review be regarded as an inferior court; and whether it should, for such purposes, be so regarded, was a matter which really depended upon the relevant provisions of the Representation of the People Act 1949.

- F An election court is an unusual court. It may take one of two forms—a court for the trial of a parliamentary election petition, and a court for the trial of a petition questioning an election in England or Wales under the Local Government Act 1972. The provisions of the Act of 1949 dealing with such courts are to be found in sections 107 et seq. We are concerned in the present case with the constitution of such a court, its jurisdiction and powers, and its relationship with the High Court. The constitution of a court for the trial of a parliamentary election petition (which for convenience we will refer to as a parliamentary election court) is provided for by section 110 (1) of the Act which provides:

- H “A parliamentary election petition shall be tried by two judges on the rota for the trial of parliamentary election petitions and the judges for the time being on that rota shall, unless they otherwise agree, try the election petitions standing for trial according to their seniority. The judges presiding at the trial of a parliamentary election petition are hereinafter referred to as the election court.”

The constitution of a court for the trial of a petition questioning an election in England or Wales under the Local Government Act 1972 (which for convenience we will refer to as a local election court) is provided for by section 115 (1) of the Act of 1949 which provides:

“A petition questioning an election in England or Wales under the Local Government Act shall be tried by an election court con-

sisting of a barrister qualified and appointed as provided by this section.” A

As to the powers of a parliamentary election court, section 110 (2) provides :

“The election court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of the High Court (or, in Scotland, a judge of the Court of Session presiding at the trial of a civil cause without a jury) and shall be a court of record.” B

And, for local election courts, section 115 (6) provides :

“The election court shall for the purposes of the trial have the same powers and privileges as a judge on the trial of a parliamentary election petition . . .” C

These were provisions upon which Mr. Barnes, for the respondent, placed some reliance. But there are other provisions of the Act, to which we must now refer, on which Mr. Tugendhat, for the applicants, relied.

First, there are a number of provisions conferring on the High Court power to deal with certain interlocutory matters in relation to election courts, such as amendment of the petition (section 114 (6)); place of trial (sections 110 (3) and 115 (7)); security for costs (section 119 (2)); consolidation of petitions (section 121 (4)); and withdrawal of an election petition (section 127 (1)). We should also refer to section 111, which makes detailed provision for the reception of, and attendance upon, judges of parliamentary election courts, and shows that they should be treated in the same way, as far as circumstances permit, as judges of the High Court on assize. We do not however regard any of these provisions as being of more than peripheral importance. They simply show the High Court exercising powers in election petitions where it is impracticable for an election court to deal with them; and they require High Court judges trying parliamentary election petitions to be treated in the same way as High Court judges on assize. D E F

There are however other provisions to which we must refer. First, sections 124 and 125 deal with the conclusion of trials on parliamentary and local election petitions respectively. In respect of the former, section 124 (1) provides that the election court shall certify its determination in writing to the Speaker of the House of Commons, and section 124 (4) provides for the sending of any special report to the Speaker. However, in respect of local election petitions section 125 (2) provides that the election court shall certify its determination in writing to the High Court, and section 125 (4) provides for any special report to be made to the High Court; under section 125 (5) a copy of any certificate or report made to the High Court shall be sent by the High Court to the Secretary of State. It is difficult, however, to envisage the High Court exercising more than a ministerial function under this section. G H

More important than the above provisions is section 126, which applies to both parliamentary and local election petitions. It provides :

“Special Case for determination of High Court

“(1) If, on the application of any party to a petition made in the prescribed manner to the High Court, it appears to the High

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- A Court that the case raised by the petition can be conveniently stated as a special case, the High Court may direct it to be stated accordingly and the special case shall be heard before the High Court. In the case of a parliamentary election petition, the High Court shall certify to the Speaker its decision in reference to the special case. In the case of a petition questioning an election in England or
- B Wales under the local government Act, a statement of the decision on the special case shall be sent by the High Court to the Secretary of State and shall also be certified by the High Court under the hands of two or more judges thereof to the clerk of the authority for which the election was held. (2) If it appears to the election court on the
- C trial of an election petition that any question of law as to the admissibility of evidence or otherwise requires further consideration by the High Court, the election court may postpone the granting of a certificate until the question has been determined by the High Court, and for this purpose may reserve the question by stating a case for the decision of the High Court."

- So section 126 (1) confers power on the High Court to assume jurisdiction over election petitions, no doubt in cases not involving a factual
- D inquiry, in place of an election court; and section 126 (2) envisages an election court reserving a question of law for the determination of the High Court. In either case, an appeal may go (with leave of the High Court) to the Court of Appeal, but no further: see section 137 (1). Section 126 was strongly relied on by Mr. Tugendhat for the applicants. In this connection, Mr. Tugendhat also referred us to the Corrupt Practices at Municipal Elections Act 1872, which was a statute under which election
- E courts for local elections were first established. In that Act, "superior court" is defined as the Court of Common Pleas in Westminster. In section 15 (6) and (7) we find (in terms which are very similar) the same powers conferred on the "superior court" as are now by section 126 of the Act of 1949 conferred on the High Court, though of course relating only to local government petitions.

- F The Act of 1872 also provides, by section 14 (5):

- "The court shall for the purposes of the trial of a petition have all the same powers and privileges which a judge may have on the trial of an election petition under the provisions of the Parliamentary Elections Act, 1868, with this modification, that any fine or order of committal by the court may upon motion by the person aggrieved be
- G discharged or varied by the superior court, or in vacation by a judge thereof, upon such terms, if any, as such superior court or judge thinks fit."

- No such modification is now to be found in section 115 (6) of the Act of 1949. But it was present in the Act of 1949 until 1960, when repealed by section 19 (2) of and Schedule 4 to the Administration of Justice Act 1960,
- H instituting the new procedure in respect of contempt of court under that Act. We shall be referring to that new procedure later in this judgment.

Finally, we refer to section 137 (3) of the Act of 1949, which we have already mentioned and which provides:

"The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with respect to an election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction."

We understand this provision to be a supplementary provision enabling the High Court to deal with any matter not expressly reserved to an election court. Such are for present purposes the relevant provisions of the Act of 1949. We now can turn to consider other tribunals, in respect of which the same problem either may arise or has arisen; and we find that the conclusion must on each occasion depend upon the precise nature and powers of the particular tribunal. To take first, two simple examples, the statutes causing the Courts-Martial Appeal Court and the Restrictive Practices Court to continue in existence each provide that the court shall be a "superior court of record": see the Courts-Martial Appeal Court Act 1968, section 1 (2), and the Restrictive Practices Court Act 1976, section 1 (1). There could, we think, in any event be no doubt that these courts are superior courts. One fact to be taken into account appears to be whether High Court judges sit in the court in question; because it may be inappropriate that a Divisional Court of the Queen's Bench Division should exercise powers of judicial review over courts consisting of, or including, High Court judges. But that is merely one factor to be taken into account; it is not conclusive. So for example the Patents Appeal Tribunal, by virtue of section 85 (2) of the Patents Act 1949, consists of "a judge of the High Court nominated for the purpose by the Lord Chancellor"; and yet the view has been expressed in the House of Lords that having regard to various provisions of the Patents Act 1949, the Patents Appeal Tribunal is an inferior tribunal, and that the only remedy of persons aggrieved by a decision of that tribunal is by way of order of certiorari: see *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] A.C. 663, 678, *per* Lord Morton of Henryton. A similar conclusion was reached by the Privy Council in 1874 in respect of Courts of Mines created by Acts of the local legislature of the old Colony of Victoria; these too were held to be inferior courts, although the Chief Judge of the Court of Mines was to be one of the judges of the Supreme Court: see *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417. In that case the court invoked the authority of the ancient decision of Lord Holt C.J. in *Rex v. Inhabitants of Glamorganshire* (1700) 1 Ld.Raym. 580, in which he stated that it was "the constant practice to grant certiorari into Wales, as also into the counties palatine of Durham and Lancaster, which yet had original jurisdiction," the implication being that the Court of Queen's Bench would readily exercise its power to issue prerogative writs directed towards courts with extensive, even comprehensive jurisdiction, within limited geographical areas. In *Willan's* case Sir James Colville, in delivering the advice of the Privy Council, said, at p. 440:

"these Courts of Mines, which have been created by Acts of the local legislature, and with a jurisdiction which, however wide, is limited both as to the persons and the matters within the colony over which it is to be exercised, must, on the principle laid down by Lord Holt in *Rex v. Inhabitants of Glamorganshire* (1700) 1 Ld.Raym. 580, be taken to stand in relation to the Supreme Court on the footing of inferior courts. . . ."

However, in *Rex v. Justices of the Central Criminal Court, Ex parte London County Council* [1925] 2 K.B. 43, Lord Hewart C.J. appears to have been sufficiently impressed by the powers of judges of the Central Criminal Court to hold that the court was a superior court. After referring to several cases he said, at pp. 56-57:

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- A "To put these judgments together and to consider them in the light of section 16 of the Judicature Act 1873 . . . one may express the conclusion which they support in this way: judges of assize exercise powers upon the same plane with the powers exercised by the judges of the High Court in that court; the Central Criminal Court is a court of not less authority than a Court of Assize; the Central Criminal Court is, therefore, a superior court, and a writ of certiorari from the King's Bench Division does not lie to it for the purpose of quashing its order."
- B

- In *Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White* [1948] 1 K.B. 195, the Court of Appeal held that, although prohibition lay to an ecclesiastical court, certiorari would not lie. It is plain from the judgment of the court that it was considered right that what we now call judicial review should be exercised over such courts for the purposes of curbing acts in excess of jurisdiction; but that such jurisdiction should not be exercised to review any errors of law by those courts, since they were concerned not with questions of common law, but with questions of canon law with which the High Court was unfamiliar. Furthermore, historically the writ of certiorari had never lain to an ecclesiastical court; and it was considered that the writ of prohibition was effective to prevent any excess of jurisdiction. It was therefore held that, whereas prohibition would lie, certiorari would not. There are however observations made in the course of the judgment of the Court of Appeal which indicate that the decision depends upon the somewhat unusual jurisdiction exercised by the ecclesiastical courts, and should not be regarded as detracting from the general application of powers exercisable by the High Court by means of judicial review. For example, Evershed L.J. said, at pp. 222-223 :
- C
- D
- E

- "Whenever, as a result of the establishment by Act of Parliament of some new jurisdiction or some new tribunal exercising judicial or quasi-judicial functions, it is necessary to consider the application thereto of well-established forms of remedy, the court will not be afraid to extend the older principles to new circumstances. But the present case is not, in my judgment, of that character. We are not considering the application of established principle to a new jurisdiction, but the scope of the principle itself in regard to a jurisdiction no less ancient than the principle."
- F

- The position of the Crown Court and the county court is a little more complicated. Under section 4 (2) of the Courts Act 1971, it is provided :
- G

- "The jurisdiction and powers of the Crown Court shall be exercised by—(a) any judge of the High Court, or (b) any circuit judge or recorder, or (c) subject to and in accordance with the provisions of the next following section, a judge of the High Court, circuit judge or recorder sitting with justices of the peace, and any such persons when exercising the jurisdiction and powers of the Crown Court shall be judges of the Crown Court."
- H

Section 10 (5) of the Act, however, provides :

"In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, pro-

hibition or certiorari as the High Court possesses in relation to the A
jurisdiction of an inferior court."

It thus appears that the Crown Court is treated as an inferior court, except B
when it is exercising its jurisdiction in matters relating to trial on
indictment. It is therefore something of a hybrid. Since however it is
difficult to imagine a High Court judge sitting in the Crown Court
otherwise than upon a trial on indictment, it appears improbable that
the actions of a Crown Court, when a High Court judge is sitting, will
be subject to a judicial review.

At first sight the position of a county court is simple. Sections 115 to
119 of the County Courts Act 1959 make it plain that a county court is an
inferior court: see also *Reg. v. Hurst, Ex parte Smith* [1960] 2 Q.B. 133.
But there have been occasions when a county court has performed functions C
which resulted in the court being treated as a superior court. This
occurred when a county court exercised bankruptcy jurisdiction under
the Bankruptcy Acts 1883 and 1890. It was provided by section 100 of
the Bankruptcy Act 1883:

"a county court shall, for the purposes of its bankruptcy jurisdiction,
in addition to the ordinary powers of the court, have all the powers
and jurisdiction of the High Court, and the orders of the court may D
be enforced accordingly in manner prescribed."

It was further provided by section 102 (2):

"a court having jurisdiction in bankruptcy under this Act shall not
be subject to be restrained in the execution of its powers under this
Act by the order of any other court, nor shall any appeal lie from E
its decisions, except in manner directed by this Act."

Having regard in particular to these provisions, it was held by the Court
of Appeal that the county court, exercising that jurisdiction, was not
subject to what we now call judicial review: see *Skinner v. County Court
Judge of Northallerton* [1898] 2 Q.B. 680. A. L. Smith L.J. said, at
p. 684: F

"In my judgment, the result of these sections is that the position
of a county court judge sitting in bankruptcy and exercising bank-
ruptcy jurisdiction, and acting within that jurisdiction, is a position
similar to that of a judge of the High Court exercising his jurisdiction,
and that so long as a county court is exercising bankruptcy jurisdiction
the remedy by which to question an order made by such a judge, G
when exercising such jurisdiction, if such order requires alteration
or amendment, is by application to the judge himself sitting in
bankruptcy, and then possibly by appeal, and not by certiorari to
bring up the order into the Queen's Bench Division."

The decision of the Court of Appeal was affirmed by the House of Lords
[1899] A.C. 439. The Earl of Halsbury L.C. put the position in
characteristically forthright terms, at p. 441: H

"the statute itself has made the county court the High Court for this
purpose. You might just as well argue that a warrant, defective in
form, issued by the Court of Queen's Bench can be set right by
certiorari. Of course that is absurd. This is the High Court for this
purpose."

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- A From these cases, it is difficult to extract any precise principle. The most that can be said is that it is necessary to look at all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court in order to decide whether the tribunal should properly be regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court. As we have already indicated, in considering
- B that question the fact (if it be the case) that the tribunal is presided over by a High Court judge is a relevant factor, though not conclusive against the tribunal being classified as an inferior court; just as relevant are the powers of the tribunal and its relationship with the High Court which can ordinarily be ascertained from the statute under which the tribunal is set up. But, as is demonstrated in particular by the approach adopted
- C by the Court of Appeal in *Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White* [1948] 1 K.B. 195, and by the Privy Council in *Colonial Bank of Australasia v. Willan*, L.R. 5 P.C. 417 (following and adopting the view of Lord Holt in *Rex v. Inhabitants of Glamorganshire*, 1 Ld.Raym. 580), there is an underlying policy in the case of tribunals of limited jurisdiction, whether limited by area, subject matter or otherwise, that unless the tribunal in question should properly
- D be regarded in all the circumstances as having a status so closely equivalent to the High Court that the exercise of power of judicial review by the High Court is for that reason inappropriate, it is in the public interest that remedies by way of judicial review by the High Court should be available to persons aggrieved; though in some cases there may be special reasons why such remedy should be available only to curb an
- E excess of jurisdiction but not to review and correct an error of law committed within the jurisdiction.

With this guidance we turn to the election court. The matter here is complicated by the fact that, as we have seen, there are two types of election court. We are only concerned with what we have called a local election court; and we do not think it would be right in this judgment to express any opinion on the position of a parliamentary election court.

F We recognise that it might perhaps be thought anomalous if one type of election court should be subject to judicial review, and the other not. That was, however, the conclusion contemplated by Lord Widgery C.J. in *Reg. v. Election Court, Ex parte Sheppard* [1975] 1 W.L.R. 1319. In his unreserved judgment in that case he expressed the opinion, obiter, at p. 1323:

- G "It is quite clear that the election court which deals with parliamentary elections, consisting as it will do, of a Queen's Bench judge, is a superior court and it is clear that no question of the prerogative orders could be available there. But it is not so clear whether the same applies to a barrister appointed under section 115, as the election court for a local government election."

- H While expressing no opinion about the status of a parliamentary election court, we think it right to comment that, having (we believe) heard fuller argument and a more copious citation of authority than did the Divisional Court in that case, we doubt whether the mere fact that such a court consists of a High Court judge is conclusive of the question.

However, we are concerned only with the position of an election court which hears petitions in respect of local elections. As to this, looking at all the relevant circumstances, we have reached the conclusion

that such a court should be regarded as an inferior court, at least for the purpose of review of any excess of jurisdiction. It is true that, by virtue of sections 115 (6) and 110 (2) of the Act of 1949, the court has for the purposes of the trial the same powers, jurisdiction and authority as a judge of the High Court; but there are other factors which, in our judgment, nevertheless tilt the balance towards the conclusion that the court is an inferior court. First, there is the fact that the court consists of a barrister, and not of a High Court judge. Second, there is the fact that, by virtue of section 126 of the Act of 1949, the High Court may either deal with the matter itself if the case raised by the petition can conveniently be stated as a special case, and may also deal with any question of law on a case stated by the election court. Third, there is the historical fact that such an election court was treated as an inferior court under the terms of the statute (the Corrupt Practices at Municipal Elections Act 1872) by which it was created; and we do not think that the present legislation, under which both types of election court are treated in the same Act, has materially altered its status. We have of course to look at the matter as a whole; and we note that, despite the wide powers conferred on the court by sections 115 (6) and 110 (2) of the Act of 1949, it could not possibly be regarded as "the High Court for this purpose" (to quote again Lord Halsbury's words in *Skinner v. County Court Judge of Northallerton* [1899] A.C. 439), so as to make it absurd that judicial review over an election court of this type should be exercised by the Queen's Bench Division of the High Court. Looking at the matter as a whole, we reach the conclusion that a local election court is an inferior court, at least for the purposes of dealing with excess of jurisdiction.

There is however one particular matter to which we should refer. Under the Act of 1872, under which election courts of this type were established, one matter on which the superior court (then the Court of Common Pleas) had jurisdiction related to orders for committal by the election court: see section 14 (5) of the Act of 1872, to which we have already referred. As we have stated, that provision was retained in section 115 (6) of the Act of 1949, though the High Court was for this purpose substituted for the superior court: that provision as re-enacted therefore lends force to the conclusion that an election court of this type is an inferior court. It is true that this part of section 115 (6) was repealed by the Administration of Justice Act 1960, under which the new procedure relating to contempt of court was introduced; and indeed that, in *Peart v. Stewart* [1983] 2 W.L.R. 451, 456, Lord Diplock expressed the opinion that an election court, having the same powers, jurisdiction and authority as a judge of the High Court, fell within the definition of a superior court in section 19 of the Administration of Justice Act 1960. We do not however think that it can be right that a statute concerned to reform the law relating to contempt of court was intended to alter the pre-existing status of a particular tribunal, in respect of the power of the High Court to exercise judicial review over the activities of that tribunal. We do not therefore regard the Administration of Justice Act 1960 as casting light on the question we have to decide.

In the result, we have reached the conclusion that Mr. Cripps, by purporting to vary the order which he made, acted in excess of the powers conferred upon him as election court in this matter: and we are satisfied that this court has jurisdiction to correct this excess of jurisdiction by judicial review. The mere fact that his purported variation of his order as to costs was a nullity is immaterial because it is well-established that this will not of itself inhibit the court from exercising its power of judicial

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A review in appropriate circumstances. We consider that we should exercise our power to quash the direction made by Mr. Cripps; indeed if we did not do so, further substantial legal costs would be wasted by both parties. We shall accordingly grant the first head of relief sought by the applicants, viz., an order of certiorari removing Mr. Cripps's direction into this court in order that it may be quashed.

B

Application allowed with costs.
Order of certiorari granted.
Liberty to apply for declarations if necessary.

Solicitors: *Penningtons; Frere Cholmeley.*

C

[Reported by SIMON CASSELL, Barrister-at-Law]

D

[CHANCERY DIVISION]

DAVENPORT (INSPECTOR OF TAXES) v. CHILVER

1983 March 7, 8;
 April 14

Nourse J.

E

Revenue—Capital gains tax—Disposal of assets—Compensation for confiscated property—Statutory order conferring right to compensation—Payments in respect of property owned by taxpayer in own right and as beneficiary of deceased mother's estate—Whether payments in 1973 "derived from assets" confiscated in 1940—Whether capital sums received as compensation for loss of assets—Whether amounting to asset acquired otherwise than by way of bargain made at arm's length—Finance Act 1965 (c. 25), ss. 19, 22 (1) (3) (4) (a)

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The taxpayer, who was born in the United Kingdom in 1920, had prior to 1940, with her parents and her sister, owned property in Latvia. In 1939 her father died intestate and according to the Latvian law then in force his estate passed in equal shares to his widow and two daughters. In 1940 all private property in the Baltic states was confiscated. That included the taxpayer's family property, the bulk of which was then owned by her mother. In 1966 the taxpayer's mother who had been domiciled in England and Wales, died and under the terms of her will left any compensation due to her in respect of the confiscation of her Latvian property to her two daughters in equal shares. In 1967 an agreement was reached between the governments of the United Kingdom and the U.S.S.R. concerning long-standing disputes as to various territories ceded to the U.S.S.R. between 1940 and 1951. By the Foreign Compensation (Union of Soviet Socialist Republics) Order 1969 funds were made available to the Foreign Compensation Commission so that payment could be made to all applicants who could establish a claim to compensation under the Order. The taxpayer and her sister made claims in respect of the Latvian property on behalf of the estates of their parents and in their own rights. The taxpayer established claims of £60,332 in respect of which in 1973 she received from the Commission £25,683, being 42 per cent. of that claim. She appealed against an assessment to capital gains

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tax for the year 1972-73 made on her under the provisions of sections 19, 22 and 45 (5) of the Finance Act 1965¹ in respect of the compensation payments in an amount of £10,000. The special commissioners upheld the appeal and discharged the assessment.

On appeal by the Crown:—

Held, allowing the appeal, (1) that although for the general purposes of section 22 (3) the compensation paid in 1973 in respect of the Latvian property confiscated in 1940 could not be said to be “derived from assets,” the various categories of the Latvian property were assets within the scope of section 22 (1) and the compensation paid in respect of the small parts of the property owned by the taxpayer in her own right and via her father’s estate were capital sums received by way of compensation for the loss of those assets and accordingly brought into the charge to the tax by the provisions of section 22 (3) (a) of the Act (post, pp. 488E—489A).

Inland Revenue Commissioners v. Montgomery [1975] Ch. 266 applied.

(2) That the Order of 1969 conferred a right on the taxpayer that was itself a form of property and therefore an asset within section 22 (1); that the greater part of the compensation money that had been paid to the taxpayer in respect of her mother’s Latvian property, was a capital sum derived from that asset within the meaning of section 22 (3) and accordingly came within the charge to the tax; but that that right was acquired by the taxpayer otherwise than by way of arm’s length bargain so that for the purpose of ascertaining whether a gain or loss accrued to the taxpayer on its disposal section 22 (4) (a) required that its acquisition be deemed to have been for a consideration equal to its market value at the time that the Order came into effect (post, p. 490A–H).

Harrison v. Nairn Williamson Ltd. [1978] 1 W.L.R. 145, C.A. applied.

Davis v. Powell [1977] 1 W.L.R. 258 distinguished.

Quaere. Whether for the purpose of computing any gain or loss accruing to the taxpayer, the value of the right conferred by the Order of 1969 could have increased or decreased between 1969 and 1973 (post, p. 491B–D).

The following cases are referred to in the judgment:

Davis v. Powell [1977] 1 W.L.R. 258; [1977] 1 All E.R. 471; 51 T.C. 492.

Harrison v. Nairn Williamson Ltd. [1978] 1 W.L.R. 145; [1978] 1 All E.R. 608; 51 T.C. 135, C.A.

Inland Revenue Commissioners v. Montgomery [1975] Ch. 266; [1975] 2 W.L.R. 326; [1975] 1 All E.R. 664; 49 T.C. 679.

Marren v. Ingles [1980] 1 W.L.R. 983; [1980] 3 All E.R. 95; T.C. Leaflet No. 2791, H.L.(E.).

O’Brien v. Benson’s Hosiery (Holdings) Ltd. [1980] A.C. 562; [1979] 3 W.L.R. 572; [1979] 3 All E.R. 652; T.C. Leaflet No. 2752, H.L.(E.).

The following additional cases were cited in argument:

Huggins, Ex parte (1882) 21 Ch.D. 85, C.A.

¹ Finance Act 1965, s. 19 (1); see post, p. 485F–G.

S. 22 (1) (3); see post, pp. 485G–H, H—486B.

S. 22 (4) “Subject to the provisions of this Part of this Act, a person’s acquisition of an asset and the disposal of it to him shall for the purposes of this Part of this Act be deemed to be for a consideration equal to the market value of the asset—(a) where he acquires the asset otherwise than by way of a bargain made at arm’s length and in particular where he acquires it by way of gift or by way of distribution from a company in respect of shares in the company . . .”

S. 45 (5); see post, p. 486B–C.

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- A *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, H.L.(Sc.).
Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.).

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

- B The taxpayer, Miss Marie Christine Chilver, was assessed to capital gains tax for the year 1972-73 on a capital gain of £10,000 that was said to have accrued by virtue of payments to her totalling £25,683 made by the Foreign Compensation Commission under the Foreign Compensation (Union of Soviet Socialist Republics) Order 1969 (S.I. 1969 No. 735). Her appeal against the assessment was upheld by the commissioners who discharged the assessment.

- C The Crown appealed.
 The facts are set out in the judgment.

Robert Carnwath for the Crown.

Peter Whiteman Q.C. and *B. R. Green* for the taxpayer.

- D *Cur. adv. vult.*

- E April 14. NOURSE J. read the following judgment. This is an appeal by way of case stated from a decision of the special commissioners given on February 13, 1980. Broadly stated, the question for decision is whether payments totalling £25,683·54 which were made to the taxpayer, Miss Marie Christine Chilver, in 1973 pursuant to the Foreign Compensation (Union of Soviet Socialist Republics) Order 1969 are subject to capital gains tax. The commissioners answered that question in the negative, and the Crown now appeals to this court. The relevant provisions of the Finance Act 1965 have once again given rise to several points of considerable difficulty.

- F The material facts as agreed before the commissioners were the following. The taxpayer's father was a British national who was born in the United Kingdom. In 1915 he married Irma Jurgenson. They had two children; namely, an elder daughter Victoria and the taxpayer, who were born in the United Kingdom in 1918 and 1920 respectively. All four members of the family owned property in Latvia, consisting of land, buildings, a business, shares, an internal bond, a bank balance, a debt and chattels. On August 20, 1939, Mr. Chilver died intestate. According to the Latvian law then in force his estate passed as to one-third to his widow and as to two-thirds to his two daughters in equal shares. On July 21, 1940, all private property in the Baltic states—Estonia, Latvia and Lithuania—was nationalised. To be more precise, it was confiscated—that is to say, expropriated without payment of compensation. That included the Chilver property to which I have referred, the bulk of which was owned by Mrs. Chilver in her own right. By her will Mrs. Chilver, who died on September 19, 1966, domiciled in England and Wales, gave any compensation due to her by reason of her property in Latvia having been confiscated to her two daughters in equal shares. That included Mrs. Chilver's interest in any compensation due to her in right of her one-third interest in her late husband's estate. The result was that on Mrs. Chilver's death each of the two daughters became beneficially entitled, in addition to any compensation in her own right, to one-half of

any compensation due to the estates of each of her parents. The elder daughter is now resident in Sweden, and accordingly there is no question of any claim for United Kingdom tax having been made against her. On January 21, 1972, letters of administration with the will annexed to Mrs. Chilver's estate were granted to the taxpayer in the United Kingdom. A

As I have said, Mrs. Chilver died on September 19, 1966. On February 12, 1967, an agreement was reached between the governments of the United Kingdom and the U.S.S.R. concerning various long-standing disputes relating not only to the Baltic states but to various territories ceded to the U.S.S.R. by Czechoslovakia, Finland, Poland and Rumania at various times between 1940 and 1951. That agreement was embodied in a treaty between the two countries dated January 5, 1968. So far as material, the terms of the treaty were that the United Kingdom government was permitted to retain certain property belonging to individuals and institutions in the Baltic states which had been frozen over here since 1940, notably gold held in London which had previously belonged to Baltic banks. The Baltic property was put into the hands of the Foreign Compensation Commission, and the manner of its distribution was prescribed by the Order of 1969, which was made under the Foreign Compensation Acts 1950 and 1969. It is unnecessary for me to go into the provisions of the Order of 1969 in detail. It recited an intention to pay money to the Commission which, under articles 3 and 4, was to be used to constitute a fund to be called the Union of Soviet Socialist Republics Compensation Fund, with power to make temporary investments, any produce of which was to be added to the fund. Article 26 (1) provided that the Commission should make payments out of the fund to every person who had established a claim under the order and who applied to the Commission for payment. Article 13 (1) provided that, in order to establish a claim in respect of property (other than a debt, a balance in the bank, a share or an internal bond) an applicant should be required to establish to the satisfaction of the Commission, *inter alia*: B C D E

“(c) that he or his predecessor in title or, if he is a trustee, the person for whom he is a trustee or the predecessor in title of such person has been deprived, on or after the relevant date and before February 13, 1967, of title to or enjoyment of such property by any act of confiscation, nationalisation, expropriation or other similar official act of dispossession and has suffered loss thereby.” F

There were similar provisions in the cases of debts, bank balances, shares and internal bonds. The relevant date in the case of the Baltic states was July 21, 1940. I should also mention article 19, which provided that the Commission should, in assessing the amount of loss with respect to each claim established under the order, add to the amount of the capital loss assessed by the Commission simple interest thereon at the rate of 4 per cent. per annum for the period from July 21, 1960, to February 12, 1967. G

Pursuant to the Order of 1969 the taxpayer and her elder sister made claims in respect of the Latvian property nationalised in 1940 on behalf of the estates of each of their parents and in their own right. In accordance with the usual practice in these cases the Foreign Compensation Commission was required by the Order of 1969 to determine the full amount of all established claims and then to divide up the distributable amount of the designated fund *pro rata*. The taxpayer succeeded in establishing claims to the extent of £60,332.50, in respect of which she H

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A received 42.57 per cent., or £25,683.54. The details, including the capital element (as distinct from the interest element under article 19), are shown in the following table:

		<i>Full Estab- lished Claim</i>	<i>Capital Element in Established Claim</i>	<i>Paid</i>
B	1. One-half of the estate of Frank Chilver	£2,358	£1,143	£1,003.80
	2. One-half of the estate of Irma Chilver	£56,474.50	£27,379.50	£24,041.19
C	3. The taxpayer's own claim	£1,500	£727	£638.55
		<hr/> £60,332.50	<hr/> £29,249.50	<hr/> £25,683.54

D In due course the Inland Revenue raised an assessment against the taxpayer to capital gains tax for the year 1972-73. In 1978, after she had appealed against that assessment, the Inland Revenue raised assessments for income tax on the interest element as interest under Case III of Schedule D for the years 1972-73 and 1973-74. The special commissioners discharged all three assessments. It does not surprise me that there has been no appeal against their decision in regard to income tax, and I need consider that question no further. The claim for capital gains tax now applies to both capital and interest elements alike. As I have said, the assessment to capital gains tax is for 1972-73, during which year the taxpayer received payments amounting in the aggregate to £13,574.80. She received the balance of £12,108.74 in the year 1973-74, but no assessment to capital gains tax has been raised for that year. Although the Crown has made no concession in this respect, it would seem that an assessment would now be too late. On that footing it appears that the maximum amount of tax at stake is something under £4,000.

F The Crown's claim to capital gains tax depends upon the provisions of the Finance Act 1965, in particular on certain of the provisions contained in sections 19, 22 and 45 (5). Section 19 (1) provides that tax shall be charged in accordance with the Act in respect of capital gains, that is to say chargeable gains computed in accordance with the Act and accruing to a person on the disposal of assets. Section 22 deals with disposals of assets and computation of gains. Subsection (1) provides:

G "All forms of property shall be assets for the purposes of this Part of this Act, whether situated in the United Kingdom or not, including—(a) options, debts and incorporeal property generally, and . . . (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired."

H Subsection (3), which is the provision upon which this case mainly depends, is in these terms:

"Subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person

paying the capital sum, and this subsection applies in particular to—
 (a) capital sums received by way of compensation for any kind of
 damage or injury to assets or for the loss, destruction or dissipation
 of assets or for any depreciation or risk of depreciation of an asset,
 (b) capital sums received under a policy of insurance of the risk of
 any kind of damage or injury to, or the loss or depreciation of,
 assets, (c) capital sums received in return for forfeiture or surrender
 of rights, or for refraining from exercising rights, and (d) capital
 sums received as consideration for use or exploitation of assets.”

I will refer to section 22 (4) later. Section 45 (5) provides that in the case of a disposal within any of paragraphs (a) to (d) of section 22 (3) the time of the disposal shall be the time when the capital sum is received as described in that subsection.

In order to see what, if any, impact those provisions have in the present case, it is necessary to examine the nature of the taxpayer's various interests with some care. First, on the facts as agreed, I think that she must be taken to have been the owner of Latvian property not only in her own right but also via her father's estate before nationalisation on July 21, 1940. Her father had died 11 months previously. Even if his estate had not been fully administered the taxpayer would, in English terms, have acquired a chose in action on his death. I must assume that she took no less a right under Latvian law. Secondly, but on the other hand, she was never the owner of Latvian property via her mother's estate. Mrs. Chilver had no Latvian property to leave to her daughters. The claim for tax, as I understand it, relates to disposals made by the taxpayer and not to disposals of assets once owned by Mrs. Chilver but not by the taxpayer. In other words, the claim is not made against the taxpayer partly in her capacity as her mother's sole personal representative. That capacity, albeit the one in which she claimed and was paid the bulk of the compensation moneys, is coincidental. In my view section 22 (3) is so worded, sc., “there is . . . a disposal of assets by their owner.” as to apply only to capital sums derived from assets which are or have been owned by the person who is treated as disposing of them. Since the taxpayer was never the owner of Latvian property via her mother's estate, no claim can lie against her in respect of such property. What then did the taxpayer acquire on her mother's death and was it an asset within section 22 (1)? What she acquired was a half share of any compensation due to Mrs. Chilver by reason of the confiscation of her Latvian property. On September 19, 1966, some five months before there was even an agreement between the governments of the United Kingdom and the U.S.S.R., the taxpayer acquired no more than a hope that she would one day receive her share of compensation. It was no different from the hope of succeeding under the will of a living person—a mere spes successionis. That is something which has never been treated as property in English law. In my judgment it is not a form of property and therefore not an asset for the purposes of section 22 (1). On these short grounds I am of the opinion that there can be no question of any charge to capital gains tax on that part of the compensation moneys which was paid to the taxpayer in respect of her mother's Latvian property, unless the right conferred on her by the Order of 1969 was itself an asset within section 22 (1). That is a question to which I will come in due course. I express this view of the position with some diffidence, because it was not urged upon the commissioners and was barely explored in the argument

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A in this court. It is therefore right that I should now consider the point on another footing, particularly since different considerations must in any event apply to those much smaller parts of the compensation moneys which were paid to the taxpayer in respect of the Latvian property which she owned in her own right and via her father's estate before nationalisation on July 21, 1940. And if, contrary to my understanding, the claim for tax can be treated as relating in part to disposals of assets once owned

B by Mrs. Chilver but not by the taxpayer, the views which I now express in regard to the smaller parts of the compensation moneys will apply to the larger part as well. However, in that event the base cost will be that of the assets and not the nil value, presumably of the claim for compensation, which I was told was put in for estate duty purposes on Mrs. Chilver's death.

C The convenient course is for me to start by considering whether the compensation moneys paid to the taxpayer were capital sums "derived from assets" within the general words of section 22 (3). Mr. Carnwath submitted that they were, although not as his primary argument in this court. In answering this question in the negative, the commissioners expressed themselves as follows:

D "The conclusion we have reached is that the compensation was not 'derived from' the Latvian property in the statutory sense. The Latvian property had been expropriated in 1940. [The taxpayer] had no right to compensation prior to the Order. The funds available for distribution by the Foreign Compensation Commission were not provided by [the taxpayer's] family property. In our view the decision of the British Government to compensate the British

E nationals who had lost property in Latvia is a novus actus. Having owned Latvian property which was expropriated is one of the conditions which [the taxpayer] had to satisfy in order to sustain a claim under the Order. But, in our view, that does not create any nexus between the compensation and the Latvian property formerly owned by [the taxpayer] and her family. Accordingly we hold that

F the compensation was not 'derived from' that Latvian property for the purposes of section 22 (3) of the Finance Act 1965."

They then said that the decision of Walton J. in *Inland Revenue Commissioners v. Montgomery* [1975] Ch. 266, where the judge had adopted the dictionary meaning of "derivation" as being to trace or show the origin, was authority for that conclusion. I agree with the commissioners' conclusion on this point. To express it in my own words, I do not think

G that one thing can be said to derive from another unless it is in some sense the fruit of the tree. In Latvia the tree is dead. The fruit has dropped from one rooted in a loftier soil to which the blight cannot attain.

The primary argument of Mr. Carnwath in this court was one which was not put to the commissioners. He submitted that the various

H categories of the Latvian property were assets within section 22 and that the compensation moneys paid to the taxpayer were capital sums received by way of compensation for the loss of those assets within section 22 (3) (a). That, he said, made it unnecessary to consider whether they were capital sums derived from assets within the general words of the subsection. The various sums referred to in paragraphs (a) to (d) are particular examples of sums which are to be treated as being derived from assets for the purposes of those general words. In answer to this argument

Mr. Whiteman submitted, first, that the particular examples of capital sums referred to in paragraphs (a) to (d) were subject to a condition precedent that they should be capital sums derived from assets, and, secondly, that the moneys were not capital sums within paragraph (a) at all. A

I was initially attracted to Mr. Whiteman's first submission, but on consideration I do not think that it is made out. It is a short question of construction. In my judgment the particular examples stand on their own feet, and, if necessary, prevail over the general words. On the other hand, they do not affect the construction of the general words and their application to cases not within the examples, and I did not understand Mr. Carnwath to suggest that they did. Mr. Whiteman's second submission raises a far more difficult question. My first impression of the language of section 22 (3) (a) was that its primary concern is with compensation payable as a result of some physical loss or damage. It clearly includes damages so recoverable in contract or in tort, but the word "compensation" demonstrates that it is not so limited. I would expect it to include, for example, compensation payable under legislation such as the War Damage Acts. I would not expect it to include compensation payable on the compulsory acquisition of land. A transaction of that kind occasions a disposal of the asset within section 19 (1). That affords some confirmation of the view that paragraph (a) is not concerned, at least primarily, with compensation payable as a result of a change of title as distinct from some physical loss or damage. On the other hand, there seems to be no reason for excluding compensation for injurious affection in a case where no land is taken from the claimant. That would be compensation received for the depreciation of an asset. That is a case where there is no change of title to the asset; but a statutory undertaking on adjoining or neighbouring land can hardly be said to cause physical loss or damage to the asset. Again the phrase "dissipation of assets" could well extend beyond the case of physical loss or damage. B C D E

With these general observations I return to the present case. The only word in paragraph (a) upon which Mr. Carnwath was able to rely is "loss." It cannot be said that the taxpayer's Latvian property was either damaged, injured, destroyed, dissipated, depreciated, or subjected to a risk of depreciation. Each of those is a process which impinges upon the integrity of the asset or reduces its value. The function of nationalisation is to preserve the integrity and value of the asset, although the effect is irretrievably to deprive the owner of it. On that ground it is certainly a fair use of language to describe nationalisation, more especially confiscation, as the loss of an asset. The question, by reference to the wording of the Order of 1969, is whether Parliament intended the word "loss" to comprehend "any act of confiscation, nationalisation, expropriation, or other similar official act of dispossession." Although an affirmative answer puts a heavy burden on that single word, it seems to me that that it is not beyond the tolerance of the wide definition of assets. If all forms of property are to be assets, I do not see why the loss of an asset should not include the confiscation of a form of property, even though that is something which involves a change of title and no physical loss or damage to the asset. In the end I have come to a clear view that paragraph (a) is a provision of wide effect which is not limited to compensation payable as a result of some physical loss or damage. Mr. Whiteman's second submission also fails and Mr. Carnwath's primary argument succeeds. F G H

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A That means that there were disposals under section 22 (3) (a) in relation to the small parts of the compensation moneys which were paid to the taxpayer in respect of the Latvian property which she owned in her own right and via her father's estate. However, the view which I have expressed in regard to that much larger part which was paid to her in respect of her mother's Latvian property makes it necessary for me to consider the Crown's alternative claim, which starts with the proposition that the Order of 1969 conferred a right on the taxpayer, and that that right was a form of property and therefore an asset within section 22 (1). More particularly Mr. Carnwath submitted that the right was a species of incorporeal property within section 22 (1) (a). For this purpose he relied on the decisions of the House of Lords in *O'Brien v. Benson's Hosiery (Holdings) Ltd.* [1980] A.C. 562, and *Marren v. Ingles* [1980] 1 W.L.R. 983. Like the commissioners who decided this point also in favour of the taxpayer Mr. Whiteman relied on *Davis v. Powell* [1977] 1 W.L.R. 258. The question for decision in that case was whether a sum equivalent to the minimum compensation payable to an agricultural tenant under section 34 of the Agricultural Holdings Act 1948 by way of compensation for disturbance on his quitting the holding was a capital sum within section 22 (3). What had happened was that the tenant had surrendered part of the land to the landlord for a consideration which included a sum, £591, equivalent to the compensation. The Crown contended, correctly, that the lease was an asset, but Templeman J., in rejecting its claim that the compensation was either a capital sum derived from assets within the general words or one received in return for a surrender of rights within section 22 (3) (c), said, at p. 260:

E "It does not seem to me that the compensation paid under section 34 is derived from the asset, namely, the lease. It is not derived from an asset at all: it is simply a sum which Parliament says shall be paid for expense and loss which are unavoidably incurred after the lease has gone. Section 22 (3) delimits some particular matters which are liable to charge; paragraph (c) charges 'capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights.' But in my judgment this section 34 compensation is not a capital sum received in return for the surrender of rights. It was not paid as a result of a bargain in which the tenant said, 'If I get out, will you pay me £591?' It is a sum paid where a tenant is faced with a notice to quit and must get out. Parliament says that in these circumstances which have nothing to do with a surrender the tenant is to have a sum by way of compensation for irretrievable loss."

Founding himself in particular on the final sentence of that passage, Mr. Whiteman submitted that that case is authority for the general proposition that a statutory right to compensation for irretrievable loss cannot be an asset for capital gains tax purposes.

H There are three reasons why I find myself unable to accept that submission in this case. First, it seems that the Crown's claim in *Davis v. Powell* was made solely under section 22 (3) and that Templeman J. did not have to consider whether the statutory right to compensation might itself have been a form of property and therefore an asset within section 22 (1). It was not necessary for him to look beyond the lease, that being the asset in respect of which the claim under section 22 (3) was made. Secondly, and perhaps more significant, it seems to me that the taxpayer's

right in the present case was one of a very different order from Mr. Powell's. Once the intended payment had been made to the Commission the effect of the Order of 1969 was to confer on the taxpayer a right to share in a designated fund, subject to proof of title and value. That is a right which can, I think, fairly be described as an independent proprietary right, whereas the right to compensation under section 34 of the Act of 1948 is a claim against the pocket of the landlord for expenses which the tenant's pocket is deemed already to have met. It is a mere right to reimbursement. I think that if I were to accept Mr. Whiteman's submission on this point, I would be giving less than full effect to the decision in *O'Brien v. Benson's Hosiery (Holdings) Ltd.* [1980] A.C. 562. Thirdly, and perhaps most significant of all, on the view I have expressed the taxpayer never did suffer an irretrievable loss in respect of her mother's Latvian property. It was Mrs. Chilver who suffered that loss. Accordingly, there is no difficulty in saying that the Order of 1969 conferred on the taxpayer, who had owned nothing beforehand, a form of property, and therefore an asset within section 22 (1). In my judgment *Davis v. Powell* [1977] 1 W.L.R. 258 is distinguishable from the present case. I respectfully disagree with the view of the commissioners on this point.

The next question which was argued was whether the right conferred on the taxpayer by the Order of 1969 was one "acquired" by her, or whether it was one "otherwise coming to be owned without being acquired" within section 22 (1) (c). Mr. Carnwath submitted that the latter view was correct. He said that the right could not have existed without the taxpayer, and that it therefore came to be owned by her without being acquired. I accept the premise, but reject the conclusion. It is a matter of everyday legal parlance to talk of somebody acquiring a right under a statute. In my view the second part of section 22 (1) (c) is not directed to this kind of right at all. Mr. Carnwath argued that if it was not it would be difficult to know to what it was directed. That may be so, although it would seem to me that it might apply, for example, to the goodwill of a business which had been built up by the person whom it was sought to tax. In any event, the difficulty of not knowing to what a very general provision of this nature may be directed is no justification for seeking to apply it to something to which it is clearly not directed. On that footing Mr. Whiteman, relying on the decision of the Court of Appeal in *Harrison v. Nairn Williamson Ltd.* [1978] 1 W.L.R. 145, submitted that the taxpayer's acquisition of the asset was otherwise than by way of a bargain made at arm's length and accordingly fell within section 22 (4) (a). In my view that is clearly so. The result is that the taxpayer's acquisition of the right is deemed to have been for a consideration equal to its market value.

There seems to have been some debate before the commissioners as to whether there had been a disposal of the right acquired by the taxpayer under the Order of 1969. I do not see much difficulty about that point myself. I can understand that there may have been no disposal or part disposal of the asset on the receipt of the sum of £13,574.80 paid in 1972-73, but on that footing I think it clear that that sum was a capital sum derived from the asset within the general words of section 22 (3). In the result I conclude that the Crown's alternative claim is made out in regard to that part of the compensation moneys which was paid to the taxpayer in respect of her mother's Latvian property. Whether it will be worth anything in practice is another matter.

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A The commissioners having discharged the assessment to capital gains tax, it was unnecessary for them to ascertain the relevant base costs. The result of this judgment is that that may now be necessary. In the absence of agreement between the parties it will, as the commissioners themselves recognised, be necessary for the matter to be remitted to them for the computation issues to be argued and determined. Mr. Whiteman submitted that I should not order a remittal, principally on grounds of delay

B and consequential hardship to the taxpayer. Without going into detail, it seems to me that I have no alternative but to remit the matter, if I am asked to do so. What I will say is that it does seem to me that some practical view ought to be taken in regard to that part of the compensation moneys which was paid to the taxpayer in respect of her mother's Latvian property. It must certainly be possible, in theory at any rate,

C that the market value of the proportionate part of the taxpayer's right when the Order of 1969 came into operation on June 16, 1969, differed from the corresponding amount which she was paid by the Commission in 1972-73. On the other hand, as a general proposition divorced from the curious effect which this difficult legislation has had on the peculiar facts of this case, the notion that the value of a right of this kind could have increased, or indeed decreased, between 1969 and 1972-73 is strange

D indeed. Common sense would suggest that it ought to be treated as a constant. If it is any part of my function to express a view on the matter, I would say that in one way or another, whether by concession or otherwise, the fair and proper course would be for the Crown to proceed on the footing that there had been neither a gain nor a loss in the value of the taxpayer's right during the material period.

E The foregoing remarks are not intended to have any application at all to those much smaller parts of the compensation moneys which were paid to the taxpayer in respect of the Latvian property which she owned in her own right and via her father's estate. I can see no reason at all why normal principles of base cost and time apportionment should not apply to them.

F Although the Crown's appeal must be allowed, it is clear to me, for the reasons which I have endeavoured to express, that the substantial victory is, or ought still to be, the taxpayer's.

Appeal allowed.

Case remitted to commissioners to determine issues of computation of any gains.

G *Taxpayer granted liberty to apply as to costs of appeal.*

Solicitors: *Solicitor of Inland Revenue; Vizard & Co., Monmouth.*

[Reported by HARRIET DUTTON, Barrister-at-Law]

H

[1983]

[COURT OF APPEAL]

A

MULTINATIONAL GAS AND PETROCHEMICAL CO. v.
MULTINATIONAL GAS AND PETROCHEMICAL
SERVICES LTD. AND OTHERS

[1980 M. No. 1769]

B

1983 Jan. 11, 12, 13, 14, 17, 18;
Feb. 16

Lawton, May and
Dillon L.JJ.

Practice—Writ—Service out of jurisdiction—Breach of duty of care alleged against English company in advising plaintiff—Plaintiff alleging its foreign shareholders and directors negligently acting on advice—Whether tort committed within jurisdiction—Plaintiff and English company both in liquidation—Whether company, shareholders or directors “proper party” to action—R.S.C., Ord. 11, r. 1 (1) (h) (j)

C

Company—Director—Action against—Directors committing solvent company to future financial liabilities—Shareholders approving decisions—Whether company having cause of action in negligence

Three oil companies, which had been incorporated in the United States of America, France and Japan respectively, decided to join together in a commercial enterprise for the purchase, storage, transportation and sale, inter alia, of liquefied petroleum gas and liquefied natural gas. To carry out that joint venture they formed the plaintiff company which was to be incorporated in England but, on receiving advice on taxation, it was decided to incorporate the plaintiff in Liberia and to form an English company S., to act as the plaintiff's adviser and agent. The plaintiff's shareholders were the oil companies and they appointed its directors, who were all resident abroad. The plaintiff had no place of business in the United Kingdom and all its meetings were held abroad. The plaintiff began to trade and by 1974 it was trading profitably. S. was acting as its adviser and agent. Between 1973 and January 1975, the plaintiff's directors made a number of decisions resulting in the plaintiff chartering or acquiring interests in some 20 tankers and incurring future financial liabilities. A fall in the market resulted in the plaintiff being in financial difficulties and by September 1977 it had to cease trading. Both the plaintiff and S. went into liquidation.

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The plaintiff obtained leave from the Companies Court to bring an action against S. for breaches of its duty of care to the plaintiff under the agency agreement in connection with the information and advice it supplied to the plaintiff and on which the plaintiff had acted. It also sought to claim against the oil companies and one of their subsidiaries for breaches of the duty of care which they owed the plaintiff as persons exercising the powers of management and direction in connection with the plaintiff's decisions and also against the plaintiff's directors for their negligence in making the decisions that had resulted in the plaintiff becoming insolvent. The plaintiff applied for leave to issue concurrent writs and serve notice of the writs out of the jurisdiction, under R.S.C., Ord. 11, r. 1 (1) (h) and (j),¹ on the foreign defendants. The

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¹ R.S.C., Ord. 11, r. 1: “(1) . . . service of a writ, out of the jurisdiction is permissible with the leave of the court in the following cases . . . (h) if the action begun by the writ is founded on a tort committed within the jurisdiction; . . . (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto; . . .”

R. 4: “(2) No such leave shall be granted unless it shall be made sufficiently to

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Multinational v. Multinational Services (C.A.)

A master granted leave but, on appeal, the judge set aside the order.

On appeal by the plaintiff:—

B *Held*, (1) that for the purposes of Ord. 11, r. 1 (1) (h) it was the place where in substance the plaintiff's cause of action arose that determined whether the tort was committed within the jurisdiction of the court; that, since the plaintiff's claim was based on allegations of S's negligence in supplying information from this country to the plaintiff's directors abroad and the alleged negligence of the plaintiff's directors in acting on that information abroad, the substance of the cause of action arose from acts committed abroad and, therefore, since the action was founded on a tort committed abroad for the purposes of rule 1 (1) (h), the court had no jurisdiction to grant leave to serve notice of the writ on the foreign defendants (post, pp. 500E–F, 504E–505B, 515H–516B).

C Dictum of Lord Pearson in *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458, 468, P.C. applied.

D (2) Dismissing the appeal (May L.J. dissenting), that, although the court had jurisdiction under Ord. 11, r. 1 (1) (j) to grant leave for notice of the writ to be served on a foreign defendant where an action had been properly brought against a defendant within the jurisdiction, an order would not be made where the foreign defendant had a good defence to the action; that, although the plaintiff had a separate existence from its shareholders, it existed for their benefit and provided they acted intra vires and in good faith they could manage its affairs as they chose while it was solvent; that the shareholders, who owed no duty to third parties or to future creditors, by approving the director's acts had made those acts the acts of the plaintiff and it could not now complain of the lack of commercial judgment of the directors in making the decisions (post, pp. 501G–502B, 518E–F, 519E–H, 522F–G).

E *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.); *The Hagen* [1908] P. 189, C.A.; *Sharples v. Eason & Son* [1911] 2 I.R. 436 and *The Brabo* [1949] A.C. 326, H.L.(E.) applied.

In re Horsley & Weight Ltd. [1982] Ch. 442, C.A. considered.

F *Per* May and Dillon L.JJ. Although the predominant reason for making S. a party to the action was to bring an action in this country against the foreign defendants, S. was a “proper party” to the action within the meaning of rule 1 (1) (j) (post, pp. 511B–E, 516G–H, 518D–E).

Per Lawton L.J. The judge's finding that the predominate reason for bringing the action against S. was to enable an application for leave to serve the defendants out of the jurisdiction was sufficient to dispose of the appeal (post, p. 501B–C).

G *Per* Lawton and May L.JJ. The defence of *volenti non fit injuria* was not available to the defendants (post, pp. 502C–E, 513H–514D, F–G).

H *Per* May L.J. A company as a separate legal entity could complain of the negligence of its directors and, although there was little likelihood of the plaintiff complaining of those acts while it was controlled by the defendant shareholders, the shareholders restraint on it did not amount to a release by the plaintiff of its cause of action and, since all the defendants were proper parties to the action, the court should exercise its discretion under Ord. 11, r. 4 (2) and grant leave to serve notice of the writ on the foreign defendants under the provisions of Ord. 11, r. 1 (1) (j) (post, pp. 511F–G, 512C–G, 514H–515E).

Decision of Peter Gibson J. affirmed.

appear to the court that the case is a proper one for service out of the jurisdiction under this Order.”

Multinational v. Multinational Services (C.A.)**[1983]**

The following cases are referred to in the judgments:

Attorney-General for Canada v. Standard Trust Co. of New York [1911] A.C. 498, P.C. **A***Brabo, The* [1948] P. 33; [1947] 2 All E.R. 363, C.A.; [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.).*Castree v. E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248; [1980] 2 All E.R. 589, C.A.*City Equitable Fire Insurance Co. Ltd., In re* [1925] 1 Ch. 407, C.A. **B***Cooney v. Wilson* [1913] 2 I.R. 402.*Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458; [1971] 2 W.L.R. 441; [1971] 1 All E.R. 694, P.C.*Duomatic Ltd., In re* [1969] 2 Ch. 365; [1969] 2 W.L.R. 114; [1969] 1 All E.R. 161.*Express Engineering Works Ltd., In re* [1920] 1 Ch. 466, C.A.*Foss v. Harbottle* (1843) 2 Hare 461. **C***Hagen, The* [1908] P. 189, C.A.*Horsley & Weight Ltd., In re* [1982] Ch. 442; [1982] 3 W.L.R. 431; [1982] 3 All E.R. 1045, C.A.*Johnson (B.) & Co. (Builders) Ltd., In re* [1955] Ch. 634; [1955] 3 W.L.R. 269; [1955] 2 All E.R. 775, C.A.*Lee, Behrens and Co. Ltd., In re* [1932] 2 Ch. 46.*Massey v. Heynes & Co.* (1888) 21 Q.B.D. 330, C.A.*North-West Transportation Co. Ltd. v. Beatty* (1887) 12 App.Cas. 589, P.C. **D***Parker and Cooper Ltd. v. Reading* [1926] Ch. 975.*Pavlidis v. Jensen* [1956] Ch. 565; [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518.*Rosler v. Hilbery* [1925] Ch. 250, Russell J. and C.A.*Ross v. Eason & Son Ltd.* [1911] 2 I.R. 459.*Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.). **E***Sharples v. Eason & Son* [1911] 2 I.R. 436.*Witted v. Galbraith* [1893] 1 Q.B. 577, C.A.*Yorkshire Tannery and Boot Manufactory Ltd. v. Eglinton Chemical Co. Ltd.* (1884) 54 L.J.N.S. 81.

The following additional cases were cited in argument:

Bailey, Hay & Co. Ltd., In re [1971] 1 W.L.R. 1357; [1971] 3 All E.R. 693. **F***Gee & Co. (Woolwich) Ltd., In re* [1975] Ch. 52; [1974] 2 W.L.R. 515; [1974] 1 All E.R. 1149.*Halt Garage (1964) Ltd., In re* [1982] 3 All E.R. 1016.*Hutton v. West Cork Railway Co.* (1883) 23 Ch.D. 654, C.A.*Newman (George) & Co., In re* [1895] 1 Ch. 674, C.A. **G****APPEAL from Peter Gibson J.**

The plaintiff, Multinational Gas and Petrochemical Co., a company incorporated in Liberia and now in liquidation, issued a writ on April 25, 1980, for damages for breaches of care owed to it by the defendants in respect of decisions taken by the plaintiff and contracts entered into by it whereby it suffered damage. The first defendant, Multinational Gas and Petrochemical Services Ltd. ("Services"), was a United Kingdom company with offices in London and it, like the plaintiff, was in liquidation. The 2nd, 3rd and 4th defendants, Herman Sauer, Masataka Tamaki and Pierre Daridan, had been nominated by the 5th, 9th and 12th defendants as directors of Services. The 5th defendant, Phillips Petroleum Co., was a company incorporated in the State of Delaware in the United States of America; the 6th defendant, Philtanker Inc., was a subsidiary of the 5th defendant and incorporated in the Republic of Liberia; the

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A 9th defendant, Société Anonyme de Gérance et d'Armement known as "S.A.G.A.," was incorporated in the Republic of France; and the 12th defendant, Bridgestone Liquefied Gas Co. Ltd., was a company incorporated in Japan. The 5th, 9th and 12th defendants were multinational oil companies and were the plaintiff's shareholders (referred to as the "joint venturers" and in the case of the 5th defendant when acting through its subsidiary, the 6th defendant Philtanker Inc.). The 7th, 8th, 10th, 11th, B 13th and 14th defendants were persons nominated by the joint venturers to act as the plaintiff's directors at the material times and they were all resident outside the United Kingdom.

The plaintiff applied for leave, under R.S.C., Ord. 11, r. 1, to issue concurrent writs of summons against the 5th to 13th defendants (the 14th defendant having died) and to serve notice of those writs on the defendants C outside the jurisdiction. On February 27, 1981, Master Dyson granted leave. The 5th to 13th defendants appealed and, on December 21, 1981, Peter Gibson J. set aside the order of the master.

The plaintiff applied for leave to appeal on the grounds (1) that the judge in considering the question of the locus of the torts alleged against the 5th to 13th defendants erred in law in following the Court of Appeal in *George Monro Ltd. v. American Cyanamid and Chemical Corporation* [1944] K.B. 432, in that the comments of the court were obiter and could not stand with the flexible approach indicated by the Board in *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458 and/or were applicable to the straightforward facts and issues before the Court of Appeal but were not applicable to the facts and issues in the present case which, as a result of the deliberate policies of the 5th, 6th, 9th and D 12th defendants when organising the way in which the plaintiff's business was to be conducted, raised serious problems not susceptible of determination by the application of a fixed rule. (2) That the judge was not justified in his finding that in a significant respect, the plaintiff's business was not conducted in London or in his findings (a) that the duties of care owed to the plaintiff by the 5th to 13th defendants and/or (b) that the breaches of those duties and/or (c) that the damages to the plaintiff E resulting from those breaches were not, and none of them were, located within the jurisdiction, in that those findings were wrong and against the weight of evidence. (3) That the judge erred in law in holding that, because the predominant motive of the plaintiff in bringing the action against Services was to support an application to serve other defendants out of the jurisdiction, the action was not properly brought against Services within the meaning of R.S.C., Ord. 11, r. 1 (1) (j) and/or that G the judge when determining that the action had not been properly brought against Services (i) wrongly took into account the plaintiff's motives in and its reasons for bringing the action and the fact that, if successful in its action, the plaintiff had no prospect of making any substantial recovery against Services alone; (ii) failed to give any or any sufficient weight to the fact that the action had been brought by the plaintiff against Services (since Services was in liquidation) by the leave of the Companies Court; H and (iii) erred in law by holding that the defence of *volenti non fit injuria* was available to Services as a complete defence to the plaintiff's claim. (4) That the judge, when considering whether or not the 5th to 13th defendants were proper parties to the action against Services within the meaning of R.S.C., Ord. 11, r. 1 (1) (j), misdirected himself by taking into account the plaintiff's motives in and reasons for bringing the action and erred in law by holding that the defence of *volenti non fit injuria*

was available to the 5th to 13th defendants and each of them as a complete defence to the plaintiff's claim and, accordingly, erred in holding that the 5th to 13th defendants were not proper parties to the action against Services. (5) That the decision of Brandon J. in *The Theodohos* [1977] 2 Lloyd's Rep. 428 (which the judge followed and applied), in which it was held that, unless a foreign corporation was carrying on business within the jurisdiction, service of process on the president of that corporation while within the jurisdiction was not service on that corporation within R.S.C., Ord. 65, r. 3, was wrong. (6) That so far as concerned the exercise of his discretion as required by R.S.C., Ord. 11, r. 4 (2), (i) the judge failed to give sufficient consideration to the suitability and convenience of England as the forum for investigating the plaintiff's claims in that he failed to give weight to the fact that the 5th, 6th, 9th and 12th defendants when incorporating the plaintiff and Services had agreed to submit disputes inter se to arbitration in London and to the fact that all or substantially all the documents relating to the conduct of the plaintiff's business by Services were in England and both companies were in the course of being wound up by the High Court in England under the Companies Acts 1948 to 1981; (ii) the judge's finding that the action had very little to do with England was against the weight of evidence; (iii) the judge's holding that the torts alleged by the plaintiff against Services were not committed within the jurisdiction was against the weight of the evidence; (iv) the judge should not have taken into account the fact that if the action were litigated in England it would be expensive since that must be the case wherever it was litigated; and (v) he failed to give any or any sufficient weight to the fact that the action had been brought by the plaintiff bona fide in the belief that it had a good prospect of succeeding in its claim against Services and (since Services was in liquidation) by leave of the Companies Court.

By a respondent's notice the defendants gave notice that they would contend that the order of Peter Gibson J. should be affirmed on the further or alternative ground that the judge ought to have held that the plaintiff had no reasonable or probable cause of action or arguable case against the defendants in that the plaintiff's claim against the defendants, as set out in its draft statement of claim, was founded upon alleged acts, defaults and/or omissions which were said to have been procured, done or made by all the members of the plaintiff.

The facts are stated in the judgment of Lawton L.J. and May L.J.

John Chadwick Q.C. and *Martin Keenan* for the plaintiff.

The first four defendants were not represented.

Allan Heyman Q.C. and *Robin Hollington* for the 5th, 6th, 7th and 8th defendants.

Andrew Bateson Q.C. and *Michael Tugendhat* for the 9th, 10th and 11th defendants.

Donald Nicholls Q.C. and *Richard McCombe* for the 12th and 13th defendants.

Cur. adv. vult.

February 16. The following judgments were read.

LAWTON L.J. The issue in this appeal is whether nine out of 13

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A defendants named in the writ of summons issued on April 25, 1980, should be served out of the jurisdiction, being resident outside. When the writ was issued there were 10 defendants outside the jurisdiction, but one of them, a Mr. Michio Dio has died and the plaintiff has not asked for leave to serve his personal representatives.

B On February 27, 1981, Master Dyson granted leave to issue concurrent writs in the United States, Liberia, France and Japan against these nine defendants. On December 21, 1981, Peter Gibson J. set aside Master Dyson's order and refused the plaintiff leave to appeal. The plaintiff applied to this court for leave to appeal and gave notice of appeal if leave were granted. With the consent of counsel we heard the application and the appeal together. We grant leave to appeal.

C The plaintiff was incorporated in Liberia on August 14, 1970. There was evidence before us that the law of Liberia relating to companies is substantially the same as English law. The plaintiff's registered office was in Monrovia. Its existence was due to a decision by three multinational oil companies, Phillips Petroleum Co., a company incorporated in the state of Delaware, U.S.A. (Phillips), Société Anonyme de Gérance et d'Armement (S.A.G.A.), a company incorporated in France, and
D Bridgestone Liquefied Gas Co. Ltd. (Bridgestone), a company incorporated in Japan. These three oil companies intended to join together in a commercial enterprise for the purchase, transport storage and sale of liquefied petroleum gas and liquefied natural gas and similar products. They contemplated chartering and acquiring suitable tankers. So far as Phillips were concerned this aspect of the enterprise was to be conducted by their wholly-owned subsidiary Philtankers Inc. (which was incorporated
E in Liberia) for the purposes of the joint enterprise. Shares in the plaintiff were allotted 40 per cent. to each of Phillips and S.A.G.A. and 20 per cent. to Bridgestone. The original plan was for these three oil companies to appoint an executive committee to run the plaintiff's business from London. English tax counsel advised, however, that an arrangement of this kind would probably have the result of making the
F plaintiff's profits, wherever earned, liable to British taxation. In order to avoid this consequence the three oil companies decided to form, and did form in December 1970, a company in the United Kingdom which was to act as the plaintiff's agent. This company was given the name of Multinational Gas and Petrochemical Services Ltd. ("Services"). Services had offices in London and as agent advised the plaintiff about business prospects, gave the plaintiff financial information, performed routine
G management work and put into effect any decisions made by the plaintiff who had no place of business in the United Kingdom or anywhere else. The members of the plaintiff's executive committee resigned as such in November 1970 and became the first directors of Services. After November 1970 the plaintiff had no formal executive committee. According to the statement of claim (from which I have taken the history of this case up to 1977) the three oil companies from time to time nominated certain
H of their employees or officers to act as the plaintiff's directors. At the times material to this action the individuals named in the writ after Philtankers Inc. were directors. Paragraph 11 of the statement of claim made the following allegation:

"Further . . . the Multinational directors acted at all material times in all relevant matters in accordance with the directions and at the behest of the joint venturers"—that is, the three oil companies—

“and, accordingly, the powers of directing and managing the affairs of Multinational in relation to the matters hereinafter complained of were vested in and were exercised by the joint venturers.” A

Save on two occasions, which are irrelevant for the purposes of these proceedings, the plaintiff's directors never met within the jurisdiction of this court to make any decisions. When they did meet it was in New York, or Paris or Copenhagen. B

The plaintiff started trading in 1971. It had a capital of U.S. \$25,000,000 but only one million was in cash, the remainder being represented by vessels or interests in vessels. At first their operations were on a smallish scale for oil companies and ran at a loss; but by 1974 they were making a profit. The plaintiff alleges that between 1973 and January 1975 the directors changed their trading policy. They decided to acquire gas tankers for employment on the spot market. To do this the plaintiff had to undertake substantial future liabilities which were not offset by forward charters. The market turned against the plaintiff. It found itself in financial difficulties. In September 1977 it had to cease trading. On October 6, 1977, the estimated deficiency as regards creditors was shown as £113,853,857. The only assets within the jurisdiction of the court were bank accounts which were in credit to between £300,000 and £400,000. The existence of these assets justified, pursuant to section 399 of the Companies Act 1948, the making of a winding up order on January 25, 1978. The plaintiff, however, has not suggested that its directors and the three oil companies who told them what to do at any material time knew or suspected that the plaintiff was insolvent. C D

There has been a financial disaster for the plaintiff's creditors. Those affected by five decisions made by the plaintiff's directors and particularised in paragraph 97 of the statement of claim were alleged to have suffered loss to the extent of about £75,416,000. The three oil companies did not offer to discharge the plaintiff's liabilities. The disaster which befell the plaintiff put Services into difficulties too. That company was ordered to be wound up on February 7, 1978. Services' assets were worth about £34,000. We were not told what its liabilities were; but whatever they were, the liquidator of Services was unlikely out of the assets to be able to finance litigation of the kind which was started by the writ issued on April 25, 1980. E F

During the autumn of 1979 and the early months of 1980 the plaintiff's liquidator consulted accountants and lawyers for the purpose of being advised whether the plaintiff could recover from its directors and the three oil companies the losses, or part thereof, which it had sustained as a result of the unsuccessful trading, particularly during the period November 1973 to January 1975. A substantial proportion of its creditors wanted action taken if a successful outcome was possible. G

The liquidator was advised that there was evidence that Services, as the plaintiff's agent, had acted negligently in providing financial information for the plaintiff and that its directors and the three oil companies had negligently failed to appreciate that Services was giving them inadequate financial information and had made decisions negligently. The decisions complained of, so it was alleged, had been highly speculative and could not properly be regarded as falling within the scope of reasonable business judgment. The making of these decisions had caused a large proportion of the losses sustained by the plaintiff. H

The liquidator was willing to accept this advice but he seems to have

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- A appreciated at least until April 21, 1980, that there were difficulties in the way of getting any worthwhile result from starting litigation. Services would be unable to satisfy any judgment given against them. In any event leave to commence an action against Services would have to be obtained from the Companies Court and if given there was likely to be the usual condition that no monetary judgment in such action was to be enforced without the leave of the court. All those who would be able to satisfy a monetary judgment were resident out of the jurisdiction. Leave to serve them out of the jurisdiction would not be granted unless the plaintiff could satisfy the court that its claim came within either, or both, R.S.C., Ord. 11, r. 1 (1) (h) and (j).

- B On April 21, 1980, there was a meeting between Services' liquidator and solicitor and the plaintiff's liquidator and solicitor. There was a discussion about the need, because of the Limitation Act 1939, to start any litigation, if there was to be any, before April 28, 1980, because the first alleged negligent decision had been made on April 29, 1974. During that discussion someone suggested (it was likely to have been the plaintiff's solicitor) that if a writ was issued against someone who was resident within the jurisdiction there would be no difficulty in joining the non-residents. The plaintiff's solicitor on being questioned by Services' solicitor said that he did not think a successful action would necessarily be of benefit to Services. Services' liquidator was also told by someone representing the plaintiff that the plaintiff's liquidator "would not actually be looking to Services for any satisfaction." Before this court the plaintiff, by its counsel, did not suggest that this was not the attitude of the plaintiff's advisers on or before April 21, 1980. It was suggested, however, that between April 21, 1980, and April 25, 1980, those same advisers appreciated better than they had done previously that Services might have some rights over against its directors and the three oil companies. Unless those persons and corporations were before the court, Services would have to start third party proceedings against them and as all those worth suing were resident out of the jurisdiction the same problems of service would face Services as have always faced the plaintiff. On April 25, 1980, an application was made by the plaintiff to Mr. Registrar Bradburn for leave to commence an action against Services. He was told that Services might have claims against those to whom the plaintiff was looking for relief. The order asked for was made on the usual terms. Services, being within the jurisdiction, were promptly served.

- G Having considered the relevant affidavits and the exhibits to them I am of the opinion that Services was put into the writ as defendant without the plaintiff having any reasonable expectation of being able to get satisfaction from any judgment which it might obtain against Services and for the purpose of being able to submit that the action was properly brought against a person duly served within the jurisdiction. This is one of the grounds upon which the plaintiff says it is entitled to an order for service out of the jurisdiction: see R.S.C., Ord. 11, r. 1 (j). The other is that the action which they began by the writ is founded on a tort committed within the jurisdiction: see R.S.C., Ord. 11, r. 1 (h). On whatever grounds the application was founded, the plaintiff had to make sufficiently clear to the court that its claim was a proper one for service out of the jurisdiction under Order 11: see r. 4 (2). Peter Gibson J. judged that the plaintiff had failed to establish any of the matters which

it had to do in order to be given leave. The plaintiff has submitted that he misdirected himself in coming to this conclusion. A

I start my examination of the plaintiff's case by asking these questions: first, why has the plaintiff started this action? Secondly, what is the essence of its case? Some of its creditors, acting through the liquidator, wanted to make the oil companies discharge at least some of the plaintiff's liabilities, the plaintiff being their creature. The oil companies, particularly Phillips, and possibly some of their nominee directors on the plaintiff's board, had enough assets to do so. They knew, or would have been advised, that the oil companies as the plaintiff's shareholders owed them no duty to ensure that the plaintiff discharged its liabilities. The only way they could get at the oil companies was by alleging that they and their nominee directors had failed to perform some duty which they owed to the plaintiff. They were not interested in Services, who were just as much a creature of the oil companies as the plaintiff was, save perhaps as a route by which they could reach the oil companies. Any worthwhile claim had to be founded on what the oil companies had done. What had they done which caused loss to the plaintiff and through it to the creditors? They had made what were alleged to have been highly speculative decisions which could not properly be regarded as falling within the scope of reasonable business judgment. Those decisions had not been made within the jurisdiction and as far as I can discover from the statement of claim the damage which it is said was caused by these decisions did not occur within the jurisdiction. It was submitted that the decisions made outside the jurisdiction were the end product of negligence which began within the jurisdiction in that the plaintiff's directors negligently allowed Services in London to provide (by which was meant prepare) financial estimates and forecasts which were inadequate. Following what Lord Pearson said in *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458, 468, I look back over the series of events alleged to constitute the tort and ask myself the question: "Where in substance did this cause of action arise." The answer is clear: wherever the plaintiff's directors made the relevant alleged decisions. In my judgment, the plaintiff has not established that its action is founded on a tort committed within the jurisdiction. B C D E F

The question whether, the action having been properly brought against a person duly served within the jurisdiction, as Services was, the parties sought to be served are proper parties thereto is more complicated. Our attention has been invited to a long line of authorities, starting with *Yorkshire Tannery and Boot Manufactory Ltd. v. Eglinton Chemical Co. Ltd.* (1884) 54 L.J.N.S. 81. I do not intend to review them in this judgment. Most of them have been gone over many times before. Nor do I intend to rely upon forms of words used in some of the judgments. Lord Porter warned against doing so in *The Brabo* [1949] A.C. 326, 340. In my judgment the principles which have to be considered in this case are these: first, that the court should "be exceedingly careful before it allows a writ to be served out of the jurisdiction": see *The Hagen* [1908] P. 189, *per* Farwell L.J. at p. 201. Secondly, that leave ought not to be given if the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction is to enable an application to be made to serve parties outside the jurisdiction: see *Sharpley v. Eason & Son* [1911] 2 I.R. 436. Thirdly, that the mere fact that the party within the jurisdiction will be unable to satisfy a judgment does not of itself mean that the action was not properly brought against G H

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A that person. Fourthly, that an action is not properly brought against a party within the jurisdiction if it is bound to fail: see *The Brabo* [1949] A.C. 326. All the defendants, being the non-resident parties to whom Master Dyson's order referred, submitted that the plaintiff's claim against them was bound to fail as a matter of law. Peter Gibson J. was not satisfied that this was so.

B On the evidence before him, Peter Gibson J. found, and in my judgment was right to find, that the predominant reason for bringing the action against Services was to enable an application to be made to serve the defendants out of the jurisdiction. The fact that Services were in liquidation was a factor which he was entitled to take into consideration in coming to this conclusion even if, by itself, it was not conclusive against the giving of leave. This view of the case is enough to dispose of this appeal in favour of the defendants. I consider it advisable, however, to make a finding on the defendants' arguments that the plaintiff's claim against them and against Services was bound to fail.

C The submission in relation to the defendants was as follows. No allegation had been made that the plaintiff's directors had acted ultra vires or in bad faith. What was alleged was that when making the decisions which were alleged to have caused the plaintiff loss and giving instructions to Services to put them into effect they had acted in accordance with the directions and behest of the three oil companies. These oil companies were the only shareholders. All the acts complained of became the plaintiff's acts. The plaintiff, although it had a separate existence from its oil company shareholders, existed for the benefit of those shareholders, who, provided they acted intra vires and in good faith, could manage the plaintiff's affairs as they wished. If they wanted to take business risks through the plaintiff which no prudent businessman would take they could lawfully do so. Just as an individual can act like a fool provided he keeps within the law so could the plaintiff, but in its case it was for the shareholders to decide whether the plaintiff should act foolishly. As shareholders they owed no duty to those with whom the plaintiff did business. It was for such persons to assess the hazards of doing business with them. It follows, so it was submitted, that the plaintiff as a matter of law, cannot now complain about what it did at its shareholders' behest.

F This submission was based upon the assumption, for which there was evidence, that Liberian company law was the same as English company law and upon a long line of cases starting with *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22 and ending with the decision of this court in *In re Horsley & Weight Ltd.* [1982] Ch. 442. In my judgment these cases establish the following relevant principles of law: first, that the plaintiff was at law a different legal person from the subscribing oil company shareholders and was not their agent: see the *Salomon* case [1897] A.C. 22, per Lord Macnaghten at p. 51. Secondly, that the oil companies as shareholders were not liable to anyone except to the extent and the manner provided by the Companies Act 1948: see the same case at the same page. Thirdly, that when the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved became the plaintiff's acts and were binding on it: see by way of examples *Attorney-General for Canada v. Standard Trust Co. of New York* [1911] A.C. 498; *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466 and *In re Horsley & Weight Ltd.* [1982] Ch. 442. When approving whatever their nominee directors had done, the oil companies

were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts. A

It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts. Further I can see no grounds for adjudging that the oil companies as shareholders were under any duty of care to the plaintiff. In coming to this conclusion I have kept in mind the doubts expressed by Cumming-Bruce and Templeman L.JJ. in *In re Horsley & Weight Ltd.* [1982] Ch. 442, 455-456. Their comments were obiter. Both Cumming-Bruce and Templeman L.JJ. were thinking of "misfeasance" which probably does not cover "an ordinary claim for damages for negligence simply": see *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, 648. Having regard to the long line of authorities to which I have referred and the examples I have mentioned I do not share their doubts. B C

Mr. Bateson, on behalf of the French interests, submitted that the plaintiff's claim against Services was also bound to fail because Services could plead "*volenti non fit injuria*." This submission was based on an allegation in the statement of claim that those responsible for the management and direction of the plaintiff's affairs "knew or ought to have known" that Services had acted negligently. The argument was that if they knew of negligence they impliedly consented to it. There are three short answers to this submission. First, knowledge of negligence does not necessarily amount to consent to negligence. Secondly, Services have in its defence denied that it acted negligently as alleged or at all. Thirdly, the *volenti* defence would not apply to "ought to have known." D E

I would dismiss the appeal.

MAY L.J. Although the substantial number of defendants and the length of the statement of claim make it clear that if and when this action has to be tried it will be an extremely complicated one, I think that for the purposes of this judgment I need refer to very little of the detail. F

The plaintiff was incorporated in Liberia for the purpose of the business in which it did thereafter principally engage, namely, that set out in paragraph 6 of the statement of claim, that is to say, the worldwide purchase, sale, transportation and passing to and through seaport terminals of liquefied petroleum gas, anhydrous ammonia and other light hydrocarbons (including liquefied natural gas). It was originally intended that the plaintiff should carry on that business in and from London. For tax reasons the plaintiff's affairs in London were managed by Services, a company which was incorporated in England for that purpose. The board meetings of the plaintiff, however, were for the same reason and in so far as is material always held outside the United Kingdom. G H

Both these companies were incorporated by the joint venturers, who became and remained throughout the relevant period the sole shareholders in each. Further, the directors of both the plaintiff and Services were employees and the nominees of each of the three joint venturers respectively and were so appointed with the intent that all of them should run each of the two companies for and in the interests of the joint venturers.

In this action it is contended that these respective directors were all of

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- A them negligent in their respective capacities, and that for that negligence the joint venturers are vicariously liable. It is said that the directors of Services were negligent in carrying out their duties with the result that budgets, forecasts and information prepared for the directors of the plaintiff, to enable the board of that company to make its decisions in and about carrying on its business, were inadequate and insufficient, at best unreliable and at worst wholly incorrect. It is contended that the directors
- B of the plaintiff were in their turn also negligent in that actually knowing or in circumstances in which they ought to have known of the deficiencies in the material with which they were being provided by Services, they nevertheless failed to appreciate those deficiencies, as they ought to have done and not only failed to require Services to rectify the material, but indeed acted upon it when making the five decisions to build or acquire
- C the tankers specified in paragraph (A) of the particulars of damage to paragraph 97 of the statement of claim, which they should not have done had they been properly and efficiently advised by Services and had exercised proper care on their own part. It is finally alleged that as a result of making those five decisions the plaintiff suffered damage to the extent of the net liabilities which their participation in such contracts involved, namely, about £75,000,000.

- D As I have said, Services was an English company, carrying on business in London and has been duly served with the writ in this action within the jurisdiction. We are concerned with whether the plaintiff should have leave to serve notice of the writ upon the other defendants out of the jurisdiction of this court.

- E To obtain such leave, it is common ground that the plaintiff must show both that it can bring its claim against the defendants, other than Services, within one of the sub-paragraphs of R.S.C., Ord. 11, r. 1 (1) and also that in all the circumstances of this case it is a proper one for the court to exercise its discretion and grant the appropriate leave: this last requirement will be found in rule 4 (2) of the same Order. It is also I think common ground that the general approach of the court in these cases should be that set out in the well known passage from the judgment of
- F Farwell L.J. in *The Hagen* [1908] P. 189, 201:

- G “During these present sittings Vaughan Williams L.J., and myself have on more than one occasion had to consider Order 11, and we have had many authorities discussed and fully considered by the court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239, 242, that ‘it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.’ The second point which we considered
- H established by the cases was this, that, if on the construction of any of the sub-heads of Order 11 there was any doubt, it ought to be resolved in favour of the foreigner; . . .”

Further, we must remember that sub-paragraph (j) of Ord. 11, r. 1 (1) is anomalous, in that, different from the other sub-paragraphs, it is not

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founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts. This requires one to look particularly closely at any application founded upon this sub-paragraph. As Lord Porter, in his speech in *The Brabo* [1949] A.C. 326, said, at p. 338:

“My Lords, where all the facts necessary for a decision are set out by one side or the other and not contradicted, I think that the tribunal must make up its mind on the hearing of the summons, at any rate where the law is plain. Primarily the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued upon must have some connection with this country or the defendant must be served here. To this principle Ord. 11, r. 1 (g) [now R.S.C., Ord. 11, r. 1 (1) (j)] is an exception and enables foreigners domiciled abroad to be impleaded in this country provided an action is properly brought against someone duly served within the jurisdiction and the party outside the jurisdiction is a necessary or proper party to that action. The rule is not only an exception to but also an enlargement of the ordinary jurisdiction of the court and should not, in my opinion, be given an unduly extended meaning. The observation of Farwell L.J. in *The Hagen* [1908] P. 189, 201, and of Lord Sumner in *John Russell & Co. Ltd. v. Cayzer, Irvine & Co. Ltd.* [1916] 2 A.C. 298, 304, both quoted by Scott L.J. [1948] P. 33, 39, point out the care which should be taken before the jurisdiction is exercised.”

In the present appeal the plaintiff first relies upon sub-paragraph (h) of rule 1 (1), namely, that the action is founded upon a tort committed within the jurisdiction. It seems to me quite clear on the facts that if tort or torts there were, these were committed partly within and partly outside the jurisdiction of this court. In such circumstances the appropriate approach is that stated by Lord Pearson in the judgment of the Privy Council in *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458, 468 recently applied in this court in *Castree v. E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248. In the *Distillers* case Lord Pearson said, at p. 468:

“The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?”

In the instant case I think that the facts and circumstances as alleged in the statement of claim need careful analysis, remembering the three components of the tort of negligence, namely, the existence of a duty of care owed to the plaintiff, a breach of that duty by the defendant and, thirdly, damage to the plaintiff resulting from that breach. One must also remember that the joint venturers' liability to the plaintiff (if any) can only be a vicarious one.

Now in my opinion there is no doubt that a director of a limited company owes such a degree of care to that company as a reasonable man might be expected to take in the circumstances on his own behalf. Consequently the defendants who were directors of the plaintiff owed that duty to that company. The statement of claim pleads and particularises breaches by those directors of that duty to take care and damage to the plaintiff resulting therefrom. Quite clearly, however, all those components of that tort, if in the event it can be shown to have been committed, occurred outside the jurisdiction. Consequently in so far as

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A the defendant directors of the plaintiff are concerned, and the joint venturers allegedly vicariously liable for their tort, I am quite satisfied that the plaintiff cannot show any ground for service out of the jurisdiction under sub-paragraph (h).

Similarly the directors of Services owed a like duty to it, but I do not think that this is relevant for present purposes because even if those directors did commit breaches of it and those breaches resulted in some damage, the tort so constituted would have been committed against Services and not against the plaintiff.

One then must ask whether there is any question on the material before us that the directors of Services owed any duty of care to the plaintiff. This is not so pleaded in part VI or VII of the statement of claim and it is noticeable that the negligence complained of in, for instance, paragraph 42 of the statement of claim is that of "Services, the [plaintiff's] directors and the joint venturers." My opinion is that no duty was owed to the plaintiff at any material time, if at all, by the directors of Services. It follows that even if the Services' directors failed to exhibit the degree of care that a reasonable man might have been expected to exhibit in the circumstances on his own account, this was not a failure of which the plaintiff can take advantage in these proceedings and constituted no component of any tort by Services' directors against the plaintiff. Consequently again, but for a different reason, I do not think that the plaintiff can rely on sub-paragraph (h) either in respect of the directors of Services nor, consequently, against the joint venturers vicariously in that connection.

I should add, however, that if I could be satisfied that the directors of Services had owed a duty of care to the plaintiff, then I would also take the view that there is on the material before us certainly a good arguable case that those directors committed a breach of that duty of care and that that breach caused damage to the plaintiff. Further, in such circumstances and applying Lord Pearson's test I would have concluded, looking back over the series of relevant events and asking myself where in substance did the cause of action arise, that it arose in London, within the jurisdiction.

In the result, however, and for the reasons which I have indicated, I do not think that the plaintiff can succeed in this appeal in so far as its application is based upon sub-paragraph (h).

I turn now to consider the terms of sub-paragraph (j) of R.S.C., Ord. 11, r. 1 (1). This provides that one of the circumstances in which leave can be given to serve a writ out of the jurisdiction is

"if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto; . . ."

This sub-paragraph thus requires the court to be satisfied of two matters before any question of the exercise of its discretion under R.S.C., Ord. 11, r. 4, arises. First, on the assumption that the writ has been duly served upon a person within the jurisdiction, that the action begun by that writ was "properly brought" against that person so served. Secondly, that the person out of the jurisdiction sought to be served is "a necessary or proper party" to the action already begun against the English defendant.

It is not, I think, disputed that there is ample authority in the speeches of the members of the House of Lords in *The Brabo* [1949]

A.C. 326 that an action is not “properly brought” against an English defendant if that action is in any event bound to fail, either on the facts if these are ascertainable by the court hearing the application for leave to serve out of the jurisdiction, or on the law. Equally, I think that if it can be shown that the action would be bound to fail against the potential foreign defendant were he made a party to it, he could be described neither as a necessary nor proper party to it. Whether it can be said that this action is bound to fail in either of these two respects as a result, first, of the argument based upon general principles of company law to which I shall refer hereafter, or on the basis that the doctrine of *volenti non fit injuria* applies, are matters with which I shall have to deal later in this judgment.

Apart, however, from actions which are bound to fail, it was submitted that an action cannot be said “properly” to be brought against an English defendant if the only or predominant purpose for which that defendant has been joined and served is to found an application under sub-paragraph (j) for leave to serve other defendants out of the jurisdiction. In my opinion this submission can be analysed in this way. If one can demonstrate that the action against the defendant within the jurisdiction is bound to fail and that it is on this ground alone that one can say that he was only joined to provide a peg for an application to serve others who are out of the jurisdiction, then of course the action cannot be said to be properly brought for the reason I have already mentioned. Thus, I think that I must then consider this second submission under this head in the context of there being a good arguable case against the English defendant, and an action brought *bona fide* but in which any judgment obtained against that defendant may or will not be met owing to his lack of funds. In such circumstances, and if the main or predominant purpose of keeping the English defendant in the proceedings is to enable the plaintiff to seek and obtain leave to join and serve persons out of the jurisdiction because they are likely to be able to satisfy a judgment which one may obtain against them, is this a ground for saying that the proceedings are not properly brought in the first place against the English defendant? Of course, if this first question is answered in the negative, it still remains to be determined whether the foreign defendants sought to be joined are necessary or proper parties to the litigation already started, and then finally whether in the exercise of the court’s discretion leave ought to be granted.

We were referred to a number of authorities on this point, but I think that it is only necessary for me to mention some of them. The first was *Massey v. Heynes & Co.* (1888) 21 Q.B.D. 330. In that case London shipbrokers were sued for breach of warranty of authority to enter into a charterparty on behalf of Austrian principals. They denied the want of authority with the result that the plaintiffs applied for leave to join the principals and to serve them out of the jurisdiction. This was granted. Of necessity, the action had to fail either against the English agents or the foreign principals. The case was principally concerned with whether in such circumstances the latter could be said to be proper parties to the action against the former. However, upholding the grant of leave in the Court of Appeal, Lord Esher M.R. said, at p. 338:

“The question, whether a person out of the jurisdiction is a ‘proper party’ to an action against a person who has been served within the jurisdiction, must depend on this,—supposing both parties had been

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- A within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction."

In agreeing Lindley L.J. said, at p. 338:

- B "When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1 (g)" —now 1 (1) (j)—"of R.S.C., Ord. 11 applies."

Lopes L.J. also agreed on the same basis as Lord Esher M.R.

- C The next case was *Witted v. Galbraith* [1893] 1 Q.B. 577. That was an action brought to recover damages for the death of the plaintiff's husband under the Fatal Accidents Act 1846. He had been killed when he fell down a hatchway whilst a stevedore about to take part in the unloading of a ship in Glasgow by a Scots firm. The English defendants were shipbrokers carrying on business in London and all that they had done relevant to the accident was to apply to the dock company in Glasgow to have the vessel unloaded. The writ was served on the brokers within the jurisdiction and the plaintiff then obtained an order giving leave to serve the writ out of the jurisdiction on the shipowners under what was then R.S.C., Ord. 11, r. 1 (g), but is now r. 1 (1) (j). This writ was served accordingly, but not surprisingly perhaps the Scottish shipowners took out a summons to set aside the writ and service. The Divisional Court refused to make that order and the shipowners appealed. In the course of his judgment, echoing what had been said in *Massey v. Heynes & Co.*, Lindley L.J. suggested that there was a very easy method of testing whether the case then before the court came within the relevant rule. He said, at p. 579:

- F "Supposing that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so; there is no plausible cause of action against the brokers. I come to the conclusion that the brokers have been brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a bona fide case of an action properly brought against a person who has been served within the jurisdiction. Consequently there is no right to proceed under the order, and the appeal must be allowed."

- G Kay L.J. agreed that the appeal should be allowed and said, at pp. 579–580:

- H "Looking at the pleading, as I have done very carefully, it seems to me plain that the pleader felt the very great difficulty of framing a pleading showing any liability on the part of the brokers. I agree that everything shows that the brokers have been joined as defendants only for the purpose of bringing in the Scotch owners so that they may be sued in these courts. This is not within the Order, and the appeal must be allowed . . ."

In both judgments, therefore, there are dicta which if read in isolation are to the effect that where the English defendant is brought into the action simply to enable the plaintiff to apply to join the defendants from outside the jurisdiction, then that is not an appropriate case for the application of the relevant rule. However, both members of the court took the view

that there was no plausible or indeed possible cause of action against the brokers, notwithstanding the ingenuity of the pleader, and that the only persons against whom the plaintiff could recover were the Scottish ship-owners. In other words, this was also a case in which the claim alleged against the English defendants was bound to fail. I do not find it surprising that in those circumstances the court came to the conclusion that leave ought not to have been given to serve out of the jurisdiction. I do not think that this case is any authority for the proposition that where there does exist a cause of action against the English defendant, but one which is unlikely to be satisfied because of his lack of funds, then the action against the English defendant is not "properly brought" because the real reason for including that defendant in the proceedings is in order to found an application under the rule. Still less if the desire to be in a position to join defendants out of the jurisdiction is only one of the reasons why the action is brought against the English defendant in the first place.

In *Ross v. Eason & Son Ltd.* [1911] 2 I.R. 459 the Irish plaintiff's principal complaint was against the publishers of a newspaper in London in respect of an alleged libel in that newspaper. It is quite clear that there was substantial correspondence between those parties before litigation and ultimately the plaintiff's solicitors asked the proposed English defendants to nominate a solicitor in Ireland to accept service of a writ. The very day upon which the plaintiff's solicitors received a reply from the English defendants refusing to do this, the former issued a writ against Eason & Son Ltd., well known newsagents in Dublin, and then applied and obtained leave to serve the English newspaper out of the jurisdiction. The Irish newsagents were joined without there having been any letter before action and indeed without any communication at all between the plaintiff's solicitors and them. The English defendants applied to set aside the order for service out of the jurisdiction. The Divisional Court set aside the order granting leave and the matter then went to the Court of Appeal. There the Lord Chancellor of Ireland said, at p. 463:

"We are all of opinion that this appeal must be dismissed. From a consideration of the correspondence which passed between the plaintiff's solicitor and the publishers and printers of the 'Winning Post' in London, I am driven to the conclusion that the action instituted against Eason & Son was not a bona fide action. The very day on which the plaintiff's solicitor received the letter from the English defendants refusing to nominate a solicitor in Ireland to accept service of a writ on their behalf, and pointing out that the action could only be instituted in England, the plaintiff, without any complaint of the alleged libel, or any intimation of his intention to make them defendants, issued a writ against Eason & Son. In my judgment that was an evasion, an abuse of the rule that should not be sanctioned. On the evidence and the particular facts of this case I have arrived at the conclusion that the action was not one properly brought against Eason & Son within the jurisdiction, and I agree with the judgment of the King's Bench Division, on the short ground stated by Gibson J., that the defendants, Eason & Son, were introduced merely for the purpose of bringing the other defendants within the jurisdiction—a judgment which is fully supported by the case of *Witted v. Galbraith* [1893] 1 Q.B. 577, referred to during the argument."

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- A Holmes L.J. would have been content to dismiss the appeal on the same basis, namely, that Easons were introduced merely for the purposes of bringing the English publishers within the Irish jurisdiction, but as a number of other arguments had been raised in the course of the appeal, namely, whether the London publishers were a proper party to the action and whether there was a cause of action against Easons, he dealt with these arguments also. In so far as the latter was concerned I think that it is
- B clear that he had substantial doubts, but he felt that in all the circumstances the matter ought to be left to a jury. His judgment then continued, at p. 467:

- C “Therefore if the plaintiff’s solicitor, when instructed to seek redress for the alleged libel, had at once determined to sue the Irish news-vendors and the London publishers and printers jointly, I should have been prepared to hold that the action was brought against them in good faith, and that, having served the writ on Eason & Son, he was entitled to an order for service on the co-defendants out of the jurisdiction. But the evidence is clear that for some reason—and I assume for a good reason—the solicitor never contemplated making Eason & Son defendants until he found that without joining
- D them he could not sue in the Irish courts the companies whom he regarded as really responsible; and that Eason & Son were brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. For this reason, and on the authority of *Witted v. Galbraith* [1893] 1 Q.B. 577, I concur in the view taken by Gibson J.”

- E Cherry L.J. reached the same result by applying the test suggested by Lindley L.J. in *Witted v. Galbraith*, taking the view that if both the defendants had been resident within the jurisdiction there would have been no question of joining Easons in the proceedings.

- F It is not clear whether the Court of Appeal’s decision in that case was founded upon the basis that it was not one within the then equivalent of R.S.C., Ord. 11, r. 1 (1) (j), or whether the circumstances in which Eason came to be joined led the court as a matter of discretion to refuse the appropriate leave. In any event it was clearly a case decided upon its own facts and cannot I think be any authority for the proposition contended for by the defendants in this appeal. For the purposes of the
- G present argument one must assume that there is a good arguable case against Services, and that there are no mala fides in the sense in which the court in *Ross v. Eason* clearly thought that there were, even though the only or predominant reasons why Services were sued was to enable the plaintiff to apply for leave to join the foreign defendants as parties and as more likely to satisfy any judgment that may be obtained.

- H In *Sharpley v. Eason & Son* [1911] 2 I.R. 436, the facts were that the plaintiff sued Eason in another libel action and having done so obtained leave to join as a second defendant the publisher of a London newspaper in which the alleged libel had been published. But then, on the same day as serving notice of trial on the foreign (in that case, English) defendant, the plaintiff gave Eason notice of discontinuance. It is not surprising that upon due application the Court of Appeal in Ireland took the view that the plaintiff by his own act had made it clear that Eason had not been properly joined in the first place. As Holmes L.J. said in the course of his judgment, at p. 449:

"The only inference I can draw is that the plaintiff had never any cause of action against Eason & Son, and only sued them for a collateral object, namely, to get the order to serve this defendant resident in London."

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I think that *Sharples'* case underlines the fact that in the cases to which we were referred the substantive basis for setting aside the original leave to serve out of the jurisdiction was that when the matter was investigated there was in truth no plausible cause of action against the defendant originally served. Clearly such a defendant could not be said to be a proper party to the proceedings, or alternatively the court in the exercise of its discretion in those circumstances was not prepared to grant leave to serve out of the jurisdiction. Viewed in this light, I think that these cases are but tenuous, if any, authority for the proposition that in other circumstances, even though a defendant against whom there is a good cause of action has only been joined in order to enable an appropriate application for leave to serve out of the jurisdiction to be made, this by itself should require the court to refuse leave.

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Cooney v. Wilson [1913] 2 I.R. 402 was another case concerning libels upon an Irish resident written by an English resident, who employed a billposter resident in Ireland to post them there. As the report says, at p. 403: "Henderson was a working billposter, and no mark for damages or costs." However, he was sued and leave was then obtained under the equivalent of R.S.C., Ord. 11, r. 1 (1) (j), to serve the English tortfeasor out of the jurisdiction. It was argued that as Henderson, the pauper, was sued merely to found jurisdiction to grant leave to serve the other defendant out of the jurisdiction, he was a sham defendant and no proper party to the litigation. The Court of Appeal in Ireland, however, accepted the argument of counsel for the plaintiff that notwithstanding Henderson's lack of resources there was a good cause of action against him, that if one applied the test suggested in *Massey v. Heynes & Co.*, 21 Q.B.D. 330, the action would have lain against both defendants had each been within the jurisdiction and thus Henderson was a proper party. After discussing *Ross v. Eason & Son Ltd.* [1911] 2 I.R. 459 and saying that in that case the court had been of the opinion that on the evidence there had been no real cause of action against Eason, O'Brien L.C. ended his judgment, at p. 407:

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"If there is a real substantial cause of action against both defendants, it would be most dangerous to hold that the mere fact that the one within the jurisdiction is a pauper can make any difference."

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The other members of the court took the same view, clearly indicating that the ratio of the earlier decisions in the *Eason* cases was that there had really been no cause of action against them when they were joined. The position in *Cooney's* case then before them, however, was different and as Cherry L.J. said, at p. 409: "Principal and agent usually and properly are sued together in such cases as this."

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Rosler v. Hilbery [1925] Ch. 250 was also a different case. Russell J. refused leave in the exercise of his discretion on the basis that a Belgian court was without question the forum conveniens rather than an English court: in any event he doubted whether any good cause of action existed against the English resident Hilbery. The Court of Appeal took the same view.

As Lord du Parc said in *The Brabo* [1949] A.C. 326, 350:

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A "... I have no intention of paraphrasing in my own language the apparently simple words 'properly brought.' One is unlikely to find other words which are precisely synonymous with them, and it is useless to substitute for them words which may have a slightly different meaning. I will confine myself to considering what effect ought to be given to these precise words, in their context, with reference to the case before the House."

B I will accept that at least the predominant reason for suing Services in England was to provide a ground for applying for leave to pursue litigation in England against the other defendants. In my opinion, however, this consideration is much more relevant, to put it no higher, when the court is considering whether to exercise its discretion under Ord. 11, r. 4 (2),

C than when it is considering whether an action is properly brought against the English resident and whether the foreign defendants are proper parties—in the present case no question of them being "necessary" parties arises. Even though that was at least the predominant reason for suing Services, I think that on the evidence a substantial plausible or arguable cause of action has been shown against Services: indeed, subject to the company law point and the argument on the availability to the

D defendants of a defence based upon the maxim *volenti non fit injuria*, the contrary was not argued. Further, there is no suggestion of any *mala fides* in the commencement of this litigation. In my judgment an action brought against an English defendant against whom a substantial, plausible, pleadable or arguable cause of action is shown, use whatever epithet one may wish, whom an injured plaintiff is fully entitled to sue, even though

E any money judgment which he obtains will or may not be satisfied, cannot be described, in the absence of *mala fides*, as one which has not been properly brought. How can one realistically criticise the plaintiff for suing Services? On the evidence the former's rights against the latter had been under consideration for some time before the writ was issued. In my opinion, the facts that Services is a pauper and that the motive for suing it in England is to enable the plaintiff to pursue legitimate litigation

F against those who cannot be so described are irrelevant to the question whether the action was properly brought against Services.

If, therefore, the plaintiff satisfies the first part of the requirement in sub-paragraph (j), are the other defendants sought to be served proper parties to this litigation? Although Lord Porter in *The Brabo* made it clear that the tests suggested by Lord Esher M.R. in *Massey v. Heynes & Co.*, 21 Q.B.D. 330, and Lindley L.J. in *Witted v. Galbraith* [1893] 1 Q.B. 577 are not of universal application, I think that they are convenient and useful ones to apply in many cases and certainly in the present one. Whichever test one does apply to all the facts and circumstances of the instant case, in my opinion it becomes clear that if the action against Services is properly brought, then the other defendants are proper parties to it.

H For my part, therefore, subject to the company law point and to *volenti non fit injuria*, the plaintiff is able to bring itself within the provisions of R.S.C., Ord. 11, r. 1 (1) (j). I will return to consider the question of discretion at the end of this judgment.

I turn now to what has been referred to in the course of the argument as the company law point. The respective contentions of the two sides on this issue are clearly set out by the judge in his judgment and I need not repeat them. It is well established by such authorities as *Salomon*

v. *Salomon and Co. Ltd.* [1897] A.C. 22 and the many authorities to like effect to which we were referred that a company is bound, in a matter which is intra vires and not fraudulent, by the unanimous agreement of its members or by an ordinary resolution of a majority of its members. However, I do not think that this line of authority establishes anything more than that a company is bound by the legal results of a transaction so entered into: that is to say, for instance, by the terms of contract which is so approved; or that neither it nor for that matter its liquidator can challenge the legal consequences, such as a transfer of title, of a transaction to which its members have agreed to the extent that I have mentioned.

This, however, is very different from saying that where all the acts of the directors of a company, for instance, Services, have been carried out by them as nominees for, at the behest and with the knowledge of all the members of the company, namely, the joint venturers, then forever the company as a separate legal entity is precluded from complaining of the quality of those acts in the absence of fraud or unless they were ultra vires. If we assume for the purposes of this argument that the directors of the plaintiff did commit breaches of the duty of care that they owed that company, as a result of which it suffered damage, then I agree with the submission made by Mr. Chadwick on behalf of the plaintiff that the company thereby acquired a cause of action against those directors in negligence. The fact that all the members of the company knew of the acts constituting such breaches, and indeed knew that those acts were in breach of that duty, does not of itself in my opinion prevent them from constituting the tort of negligence against the company nor by itself release the directors from liability for it. Of course, in the circumstances of the present case, whilst the joint venturers retained effective control of the company they would be extremely unlikely to complain of the negligence of their nominees. But such restraint on their part could not and did not in my opinion amount to any release by the company of the cause of action which ex hypothesi had become vested in it against its directors. *Salomon's* case and the subsequent authorities make it clear that a limited company is a person separate and distinct from its members, even though a majority of the latter have the power to control its activities so long as it is not put into liquidation and whilst they remain members and a majority. Once, however, the joint venturers ceased to be able to call the tune, either because the company went into liquidation or indeed, though it is not this case, because others took over their interests as members of the company, then I can see no legal reason why the liquidator or the company itself could not sue in respect of the cause of action still vested in it. I agree with counsel's submission that that cause of action was an asset of the company which could not be gratuitously released in the absence of a substantive object in its memorandum of association unless the two conditions stated by Eve J. in his judgment in *In re Lee, Behrens and Co. Ltd.* [1932] 2 Ch. 46 were satisfied, namely: (i) was the release reasonably incidental to the carrying on of the company's business and (ii) was it made bona fide for the benefit and to promote the prosperity of the company? That a shareholder knows that a director has been negligent and yet does nothing about it, or that an act is done by a director with his approval which is later shown to have been negligent, does not preclude the company from then suing in respect of it provided that properly authorised and constituted proceedings can be started in respect of it. I need only mention two or three cases to which

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A we were referred on this particular point. In *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634 two questions arose; first, whether a receiver and manager of a company's property appointed by a debenture holder was neither an "officer" of the company within section 455 of the Companies Act 1948 nor a "manager" within section 333; secondly, whether misfeasance proceedings could be taken in respect of common law negligence under section 333. The first question is immaterial for present purposes. On the second it was held that common law negligence did not fall within the scope of section 333, but the Court of Appeal made quite clear that that section was merely procedural creating no new causes of action nor, on the other hand, preventing a company or, for instance, its liquidator from enforcing established causes of action outside the scope of section 333 otherwise as the law permitted.

B The decision in *Pavlides v. Jensen* [1956] Ch. 565 was also relied on by the defendants on this point. In my opinion, however, the claim in that case failed solely upon well-known *Foss v. Harbottle* principles: (1843) 2 Hare 461.

C Finally, although their comments were clearly obiter, I think that in their judgments in *In re Horsley & Weight Ltd.* [1982] Ch. 442 Cumming-Bruce and Templeman L.JJ. were certainly not ruling out claims by a company against its directors based on negligence in the corporate circumstances which existed in the instant case. I agree with Cumming-Bruce L.J. that it would surprise me if the law is to be so understood. In so far as the judgment of Templeman L.J. is concerned, I respectfully agree with Peter Gibson J. in our case that the distinction which the former drew between gross and ordinary negligence is not easy to reconcile with the comments of Evershed M.R. in *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, 648. Be that as it may, I think the correct interpretation to place upon the latter part of the judgment of Templeman L.J. in *In re Horsley & Weight Ltd.*, which concerned a misfeasance summons under section 333 of the Companies Act 1948 is, first, that he took the view that on the facts it was difficult to say that the directors had been guilty of negligence; secondly, that it was impossible to hold them guilty of gross negligence on that summons because the allegation had never clearly been made, the directors had not even been so accused by the liquidator and did not give evidence at the hearing of the summons. However, and thirdly, that had it been otherwise proper to find the directors guilty of gross negligence Templeman L.J. was not satisfied that they could excuse themselves because they held all the issued shares in the company and as shareholders had ratified their own gross negligence as directors. I then add that if as a matter of law they could not have ratified their own gross negligence, the position can be no different if one removes "the opprobrious epithet."

D For the reasons I have given, I do not think that what has been described as the company law point does provide the defendants herein with such a defence to the plaintiff's claims that it can be said that these are bound to fail. Consequently it cannot be said on this ground either that the action was not properly brought against Services or that the other defendants are not proper parties to it.

E Similarly in so far as the like argument based on the principle of *volenti non fit injuria* is concerned, I think that there are a number of reasons why it cannot be said that the plaintiff is bound to fail in these proceedings against the defendants.

F First, I stress as did counsel that knowledge alone is not enough: the

maxim is *volenti non fit injuria* not scienti. Secondly, as is pointed out in *Salmond & Heuston on Torts*, 18th ed. (1981), p. 469, the traditional form of the question, namely, did the plaintiff assume the risk, tends to disguise the fact that the burden of proving this defence lies on a defendant. Thirdly, subject to the ultimate question of discretion, it is only if one can say that the defence of *volenti* is bound to succeed in the circumstances of the present case as we so far know them that it follows that either the action was not properly brought against Services, or that one or more of the proposed foreign defendants are not proper parties thereto, as the case may be, and thus the application to serve out of the jurisdiction cannot succeed to the extent that it is based upon R.S.C., Ord. 11, r. 1 (1) (j).

If, therefore, one postulates for the purpose of this argument that Services were negligent in preparing the relevant information, advice and recommendation for the plaintiff, that the directors of both companies knew this and that each were the nominees of the joint ventures, the question which has to be asked and answered is whether the only inference to be drawn from all the facts and circumstances of the case is that it was a term of the relationship between the plaintiff and Services that the risk of injury to the former by any misconduct of the latter was required by the latter to be accepted by the plaintiff with no right of recourse against Services and that this risk, without any right of recourse, was in fact accepted by the plaintiff. My answer is that that inference cannot be drawn, let alone is it the only possible inference.

Alternatively, if one considers the plaintiff's claim against its own directors, for the principles embodied in the maxim to provide the latter with a defence one has to postulate a consent to assume the risk being given by the very people who *ex hypothesi* are committing the material negligence. I confess I find this fanciful in the extreme and indeed, although Mr. Chadwick did not so contend, I doubt whether the concept of *volenti non fit injuria* has any reality in the particular circumstances of this litigation.

Finally, the relevant pleas in the statement of claim are that the various defendants "*knew or ought to have known*" (my emphasis) this or that. If in the ultimate event the plaintiff fails on the first part of these pleas but succeeds on the second, no question of *volenti* can arise and I for my part am not prepared to speculate about the possibility canvassed in argument before us and the court below by Mr. Bateson for the French interests, that all the defendants apart from Services might serve defences admitting actual knowledge of all matters complained of against them and pleading *volenti*. For reasons which it is unnecessary to elaborate, I think that such a course is most unlikely.

I turn finally to the question of discretion. I remind myself that foreigners resident outside the jurisdiction ought only to be impleaded in litigation within our jurisdiction in clear cases. I also remind myself of the limited circumstances in which this court is entitled to interfere with the exercise by a judge of a discretion in cases of this nature. However, with all respect to Peter Gibson J. I think that it is apparent from his judgment, and indeed when pressed Mr. Nicholls on behalf of the Japanese interests was inclined to accept, that the former failed to take into account when exercising his discretion that the underlying agreements between the joint venturers setting up the plaintiff and Services included provisions for arbitration in London. I think that in this he erred and that this was a matter which he ought to have taken into account.

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- A On a related point, I think with respect that the judge was wrong in stating as a fact, which he did take into account, that this action has very little indeed to do with this country. As is clear from the recital of the facts in the judgment of Lawton L.J., at the beginning the joint venturers intended that the plaintiff should carry on business in London. It was merely in an attempt to reduce the incidence of United Kingdom taxation upon their operations that they incorporated Services to act as their
- B agents in this country. The plaintiff itself so far as we know, had no office nor office staff; all that it did, apart from hold board meetings and take decisions at them, it did in London by and through Services. Differing from Lawton L.J., as I have said, I take the view that the torts alleged against Services and its directors were largely committed by it and them within the jurisdiction. Clearly this litigation ought to be conducted in its
- C entirety in one forum. When I ask myself whether this should be Japan, I find France and the state of Delaware coming forward as equal contenders with no more real connection with the events sought to be litigated than that these are the jurisdictions within which the international joint venturers were respectively incorporated. I think that this action does have a substantial connection with this country. In all the circumstances I do not think that one can justly criticise the liquidator of the plaintiff
- D for suing and serving Services within the jurisdiction principally or solely to seek leave to serve the other defendants out of the jurisdiction. In my judgment, with the great majority of a mass of the relevant documents being physically in London, in all the circumstances the latter is the most convenient and likely to be the most economical forum for these matters to be litigated. Thus I reach the conclusion that this case is a proper one
- E for service out of the jurisdiction.

For the reasons I have given, whilst differing both regretfully and respectfully from Lawton and Dillon L.J.J., I would allow this appeal.

- DILLON L.J. The plaintiff has to establish that its causes of action against the foreign defendants fall within one or other of the sub-paragraphs of R.S.C., Ord. 11, r. 1, and it has further to establish, under Ord.
- F 11, r. 4 (2) that the case is a proper one for service out of the jurisdiction under Order 11. The plaintiff submits that the case is within sub-paragraph (h) or sub-paragraph (j) of Ord. 11, r. 1.

For sub-paragraph (h) to apply it has to be shown that the action is founded on a tort or torts committed within the jurisdiction.

- The plaintiff is faced, however, with this difficulty that at a very early stage in its existence it was advised by leading tax counsel that it should
- G not carry on business itself within the jurisdiction and its directors should not hold their meetings within the jurisdiction. As a result of that advice, and in accordance with it, Services were incorporated in England to carry on the day to day running of the business under an agency agreement, the members of the former executive committee of the plaintiff resigned from its board and became directors of Services instead, and the directors of the
- H plaintiff held all their relevant board meetings, including the three at which the decisions challenged in this action were taken, outside the jurisdiction.

It is not suggested that Services was a sham or that the corporate veil can be torn aside so as to treat the activities of Services as activities of the plaintiff. In the circumstances of this case, that, as it seems to me, is fatal to the attempt to bring this case within sub-head (h) as against the 5th to 13th defendants. Where the tort relied on is the tort of negligence the right approach, as Lord Pearson stated in *Distillers Co.*

(*Biochemicals*) Ltd. v. *Thompson* [1971] A.C. 458, 468, is to look back over the series of events constituting the tort and ask the question where in substance did this cause of action arise? To substantially the same effect, the question as put by this court in *Castree v. E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248 by Ackner L.J. at p. 1252 is "where was the wrongful act, from which the damage flows, in fact done?" So far as the 5th to 13th defendants are concerned, all their allegedly wrongful acts were done abroad and the cause of action against each of them substantially arose abroad, in New York or Paris where the directors met or in the United States of America, France or Japan where the joint venturers (that is to say, the 5th or 6th, 9th and 12th defendants) reside. Therefore the attempt to rely on sub-paragraph (h) must fail.

As for sub-paragraph (j), the plaintiff has duly served the proceedings on Services within the jurisdiction. To be within (j), therefore, the plaintiff has to show first that the action has been "properly brought" against Services and secondly that the 5th to 13th defendants are "proper" parties, although admittedly not necessary parties, to that action against Services. The plaintiff has also to satisfy the court, as I have mentioned, that the case is a proper one for service outside the jurisdiction. This latter point is a matter primarily for the discretion of the judge at first instance.

It is well established that an action is not properly brought against a defendant within the jurisdiction if that defendant has been made a party to the action solely in order to found an application under what is now sub-paragraph (j) of R.S.C., Ord. 11, r. 1, to serve the proceedings out of the jurisdiction on foreigners who could not otherwise be sued in the courts of this country. The most common instances are where the plaintiff has as a matter of law or on the undisputed facts no valid claim at all against the defendant within the jurisdiction, as in *The Brabo* [1949] A.C. 326 and *Witted v. Galbraith* [1893] 1 Q.B. 577. But the decisions of the Court of Appeal in Ireland in the *Eason* cases, *Ross v. Eason & Son Ltd.* [1911] 2 I.R. 459 and *Sharples v. Eason & Son* [1911] 2 I.R. 436 show, as I understand those cases, that even if the plaintiff technically has a cause of action against a defendant within the jurisdiction in circumstances in which the probably successful defence of that defendant depends on facts which would have to be proved by that defendant at the trial, yet the action is not to be regarded as properly brought against the defendant within the jurisdiction for the purposes of Order 11 if the true inference from all the facts is that the sole reason for suing the defendant within the jurisdiction is to found an application under what is now sub-paragraph (j) of Ord. 11, r. 1, to join foreign defendants in the action: see the judgment of the Lord Chancellor of Ireland Sir Samuel Walker in *Ross v. Eason & Son Ltd.* [1911] 2 I.R. 459, 463.

In the present case there is no doubt that if Services was a solvent company this action would have been properly brought against it. The difficulty is that Services is in compulsory liquidation. Such assets as it has will be entirely exhausted in meeting the costs and expenses of liquidation, including its own costs of defending this action. It is therefore frankly admitted that the plaintiff, which is itself insolvent and brings these proceedings by its English liquidator, would not for a moment have contemplated bringing such an action as this against Services if there had been no other potential defendants to this action from whom substantial recovery might be made.

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- A In *Cooney v. Wilson* [1913] 2 I.R. 402 where a libel action was sought to be brought against the first defendant, the author of the libel who was not within the jurisdiction of the Irish court, as being a proper party to an action properly brought against the second defendant, a bill poster who had disseminated the libel in Ireland and was resident in Ireland, it was held that the action was "properly brought" against the second defendant in Ireland, notwithstanding that the second defendant was a pauper.
- B O'Brien L.C., the then Lord Chancellor of Ireland, said, at p. 407, that if there was a real substantial cause of action against both defendants it would be most dangerous to hold that the mere fact that the one within the jurisdiction is a pauper can make any difference. Holmes L.J. referred to the assertion that the Irish defendant was too poor to pay damages, and expressed the view that that was no reason for holding that the plaintiff
- C was not justified in suing him for what was *prima facie* a most serious libel, and for joining with him another person equally responsible. Cherry L.J. expressed a view similar to that of Holmes L.J. It is not clear whether it was a factor in the minds of the court that the plaintiff might reasonably have wanted to sue the second defendant in Ireland despite the latter's poverty, as the most obvious way of clearing the plaintiff's name in Ireland from a very grave libel. Unless, however, the court did have some such
- D factor in mind, I find it difficult to support *Cooney's* case. Whether an action is properly brought against a particular defendant within the meaning of sub-head (j) must surely depend on the substance of the matter in the light of all the circumstances, and not on the mere form of the pleading and whether there is technically a cause of action.

- E It is suggested that, by the time the writ was issued, there was a fresh factor which justified the plaintiff in suing Services in this action, in that it had been appreciated by the liquidator and his advisers that Services might, if sued, bring third party proceedings or serve contribution notices against the 5th to 13th defendants or some of them. I cannot think that this can assist the plaintiff under sub-heading (j) because the argument is circular: it comes down to this that the action is properly brought
- F against Services under sub-heading (j) so as to enable the foreigners to be made defendants because Services would wish to make claims against the foreigners for which, if they are not made defendants, Services would itself require leave under Order 11.

- G Until December 1979 or thereabouts, the 5th defendant, Phillips Petroleum Co., was registered as an overseas company under Part X of the Companies Act 1948. It was thus unnecessary at that stage for the plaintiff to make Services a defendant in order to found jurisdiction against the 5th defendant or any of the other foreign defendants. The evidence shows, however, that from the outset it had been contemplated by the liquidator and advisers of the plaintiff that Services would be a defendant in the proposed action.

- H By the time the writ came to be issued in April 1980, the 5th defendant had been deregistered, and I have no doubt that the judge was right in his conclusion that by the time the writ was issued the predominant reason why Services was joined as a defendant was not to recover damages from Services but to enable the foreign defendants to be joined in one action in England. The attendance note of Mr. Hodge, the assistant to the liquidator of the plaintiff, of a meeting with the liquidator of Services on April 21, 1980, four days before the issue of the writ, contains the following paragraph:

“ Basically it was necessary to issue a writ for negligence against Mr. Sauer and Services and subsequently to join the directors of Multinational and its shareholders as proper parties to the action and obtain leave to serve a writ outside the jurisdiction. Whilst it was clear that there was no great profit in pursuing litigation against Services for its own sake it was necessary to go this route and sue Services otherwise it would not be possible to join the directors and shareholders and it was from the latter that one expected to make any substantial recoveries.” A
B

The reference to Mr. Sauer, the second defendant, does not matter as he has not been served and is now out of the jurisdiction. The very experienced solicitors for the plaintiff would be bound to have had Order 11 very much in mind. Nevertheless, it does not follow, in my judgment, that the joining of Services as a defendant in the action was not bona fide or that the action has not been properly brought against Services in this country. C

I lay aside, since it has not been relied on in any of the affidavits filed on behalf of the plaintiff, the procedural convenience of being able to obtain discovery against Services in this action, instead of having to bring the equivalent of a bill of discovery against Services, or to claim against Services in separate proceedings to produce all documents which came into its possession as a former agent of the plaintiff. D

Bearing in mind, however, how closely Services was involved in all the matters of which complaint is made in the action and bearing in mind the evidence as to the preparation of the plaintiff's claims, I conclude that this action has been brought properly and in good faith against Services. There is a genuine desire to establish the claim against Services. E

It is then necessary to consider whether the 5th to 13th defendants are proper parties to the action. By analogy to *The Brabo* [1949] A.C. 326 they cannot be proper parties who should be hailed before the English court although they owe no allegiance here, if they have a good defence in law to the plaintiff's claim on facts which are not in dispute. In my judgment they have such a defence. F

The 5th to 13th defendants were the only shareholders in and the only directors of the plaintiff when the three board meetings of the plaintiff were held, two in New York and one in Paris, on May 23, 1974, October 8, 9, 1974, and January 28, 1975, at which the decisions were made, allegedly negligently, to commit the plaintiff to contracts and arrangements for the building, purchase, or chartering on long term time charter of ships, carriers of liquid petroleum gas or other gases. The term “ joint venturers ” is, as I have mentioned used in the statement of claim to mean the 5th or 6th, 9th and 12th defendants and they at all times held all the issued shares in the plaintiff. G

The case against the 5th to 13th defendants is summarised in paragraph 11 of the statement of claim: H

“ the business and affairs of Multinational were, at all times material to this action, under the control of the joint venturers. Further (as is pleaded more particularly in paragraph 32 below) the Multinational directors acted at all material times in all relevant matters in accordance with the directions and at the behest of the joint venturers; and, accordingly, the powers of directing and managing the affairs of Multinational in relation to the matters hereinafter

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A complained of were vested in and were exercised by the joint venturers. In the alternative, such powers were vested in and exercised by the Multinational directors as the employees and nominees of the joint venturers and the joint venturers are liable to answer for the acts or defaults of Multinational directors in the direction and management of the affairs of Multinational."

B The plaintiff is a Liberian company, but such evidence of Liberian law as is before us indicates that Liberian company law is the same as English and American company law, and for the purposes of this appeal all parties have been content to treat it as the same as English law.

C Certain fundamental facts are not in dispute, viz.: 1. It is not alleged and could not be alleged that the making of any of the contracts or arrangements authorised at the three board meetings of which complaint is made was ultra vires the plaintiff or in any other way illegal. On the contrary they were well in line with the plaintiff's main objects. 2. It is not alleged that the plaintiff was insolvent when the board meetings were held. On the contrary on the figures pleaded in the statement of claim the plaintiff traded profitably in the calendar years 1973 and 1974 and the forecast, available to the joint venturers and directors, although in the event not borne out and much criticised in the statement of claim, predicted that the plaintiff would continue to make profits in 1975. It is said that the plaintiff suffered a shortage of working capital from and after the end of 1975. 3. It is not alleged that the joint venturers or the directors of the plaintiff acted fraudulently or in bad faith in any way or were guilty of fraudulent trading. What is alleged is that they all acted negligently in that they made five speculative decisions in relation to the ships, when they knew or ought to have known that they did not have sufficient information to make sensible business decisions. The decisions which they took in good faith went, it is said, outside the range of reasonable commercial judgment.

F The heart of the matter is therefore that certain commercial decisions which were not ultra vires the plaintiff were made honestly, not merely by the directors but by all the shareholders of the plaintiff at a time when the plaintiff was solvent. I do not see how there can be any complaint of that.

G An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals.

H A company, as it seems to me, likewise owes no duty of care to future creditors. The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. The duties owed by a director include a duty of care, as was recognised by Romer J. in *In re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407, 426-429, though as he pointed out the nature and extent of the duty may depend on the nature of the business of the company and on the particular knowledge and experience of the individual director.

The shareholders, however, owe no such duty to the company. Indeed, so long as the company is solvent the shareholders are in substance the company. The most commonly cited passage as to the position of the

shareholders is in the decision of the Privy Council in *North-West Transportation Co. Ltd. v. Beatty* (1887) 12 App.Cas. 589 delivered by Sir Richard Baggallay who said, at p. 593: A

“The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, *and consequently upon the company*, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company.” (My emphasis). B

He went on to contrast the position of a director who owed a fiduciary duty to the company. Thus in *Pavlides v. Jensen* [1956] 1 Ch. 565, where the directors were alleged to have been guilty of negligence in effecting a sale of a valuable asset of the company at a price greatly below its market value, but there was no allegation of fraud, Danckwerts J. was, in my judgment, right when he said, at p. 576, that it was open to the company on the resolution of the majority of the shareholders to sell the asset at a price decided by the company in the way the price had been decided. It was also open to the company by a vote of the majority to decide that if the directors by their negligence or error of judgment had sold the company's mine at an undervalue proceedings should not be taken by the company against them. Therefore, on a preliminary issue it was held that a minority shareholder's action, seeking to complain of the negligent sale, was not maintainable and it was dismissed. C

Mr. Chadwick has submitted that the real analysis of *Pavlides v. Jensen* is that the plaintiff's claim was dismissed because it was premature. He ought to have waited until the company had purportedly carried a resolution to absolve the directors and ought then to have challenged that resolution as ultra vires or not passed bona fide in the interests of the company as a whole. But there is no suggestion of that in the judgment of Danckwerts J. D

Mr. Chadwick has put before us some very interesting submissions on what the shareholders ought to have in mind if they seek to release a director from liability to the company for breach of duty, and the release is not to be ultra vires the company, and as to the extent of knowledge of the facts which the shareholders must have before they can validly release a director from such liability, i.e. they must know that there is said to have been something wrong with what the director did. It seems to me, however, that in the present case we never get to that point. The case set up is that all the shareholders, the joint venturers, made the impugned decisions at the outset. In so far as the decisions were made at the three meetings in New York and Paris referred to in the statement of claim, it matters not that these meetings were called board meetings, rather than general meetings of the plaintiff: see *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466. It would equally matter not if the decisions were made by all the shareholders informally and without any meeting at all: *Parker and Cooper Ltd. v. Reading* [1926] Ch. 975 and *In re Duomatic Ltd.* [1969] 2 Ch. 365. E

The well known passage in the speech of Lord Davey in *Salomon* F

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A v. *A. Salomon and Co. Ltd.* [1897] A.C. 22, 57 that the company is bound in a matter intra vires by the unanimous agreement of its members is, in my judgment, apt to cover the present case whether or not Lord Davey had circumstances such as the present case in mind.

B If the company is bound by what was done when it was a going concern, then the liquidator is in no better position. He cannot sue the members because they owed no duty to the company as a separate entity and he cannot sue the directors because the decisions which he seeks to impugn were made by, and with the full assent of, the members.

C To get out of this difficulty, Mr. Chadwick points to certain dicta which he admits were obiter, of Cumming-Bruce and Templeman L.J., in *In re Horsley & Weight Ltd.* [1982] Ch. 442. In that case a company which at the material time had three directors, two of whom held all the issued shares of the company, had with the approval of all three expended a substantial sum of the company's money in buying a pension annuity for the director who had no shares. Subsequently the company went into compulsory liquidation. The liquidator then made claims against the recipient of the pension. The primary claim was that the purchase of the pension for a director was in all the circumstances ultra vires the company. That claim was rejected by the court after examination of a number of decisions at first instance to which I need not refer. The liquidator claimed in the alternative that the taking out of the pension for a director was a misfeasance on the part of the directors which was not cured or validated by the fact that two of the directors were the only shareholders of the company. Buckley L.J. took the view that the assent to the transaction of the two directors who held all the shares made it binding on the company and unassailable by the liquidator. He cited the passage to which I have just referred in the speech of Lord Davey, and also *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466 and *Parker and Cooper Ltd. v. Reading* [1926] Ch. 975.

E Cumming-Bruce L.J. said that the ratification by the shareholders was effective unless the decision of the directors was proved to have been misfeasance on their part. He commented that the evidence fell far short of proof that the directors should at the time have appreciated that the payment for the pension was likely to cause loss to creditors. It was therefore unnecessary to decide whether, had misfeasance by the directors been proved, it was open to them in their capacity as shareholders to ratify their own negligence so as to prejudice the claim of creditors, but he said
F he would be surprised if it was open to them.

G Templeman L.J., while agreeing that the claims of the liquidator failed, held that even in the absence of fraud there could have been negligence on the part of the directors if the company could not afford to spend the relevant sum on the grant of a pension having regard to problems of cash flow and profitability, and there could have been gross negligence amounting to misfeasance if—as I understood what he said—the company was doubtfully solvent and so the expenditure threatened the continued existence of the company. On the facts, neither negligence nor gross negligence was made out but Templeman L.J. was not satisfied that directors who were guilty of such misfeasance, even without any fraudulent intent, could excuse themselves because two of them held all the issued shares in the company.
H

Several points arise in relation to these observations of Templeman L.J.

(and I take it that in his briefer comments Cumming-Bruce L.J. meant much the same as Templeman L.J.). A

In the first place there is in the statement of claim in the present case no allegation of misfeasance against the directors of the plaintiff.

In the second place, Templeman L.J. draws a distinction between negligence and what he calls "gross negligence amounting to misfeasance." It is only if misfeasance is alleged and proved that he has doubts whether the fact that the delinquent directors are also the shareholders can absolve them. It is clear from the judgment of Sir Raymond Evershed M.R. in *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634 in which Jenkins L.J. concurred that a claim based exclusively on common law negligence, an ordinary claim for damages for negligence, is not a claim for misfeasance: see p. 648. That is of course in line with what Templeman L.J. said. It is more difficult to discern what he meant by "gross negligence amounting to misfeasance." Indeed, in *In re B. Johnson & Co. (Builders) Ltd.*, Sir Raymond Evershed M.R. commented that an ordinary claim for negligence is not brought into the field of misfeasance by the mere expedient of adding epithets to it such as "gross." The distinction between mere negligence—failure to satisfy a director's duty of care to his company—on the one hand and misfeasance or "gross negligence amounting to misfeasance" on the other hand, must, I apprehend, lie in the state of mind of the director. It seems to me that what Templeman L.J. had in mind when he used the phrase "gross negligence amounting to misfeasance" was what is often called "recklessness." Recklessness, however, which is conduct nearly approaching fraud, is not alleged against any of the defendants in the present case. B C D

In the third place, Templeman L.J.'s comments are concerned with a situation where directors guilty of misfeasance are themselves or include all the shareholders. In the present case, the shareholders in the plaintiff are the joint venturers who are not directors and owe no duty to the company. For my part, therefore, I find nothing in the dicta of Cumming-Bruce and Templeman L.J.J. in *In re Horsley & Weight Ltd.* [1982] Ch. 442 to assist Mr. Chadwick, and I conclude that the plaintiff has failed to make out that the 5th to 13th defendants are proper parties within the meaning of sub-heading (j) to this action. E F

It remains to consider the question of discretion. Had I taken the same view as the judge on the company law point and on the question whether this action was properly brought against Services, I would have agreed with his exercise of his discretion against the granting of leave to serve the foreign defendants outside the jurisdiction, and indeed I would have had no valid ground for interfering with his exercise of his discretion. Taking a different view from him on the question whether the action was properly brought against Services, I would still exercise discretion against granting leave to serve the foreign defendants outside the jurisdiction. G

The factors which favour granting leave under Order 11 in order that the action may be tried here as between all parties are, as I see them, (1) that by the arrangements with the joint venturers, Services, which is at the very heart of the matters in issue, carried on its business in London, with the result that, as we are told, an enormous number of documents relevant, or possibly relevant, to the matters in issue are in London; (2) that the liquidator has been properly constituted to represent the plaintiff in this country, but he has as yet no locus standi to act for H

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A the plaintiff in any other jurisdiction; (3) that Liberian company law is the same as English or American company law and so it would be more convenient to decide the issues of law involved in this action in England than in, for instance, France or Japan; and (4) that the agreements made by the joint venturers to incorporate the plaintiff and Services provided for the arbitration of disputes in London.

B As against these factors, however, it has been often emphasised that the courts should exercise great care before they subject to the jurisdiction of these courts a foreigner who owes no allegiance here. This is, in part at least, for reasons of the comity of nations and to avoid invasion of the sovereignty of the state within which leave to serve is granted. In so far as the reluctance of the courts to bring foreigners before the English courts is also due to a recognition of the inconvenience to the foreigner that would be involved, it has been submitted that the inconvenience is greatly reduced by modern methods of communication. But that argument cuts both ways, in that modern methods of communication would make it much less difficult for the plaintiff to bring this action in any other jurisdiction, e.g. in that part of the United States where the 5th defendant is resident. I cannot assume that it is impossible for the creditors of the plaintiff to achieve effective representation of the plaintiff in other jurisdictions.

D In the next place, even if it is putting it too high to say, as I do, that the company law point provides a complete answer to all the plaintiff's claims and has the effect that the foreign defendants would not be proper parties to be joined in this action, the position must be that to succeed the plaintiff must break new ground in company law. The foreign defendants would therefore be faced with an action in this country involving novel propositions of law as well as lengthy and expensive investigation of the facts. It seems probable that all the principal witnesses, other than accountants investigating ex post facto, would have to come from abroad and would have to remain in this country for many weeks.

E The wrongs alleged against the 5th to 13th defendants in the statement of claim were not committed here and in so far as this action is, in substance, a dispute between the creditors of the plaintiff on the one hand and the shareholders and directors of the plaintiff on the other hand, it is, on the information before us, a dispute between foreigners over the affairs of a foreign company. These factors outweigh, in my judgment, those which would favour granting leave to serve outside the jurisdiction.

G I agree that, as such full argument has taken place, the plaintiff should be granted leave to appeal to this court but I would dismiss the appeal.

*Appeal dismissed with costs.
Leave to appeal refused.*

H April 4. The Appeal Committee of the House of Lords (Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook) dismissed a petition by the plaintiff for leave to appeal.

Solicitors: *Stephenson Harwood; Freshfields; Jaques & Lewis; Linklaters & Paines.*

L. G. S.

[PRIVY COUNCIL]

A

CASTLE INSURANCE CO. LTD. AND OTHERS . . . APPELLANTS

AND

HONG KONG ISLANDS SHIPPING CO. LTD. . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

B

1983 June 13, 14, 15;
July 25Lord Diplock, Lord Roskill, Lord
Brandon of Oakbrook, Lord Brightman
and Sir John Megaw

Shipping—General average—Contribution—Accrual of shipowners' cause of action against cargo insurers and consignees—Bill of lading providing general average adjustment according to York-Antwerp Rules 1950—Consignees giving Lloyd's average bonds and insurers' letters of guarantee for release of preserved cargo—Ship managers applying to join shipowners as plaintiffs to action more than six years after sacrifice—Whether shipowners' action time-barred

C

Ships' Names—Potoi Chau

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Between October 30 and November 27, 1972, salvage operations which included jettison of cargo were carried out on the ship *Potoi Chau*. The ship was on a voyage carrying general cargo consigned under bills of lading containing a clause which provided that general average was to be "adjusted, stated and settled according to the York-Antwerp Rules 1950." Between November 1972 and the end of February 1973 the ship managers released the preserved cargo to its several consignees on each of the consignee's signing a Lloyd's standard form average bond supported by an insurer's letter of guarantee from the insurer of the particular consignment as security. The ship was a constructive total loss. On August 31, 1977, the average adjustment and statement were completed and showed contribution to be due from those concerned in the preserved cargo to those concerned in the ship. On October 25, 1978, the ship managers as sole plaintiffs issued a writ against the consignees and the cargo insurers as defendants claiming the consignees' respective proportions of general average contribution as ascertained and adjusted in the statement. On July 19, 1979, the ship managers applied to join the shipowners as additional plaintiffs in the action. In the Supreme Court the application was refused. On appeal the Court of Appeal allowed joinder in the claim against the cargo insurers but refused it in the claim against the consignees on the ground that at the time the application was made the shipowners' right of action against the consignees was time-barred.

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On appeal by the insurers and cross-appeal by the ship managers:—

Held, (1) that the effect of the general average clause in the bill of lading was to transfer to the consignee as indorsee of the bill of lading the common law liability to contribute to general average of whoever had been the owner of the cargo at the time the sacrifice was made; that, therefore, since by its terms the clause itself did not postpone the date when the cause of action accrued and, since at common law a cargo owner's liability to contribute to general average accrued at the time the sacrifice was made or the expense incurred, the shipowners' cause of action against the consignees under the general average clause

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A had been time-barred at the time when the ship managers had applied to join the shipowners as additional plaintiffs (post, pp. 529D–G, G—530D, 532A–F).

Tate & Lyle Ltd. v. Hain Steamship Co. Ltd. (1936) 55 Ll.L.Rep. 159, H.L.(E.) and *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265, H.L.(E.) applied.

B *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65 approved.

But (2), allowing the cross-appeal, that where a consignee of cargo executed a Lloyd's standard form average bond in return for release of cargo to him he undertook a fresh contractual obligation to contribute to general average; that, since by their terms the bonds provided that the obligation to contribute was not to arise until the adjusters had completed the general average statement, that was the earliest date at which the shipowners' cause of action against the consignees for payment of contribution arose under the general average bonds; and that, therefore, the shipowners' claims under the bonds against the consignees had not been time-barred when the ship managers applied to join the shipowners as plaintiffs (post, pp. 533H—534B, B–D, G—535A, A–B).

D Dictum of Kerr J. in *Schothorst and Schuitema v. Franz Dauter G.m.b.H. (The Nimrod)* [1973] 2 Lloyd's Rep. 91 disapproved.

(3) Dismissing the appeal, that by the terms of the letters of guarantee used, each of the insurers had assumed a primary liability to pay a sum of money either explicitly or implicitly expressed to be the general average contribution which might properly be found to be due on completion of the average statement by the adjusters; and that, therefore, at the time when the ship managers applied to join the shipowners as plaintiffs the shipowners' right of action against the insurers had not been time-barred (post, pp. 535G—536A).

The following cases are referred to in the judgment of their Lordships:

Chandris v. Argo Insurance Co. Ltd. [1963] 2 Lloyd's Rep. 65.

Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners) [1947] A.C. 265, H.L.(E.).

F *Schothorst and Schuitema v. Franz Dauter G.m.b.H. (The Nimrod)* [1973] 2 Lloyd's Rep. 91.

Svensden v. Wallace Brothers (1885) 10 App.Cas. 404, H.L.(E.)

Tate & Lyle Ltd. v. Hain Steamship Co. Ltd. (1934) 49 Ll.L.Rep. 123, C.A.; (1936) 55 Ll.L.Rep. 159, H.L.(E.)

Wavertree Sailing Ship Co. Ltd. v. Love (1895) 16 N.S.W.L.R. 271; [1897] A.C. 373, P.C.

G The following additional cases were cited in argument:

Australian Coastal Shipping Commission v. Green [1971] 1 Q.B. 456; [1971] 2 W.L.R. 243; [1971] 1 All E.R. 353; [1971] 1 Lloyd's Rep. 16, C.A.

Brandeis Goldschmidt & Co. v. Economic Insurance Co. Ltd. (1922) 11 Ll.L.Rep. 42.

Coburn v. Colledge (1897) 1 Q.B. 702, C.A.

H *Huth & Co. v. Lampart* (1886) 16 Q.B.D. 735.

Norway, The (1864) Br. & Lush. 377.

Simonds v. White (1824) 2 B. & C. 805.

Strang, Steel & Co. v. A. Scott & Co. (1889) 14 App.Cas. 601, P.C.

APPEAL (No. 7 of 1982) by Castle Insurance Co. Ltd. (formerly Pacific and Orient Underwriters (H.K.) Ltd.) and 84 others, consignees and insurers of cargo carried on the ship *Potoi Chau*, and cross-appeal by

Hong Kong Islands Shipping Co. Ltd., the ship managers, against a judgment of the Court of Appeal of Hong Kong (Sir Alan Huggins V.-P., Leonard J.A. and Silke J.) dated July 8, 1981. The Court of Appeal allowed in part the ship managers' appeal from a judgment and order of Mr. Commissioner Mayo dated October 15, 1980, refusing the ship managers' application to join the shipowners, Hong Kong Atlantic Shipping Co. Ltd., as additional plaintiffs in the ship managers' action against the consignees and insurers claiming general average contribution to losses arising from general average sacrifices made and expenses incurred on the running aground of the *Potoi Chau* off the northeast coast of Somalia on October 25, 1972. The Court of Appeal allowed joinder of the shipowners as additional plaintiffs in the ship managers' claim against the insurers of the cargo but refused it in respect of the claim against the consignees.

The facts are stated in the judgment of their Lordships.

The four main variants of the insurers' letters of guarantee referred to in the judgment, post, p. 535G, were as follows:

(1) "Guarantee . . . the due payment to the shipowners of any contribution for general average and/or salvage and/or other charges which may be properly chargeable against the said merchandise."

(2) "In consideration of the delivery in due course to the consignees of the merchandise specified below, without collection of a deposit on account of average, we, the undersigned underwriters, hereby guarantee to the shipowners on account of the concerned the payment of any contribution to general average and/or salvage and/or charges which may hereafter be ascertained to be due in respect of the said merchandise. We further agree to arrange a prompt payment on account if required by you, so soon as such payment may be certified to by the adjusters."

(3) "In consideration of your delivering to . . . the undermentioned cargo ex . . . from . . . covered under our policy(ies) No.(s) . . . for . . . I hereby guarantee that this . . . will pay any just claim for general average, special and/or other charges as may properly be found due in respect of said cargo."

(4) "In consideration of your delivering to the under-mentioned consignees the goods specified below without payment of a deposit we undertake to guarantee the due payment of the general average contribution and/or special charges that may be properly found to be due on the said goods upon the completion of the average statement by the adjusters."

Ian Hunter Q.C. and *Roderick Cordara* for the insurers and consignees of the cargo.

Kenneth Rokison Q.C. and *David Grace* for the ship managers.

Cur. adv. vult.

July 25. The judgment of their Lordships was delivered by LORD DIPLOCK.

The immediate question in this interlocutory appeal and cross-appeal from an order of the Court of Appeal of Hong Kong is whether the original plaintiffs in the action, Hong Kong Islands Shipping Co. Ltd. (the ship managers), should be allowed to join Hong Kong Atlantic Shipping Co. Ltd. (the ship owners) as second plaintiffs in an action brought by writ issued on October 25, 1978, against 85 defendants, of

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A whom 74 (the consignees) were consignees of cargo carried upon a general ship *Potoi Chau* owned by the shipowners and managed by the ship managers and the remaining 11 defendants (the cargo insurers) are insurers of the cargo. The plaintiffs' claims in the action are for general average contributions to losses consequential on general average sacrifices made and general average expenditures incurred in the course of a voyage from ports in the Far East to Jeddah, Hodeidah, Aden and Bombay. The claims against the consignees are not made against them at common law as owners of the cargo at the time of the sacrifices and expenditure but are based upon the contracts contained in the bills of lading or, in the preferred alternative, upon agreements in one or other of the forms that are usually, though inaccurately, referred to as Lloyd's average bonds. The claims against the cargo insurers are based upon agreements contained in what are usually, and again inaccurately, called letters of guarantee.

C The Court of Appeal, upholding in this respect the order of Mr. Commissioner Mayo at first instance, refused to allow the joinder of the shipowners as plaintiffs in the claim against the consignees of the cargo. *This refusal is the subject of the cross-appeal by the plaintiffs.* The Court of Appeal, however, reversing in this respect the order of the commissioner, allowed the joinder of the shipowners as additional plaintiffs in the claims against the cargo insurers. *This is the subject of the appeal.* The grounds of the Court of Appeal's decision were that as against the cargo owners the shipowners' claims were barred by the expiry of the six-year limitation period; whereas as against the cargo insurers the shipowners' claims were not.

E Since limitation periods are involved it is necessary to state a few salient dates.

October 25, 1972. The *Potoi Chau* encountered cyclonic weather in the Indian Ocean and ran aground off the northeast coast of Somalia.

F October 30, 1972. The services of professional salvors were engaged under Lloyd's open form of salvage agreement, and salvage operations, including jettison of considerable quantities of cargo, continued until November 27, 1972, by which time the ship and her remaining cargo had arrived at Aden and were in safety.

G November 27 to December 25, 1972. The Aden cargo and cargo destined for Jeddah and Hodeidah were discharged at Aden, the latter for onward carriage to its destination. The Aden cargo was released to the respective consignees upon their signing average bonds in the usual Lloyd's forms, in the case of uninsured cargo secured by a deposit and in all other cases by a letter of guarantee from the cargo insurer of the particular consignment.

December 25, 1972. The *Potoi Chau*, to which temporary repairs had been carried out at Aden, left that port for Bombay with the cargo consigned to Bombay remaining on board.

H January 2, 1973. The *Potoi Chau* arrived at Bombay and discharged the Bombay cargo. It was released to its consignees on terms as respects average bonds and cargo insurers' letters of guarantee similar to those that had been exacted on the release of the Aden cargo at that port. Inspection of the vessel after dry-docking at Bombay showed her to be a constructive total loss and on January 16, 1973, the voyage was abandoned.

January 24 to end February 1973. The cargo destined for Jeddah and Hodeidah that had been left at Aden was carried on by other vessels to its port of destination and there released by the ship managers to the

consignees on similar terms as respects average bonds and cargo insurers' letters of guarantee. A

January 9, 1976. An award to the salvors of salvage in the sum of £120,000 and £25,801 interest was made by the arbitrator under the Lloyd's open form of salvage agreement.

August 31, 1977. The average adjustment and statement was completed and published. It showed a substantial general average contribution due to those concerned in ship by those concerned in cargo that had been delivered at its destination and released to its consignees. B

October 25, 1978. A specially endorsed writ was issued by the ship managers as sole plaintiffs against the consignees and the cargo insurers claiming against them, as moneys due under the average bonds and letters of guarantee, the consignees' respective proportions of general average as ascertained and adjusted in the average statement. C

July 19, 1979. Application by the ship managers to join the shipowners as additional plaintiffs in the action.

The significance of these dates is that the original writ was issued within six years of the first general average act and within six years of the execution of the average bonds by each of the consignees and of the letters of guarantee by each of the cargo insurers. On the other hand the application to join the shipowners as plaintiffs in the action was made more than six years after the last of these events. D

Under that branch of English common law into which the *lex mercatoria* has long ago become absorbed, the personal liability to pay the general average contribution due in respect of any particular consignment of cargo that had been preserved in consequence of a general average sacrifice or expenditure lies, in legal theory, upon the person who was owner of the consignment at the time when the sacrifice was made or the liability for the expenditure incurred. In practice, however, the personal liability at common law of whoever was the owner of the contributing consignment of cargo at the time of the general average act is hardly ever relied upon. There are two reasons for this. The first is that the contract of carriage between the shipowner and the owner of the consignment, whether the contract be contained in a charterparty or a bill of lading, invariably nowadays (so far as the decided cases show) contains an express clause dealing with general average and so brings the claim to contribution into the field of contract law. The second, and this has in practice been the decisive reason, is that there attaches to all cargo that has been preserved in consequence of a general average sacrifice or expenditure a lien in favour of those concerned in ship or cargo who have sustained a general average loss. The lien attaches to the preserved cargo at the time when the sacrifice is made or the liability to the expenditure incurred. E

The lien is a possessory lien and it is the duty of the master of the vessel to exercise the lien at the time of discharge of the preserved cargo in such a way as will provide equivalent security for contributions towards general average sacrifices made or expenditure incurred not only by those concerned in the ship but also by those concerned in cargo in respect of which a net general average loss has been sustained. The lien, being a possessory one and not a maritime lien, is exercisable only against the consignee, but it is exercisable whether or not the consignee was owner of the consignment at the time of the general average sacrifice or expenditure that gave rise to the lien: a fact of which the shipowner may well be unaware. At the time of discharge the sum for which the lien is security (save in the simplest cases, which do not include that of a general ship) is unquantifi-

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A able until after there has been an average adjustment. Indeed in the case of some consignees of cargo that has been preserved in part only or damaged in consequence of a general average loss, so far from being liable to a net general average contribution they may eventually turn out to be entitled to a net payment in general average. The disadvantages and legal complications which would result from the master's actually withholding delivery to its consignee of cargo preserved by general average

B acts are conveniently set out in *Lowndes & Rudolf, General Average and York-Antwerp Rules* (*British Shipping Laws* vol. 7), 10th ed. (1975), para. 453 and need not be repeated here. In practice what happens is what happened in the instant case; the master, acting on behalf of the shipowner and of any persons interested in cargo who will be found on the adjustment to be entitled to a net general average payment, releases the preserved

C cargo to the consignees upon the execution by each consignee of an average bond in one or other of Lloyd's standard forms accompanied, in the comparatively rare cases of cargo that is uninsured or underinsured, by a deposit in a bank in joint names of money as security or, more usually, by a letter of guarantee from the insurer of the cargo.

Although the instant case is not concerned with the common law liability to general average contribution of the owner of the cargo at the time of the general average act, the bills of lading contained an express clause dealing with general average which was in the following terms:

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"28 (General Average). General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1950."

This creates a contractual liability on the part of the consignee as indorsee of the bill of lading to pay general average contribution, if there be any chargeable on the cargo shipped, whether it was he, the shipper or some intermediate indorsee of the bill of lading, who happened to be owner of the goods at the time when a general average sacrifice took place or a liability for a general average expenditure was incurred. Since this liability arises under a simple contract, the period of limitation is six years from the accrual of the cause of action; but the clause is intended to regulate, and to transfer to whoever acquires title to the consignment of cargo

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F under the bill of lading, what would otherwise be a common law liability of the owner of the cargo at the time of the general average act; so for the purposes of the instant case a necessary starting point is first to determine when, at common law, a cause of action for a general average contribution would have accrued against the owner of cargo, and then to see whether the wording of the clause is apt to postpone the accrual of a cause of action for such contribution against a holder of the bill of lading or to create some different cause of action accruing at a later date than that of the general average act in respect of which contribution was claimed.

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The relevant cases as to the time of accrual of a cause of action for a general average contribution at common law are scanty. They are the subject of close analysis in the judgments of Sir Alan Huggins V.-P. and Leonard J.A. in the Court of Appeal. Scanty though the cases may be, their Lordships are of opinion that the law is plain and was correctly stated by Greer L.J. in his dissenting judgment in *Tate & Lyle Ltd. v. Hain Steamship Co. Ltd.* (1934) 49 Ll.L.Rep. 123, 135:

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"I cannot find that these questions have ever been definitely settled in any of the decided cases, but the law has been frequently stated by judges and jurists of authority in commercial matters in words which lead me to conclude that both the liability and the lien come into

existence as soon as the sacrifice has been made or the expenses have been incurred, but that the liability and the lien are subject to be defeated by the non-arrival of the cargo at the port of destination.” A

This judgment was expressly approved by the House of Lords upon appeal where Lord Atkin said (1936) 55 Ll.L.Rep. 159, 174:

“ . . . I think it clear that on principle the contribution falls due from the persons who were owners at the time of the sacrifice . . . ” B

a statement that is consistent only with the cause of action accruing at the time of the general average act. The passage from Greer L.J.’s judgment was also expressly approved by the House of Lords in *Morrison Steamship Co. Ltd. v. Greystoke Castle* [1947] A.C. 265 283, by Lord Roche, and the speech of Lord Uthwatt in the same case is to the like effect. Finally, and directly on the question of limitation of actions, there is the judgment of Megaw J. in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd’s Rep. 65, a case under a hull policy of marine insurance in which it was held that the limitation period started to run at the date of the general average act in respect of which the contribution was claimed. To this judgment of Megaw J. their Lordships will also find it necessary to revert in dealing with the next question: whether the general average clause in the bills of lading has the effect of postponing the accrual of the cause of action or of creating or substituting another cause of action accruing at some later date. C

Although the claim to general average contribution against the consignees in the instant appeal appears in the points of claim to be based primarily upon the average bonds executed by them upon discharge of the cargo at its port of destination, a claim based upon the general average clause in the bills of lading was permitted to be argued in the Court of Appeal where it is discussed in the judgment of Leonard J.A. The Court of Appeal rejected it; but it was renewed, albeit with a justifiable air of diffidence, before this Board. D

Upon a claim so framed the judgment in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd’s Rep. 65 is very much in point. That was a single judgment given in six test cases that were heard together and involved, inter alia, claims by assureds against insurers to be indemnified against general average contributions under a hull policy of insurance which incorporated a provision that: E

“8. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to York-Antwerp Rules 1890 . . . or York-Antwerp Rules 1924.” G

The contracts of affreightment did provide that general average should be “adjusted according to York-Antwerp Rules.” The actions were commenced more than six years after the general average acts in respect of which the liability to general average contributions arose, but less than six years after an average adjustment had been completed by average adjusters and the average statement published. The relevant provision of the Marine Insurance Act 1906 dealing with the assured’s right to recover general average contribution from the insurer under the policy is contained in section 66(5) which reads: H

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A "Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer."

B So the question for the learned judge in the *Chandris* case was: when does a shipowner become liable to pay a general average contribution to a consignee of cargo under a contract of affreightment which provides for adjustment of general average according to York-Antwerp Rules? The argument for the assured in the *Chandris* case was that since the contract of affreightment, and hence the policy, contemplated that there would be an adjustment of general average according to York-Antwerp Rules, and since those rules contemplate that the adjustment will lead to the making by average adjusters of a general average statement, this statement, the argument goes, will for the first time quantify the net amount of the general average contribution due from each individual contributor, which up to that time had been only an unliquidated and unascertained sum, so a fresh cause of action thereupon arises for recovery of the amount so quantified.

D The difficulty in this argument lies in that part of the judgment of the Privy Council delivered in *Wavertree Sailing Ship Co. Ltd. v. Love* [1897] A.C. 373 that states what for more than a century had been the accepted law of general average. Their Lordships do not refer to this authority for the purpose of relying upon the opinion of the Board that it was *not* an implied term of the contract of affreightment that in the event of the occurrence of a general average act in the course of the voyage the shipowner would procure an average adjustment and statement to be prepared by a professional average adjuster. There is nothing in the instant appeal that makes it necessary for their Lordships to consider whether changes in mercantile practices which have taken place since 1897 have made such an implication necessary, at any rate in cases of contracts contained in bills of lading for carriage in a general ship. In the instant case this question cannot arise; there was a prolonged and complex average adjustment and statement made by professional average adjusters.

E But the Board's other reason for allowing the appeal in *Wavertree Sailing Ship Co. Ltd. v. Love* [1897] A.C. 373 in the view of their Lordships, presents insuperable difficulties to the consignees' claims so far as they are based upon the general average clause in the bills of lading. It is that an average statement under the York-Antwerp Rules prepared by average adjusters appointed by shipowners is not binding upon cargo owners either as respects any net general average contribution or any net general average claim. Cargo owners can not only dispute entire liability upon such grounds as that the vessel was unseaworthy at the beginning of the voyage owing to failure by the shipowner to exercise due diligence, or that sacrifices or expenses claimed were not made or incurred to preserve from a common peril the property involved in the adventure and therefore did not amount to general average acts, but they can also dispute the quantum of any contribution or claim attributed to their consignment by the average statement. If there were any such dispute it would fall to be determined by a court of justice of competent jurisdiction or, if the contract of affreightment contained an arbitration clause, by arbitration.

H So, as a matter of law, in the absence of any agreement to the contrary, the publication of the average statement settles nothing: it has no other legal effect than as an expression of opinion by a professional man as to what are the appropriate sums payable to one another by the

various parties interested in ship and cargo. It is just not capable of giving rise to any fresh cause of action or of postponing the accrual of an existing cause of action for an unliquidated sum.

Causes of action for unliquidated sums that, in the absence of earlier agreement as to quantum reached between the parties themselves, will only become quantified by the judgment of a court or the award of an arbitrator, accrue at the time that the events occur which give rise to the liability to pay to the plaintiff compensation in an amount to be subsequently ascertained. They are commonplace in the field of contract as well as in the field of tort. Unliquidated damages for breach of contract, claims on a quantum merit, claims for salvage services under Lloyd's open form of salvage agreement are examples and in their Lordships' view it was rightly decided in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65, that claims for contributions in general average under contractual provisions which do no more than require general average to be adjusted according to York-Antwerp Rules fall within this class and that, accordingly, the cause of action under such a contractual provision in a bill of lading accrues at the time when each general average sacrifice was made or general average expense incurred.

It was submitted that a distinction could be drawn between the more common form of general average clause in bills of lading which refers only to general average being "adjusted" according to York—Antwerp Rules and the general average clause in bills of lading in the instant case which refers to general average being "adjusted, stated and settled" according to York-Antwerp Rules 1950. In their Lordships' view, however, the inclusion of the additional words "stated and settled" makes no difference. The York-Antwerp Rules do not make the average adjuster's assessments of liability to contribute contained in his general average statement binding upon cargo owners nor do the rules impose any legal obligation on cargo owners to settle general average claims by paying the amount so assessed; so in the context the additional words add nothing to what would already be comprehended in "adjusted according to York-Antwerp Rules."

The judgment in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65 in what were intended to be test cases has stood unchallenged for 20 years. In the interests of business certainty their Lordships would have been very reluctant to overrule it; but so far as claims in general average between parties to the maritime adventure are concerned, the almost invariable use of average bonds eliminates the need to rely directly on the general average clause in the contract of affreightment.

Their Lordships turn now to the average bonds executed by the consignees upon delivery to them of their respective consignments at the port of destination. The Court of Appeal held that the contracts thereby created did not give rise to a fresh cause of action which did not accrue until the amount of the contribution chargeable to the consignment had been ascertained and stated in a general average statement prepared by an average adjuster. It is this decision of the Court of Appeal that is the principal subject of challenge in the ship managers' and the shipowners' appeal.

The average bonds, to give them their common though legally inaccurate description, were in the usual Lloyd's forms which appear to have been in use in substantially the same terms for well over a century: *Svendsen v. Wallace* (1885) 10 App.Cas. 406, 410. There are two varieties

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A one of which provides for security in the form of a cash deposit on joint account in a bank, the other does not call for any cash deposit but it is stated on its face that it is: "To be used in conjunction with underwriters' guarantee." In both varieties the wording of the preamble and the mutual promises is the same. As respects the bonds providing for cash deposits, of which there were very few in the instant case, it is only necessary for
B their Lordships to draw attention to the fact that the provisions relating to the cash deposit deal with interim payments on account out of the deposit of sums certified to be proper "by the adjuster or adjusters who may be employed to adjust the said . . . general average." The implication from this is clear: it was the mutual intention of the parties that there should be an average adjustment undertaken by professional average adjusters.

C Since their Lordships differ from the Court of Appeal on the legal effect of these average bonds, it is convenient to set out their terms omitting only those relating to the cash deposit in the bonds which were not accompanied by an insurer's guarantee.

D "An agreement made this first day of March 1973 between owner of ship or vessel called the *Potoi Chau* of the first part and the several persons whose names or firms are set and subscribed hereto being respectively consignees of cargo on board the said ship of the second part. Whereas the said ship lately arrived in the Port of . . . on a voyage from . . . and it is alleged that during such voyage the vessel met with a casualty and sustained damage and loss and that sacrifices were made and expenditure incurred which may form a charge on the cargo or some part thereof or be the subject of a salvage and/or
E a general average contribution but the same cannot be immediately ascertained and in the meantime it is desirable that the cargo shall be delivered now therefore these presents witness and the said owner in consideration of the agreement of the parties hereto of the second part hereinafter contained hereby agrees with the respective parties hereto of the second part that he will deliver to them respectively or
F to their order respectively their respective consignments particulars whereof are contained in the schedule hereto on payment of the freight payable on delivery if any and the said parties hereto of the second part in consideration of the said agreement of the said owner for themselves severally and respectively and not the one for the other of them hereby agree with the said owner that they will pay to
G the said owner of the said ship the proper and respective proportion of any salvage and/or general average and/or particulars and/or other charges which may be chargeable upon their respective consignments particulars whereof are contained in the schedule hereto or to which the shippers or owners of such consignments may be liable to contribute in respect of such damage loss sacrifice or expenditure and the said parties hereto of the second part further promise and agree
H forthwith to furnish to the owner of the said ship a correct account and particulars of the value of the goods delivered to them respectively in order that any such salvage and/or general average and/or particular and/or other charges may be ascertained and adjusted in the usual manner."

This is a fresh agreement which stands on its own independently of the bill of lading and is for fresh consideration on either side: the release by

the shipowner of his claim to any possessory lien for a general average contribution (also referred to as a "charge") he may have on the consignment, and the assumption by the consignee of a personal liability, secured by a cash deposit or an insurer's guarantee, to pay such general average contribution/charge which may have been payable, at common law, by the owner of the consignment at the time of the general average act or, under the contract of affreightment, by the shipper (each of whom, particularly in the case of a general ship, may well be someone other than the consignee). Their Lordships draw attention to the statement in the preamble that the general average contribution (if there be one) "cannot be immediately ascertained." The agreement then goes on to deal with what is to be done by the parties until it is ascertained. First of all the consignment is to be delivered "on payment of freight payable on delivery if any" i.e., against payment to be made immediately. This is to be contrasted with the promise by the consignee which immediately follows expressed in the future tense that he "will pay" his proper general average contribution. This is a promise to make a payment of a liquidated sum at some date in the future which cannot arrive until what is his proper general average contribution/charge has been ascertained. The contrast between this promise to do something in the future and a promise to do something immediately is again apparent from the succeeding promise by the consignee to furnish particulars of the value of the consignment "forthwith" in order that something further may be done in the future that is needed to enable the liquidated sum that the consignee has promised that he will pay to be ascertained. What is to be done is in order that the general average contribution/charge "may be ascertained and adjusted *in the usual manner*." The words italicised are crucial. They direct one to the procedure that is in actual practice followed when general average is adjusted according to York-Antwerp Rules even though such practice may involve the non-insistence by persons interested in the adventure upon their strict legal rights. The usual practice, in the case of a general ship at any rate, is for the shipowner to employ a professional average adjuster to determine and set out in a general average statement his determination on the one hand of the sums payable as a contribution from each party to the adventure who is liable to contribute to general average and on the other hand of the sums in respect of general average sacrifices or expenditures which are recoverable by way of reimbursement by each party to the adventure by whom such sacrifices were made or expenditures incurred. The usual practice is for actual payment of contributions/charges to be deferred until completion of the general average statement, unless, as did not happen in the instant case, the average adjuster has given a certificate providing for some interim reimbursement to be made to a claimant for a general loss without prejudice to ultimate liability.

In their Lordships' view, although, from the point of view of clarity, the draftsmanship of the Lloyd's forms of average bonds leaves much to be desired, the application of commercial common sense to the language used makes clear the intention of the parties to it as respects payments by the consignees. The contractual obligation assumed by the consignee is to make a payment of a liquidated sum at a future date which will not arrive until the general average statement has been completed by an average adjuster appointed by the shipowners. That in the instant case, where no

3 W.L.R. Castle Insurance Co. v. Hong Kong Shipping Co. (P.C.)

A question of the issue by the adjuster of certificates for interim reimbursements arose, was the earliest date at which the shipowners' cause of action against the consignees under the average bond for payment of general average contribution arose. It was not time-barred at the date of the application of July 19, 1979, to add the shipowners as additional plaintiff.

B Since the average bond provided that the consignees' general average contributions should be adjusted in the usual manner, which in the instant case meant according to York-Antwerp Rules, the consignees were not thereby deprived of any defence they might have on the ground that the statement had not been drawn up according to such rules, as for instance that they were excused from liability owing to the unseaworthiness of the *Potoi Chau* resulting from the failure of the shipowners to exercise due diligence—a defence which it appears from the affidavit evidence they intend to raise.

C For these reasons their Lordships are of the opinion that the plaintiffs' cross-appeal should be allowed as against the consignees.

It follows from the foregoing that their Lordships do not accept the correctness of the statement of Kerr J. in *Schothorst and Schuitema v. Franz Dauter G.m.b.H. (The Nimrod)* [1973] 2 Lloyd's Rep. 91, 97 that the reasoning of Megaw J. in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65 applies to an average bond in Lloyd's usual form, and that the cause of action upon such bond accrues at the date of the general average act or of the bond if later. This statement by the learned judge was confessedly obiter; the conclusion expressed was reached without any analysis of the language of the general average bond; it was treated as being the necessary corollary of regarding the reasoning in the *Chandris* case on a claim under a hull policy of insurance as applying "equally to a claim for general average contribution made by one party to the adventure against another party to the adventure." As has already been indicated their Lordships agree that the reasoning in the *Chandris* case applies to claims for general average contributions between parties to the adventure where such claims are based upon either the liability at common law or contractual liability under a general average clause in the usual terms contained in the contract of affreightment; but the suggestion that the same reasoning leads to the same conclusion in the case of a new and entirely different contract, an average bond, is a non sequitur and in their Lordships' view is wrong.

F Their Lordships can deal quite briefly with the defendants' appeal against the Court of Appeal's order allowing the joinder of the shipowners as an additional plaintiff in the claims against the insurers, since their Lordships find themselves in agreement with the reasons of the Court of Appeal for making this order.

G The letters of guarantee given by the various insurers were not in identical terms. Four different forms are set out in the judgment of Leonard J.A. in the Court of Appeal to which reference can be made ante, p. 526c–f; to two of these forms there were also minor variants. Although the expression "we hereby guarantee" appears in each of the forms the verb "guarantee" is used loosely, as meaning "agree" or "undertake" and not in its strict legal sense of agreeing to answer for the debt, default or miscarriage of another. By each of the forms of letters of guarantee the insurers assume a primary liability to pay a sum of money on the happening of a defined event.

H The sum agreed to be paid is defined in various terms each of which

either expressly or by necessary implication indicates the event on the happening of which it is to become payable. The most explicit language in which the sum and the event are spelt out is: "The general average contribution that may be properly found to be due upon the completion of the average statement by the adjusters"; but their Lordships agree with the Court of Appeal that what is explicit in this form is implicit in each of the others.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed, the cross-appeal allowed and the matter remitted to the Court of Appeal of Hong Kong with a direction that such order be made as is proper to give effect to their Lordships' judgment. The plaintiffs' costs of this appeal and cross-appeal and of the proceedings before Mr. Commissioner Mayo and in the Court of Appeal of Hong Kong must be paid by the defendants.

Solicitors: *Clyde & Co.; Norton Rose Botterell & Roche.*

T. J. M.

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A

[QUEEN'S BENCH DIVISION]

C. (A MINOR) v. EISENHOWER

1983 April 28

Robert Goff L.J. and
Mann J.

B

Crime—Assault—Unlawful wounding—Air gun pellet hitting victim near left eye—Rupture of internal blood vessels—Whether black eye sufficient to constitute “wound”—Offences against the Person Act 1861 (24 & 25 Vict. c. 100), s. 20

C

The defendant, aged 15, was involved in an incident in which C. was hit by an air gun pellet near his eye. The defendant was charged with unlawfully and maliciously wounding C. contrary to section 20 of the Offences against the Person Act 1861¹. The justices held that the abnormal presence of red blood cells in the fluid of the eye, indicating at least the rupture of one or more internal blood vessels, was sufficient to constitute a wound for the purposes of section 20.

D

On appeal by the defendant:—

Held, allowing the appeal, that on the authorities, the word “wound” meant a break in the continuity of the whole skin; that, accordingly, the rupture of internal blood vessels was not sufficient to constitute a wound for the purposes of section 20 of the Act of 1861; and that, therefore, the defendant had not committed an offence under the section (post, pp. 541H, 542F, 543E–F, G–H).

E

Rex v. Wood (1830) 1 Mood. 278 and *Reg v. Waltham* (1849) 3 Cox C.C. 442 applied.

Reg. v. Warman (1846) 1 Den. 183 distinguished.

The following cases are referred to in the judgments:

Reg. v. M'Loughlin (1838) 8 Car. & P. 635.

Reg. v. Waltham (1849) 3 Cox C.C. 442.

Reg. v. Warman (1846) 1 Den. 183.

F

Rex v. Shadbolt (1833) 5 Car. & P. 504.

Rex v. Wood (1830) 1 Mood. 278.

The following additional cases were cited in argument:

Reg. v. Jones (1848) 3 Cox C.C. 441.

Reg. v. Smith (1837) 8 Car. & P. 173.

Rex v. Beckett (1836) 1 M. & Rob. 526.

G

Rex v. Payne (1831) 4 Car. & P. 558.

CASE STATED by Middlesex justices sitting at Tottenham.

On February 17, 1982, an information was preferred by the prosecutor, Vincent Eisenhower, against the defendant, J.J.C., a minor, that he jointly with L. on January 21, 1982, at Flexmere Road, Tottenham, N.17, did unlawfully and maliciously wound Martin Cook, contrary to section 20 of the Offences against the Person Act 1861.

H

The justices heard the information on May 17, 1982. Both the defendant and his co-accused L. denied the offence alleged by the information. The justices found the following facts. On January 21, 1982,

¹ Offences against the Person Act 1861, s. 20: “Whosoever shall unlawfully and maliciously wound . . . any other person . . . shall be guilty of a misdemeanor.”

the date of the offence alleged by the information, the defendant and L. were each 15 years of age. At about 9 p.m. on January 21, 1982, the defendant and L., who were friends, were in Flexmere Road, Tottenham, and they had with them an air pistol which was being carried by L. The air weapon in question had been acquired by L. on about Friday, January 15, 1982, from a fishing tackle shop in Tottenham, for the sum of £8.95. At the same time the pellets to be used in the pistol had been purchased for the sum of £1.25. The defendant had accompanied L. at the time the latter had made those purchases. As the defendant and his friend walked in Flexmere Road they were aware of a young man by the name of Martin Cook together with another young man and two girls standing talking on the opposite side of the road. As the defendant and his friend passed a stationary car on their side of the road L. aimed the air pistol in the direction of the group of four people opposite and fired once and as the pair walked on he fired again. Martin Cook was hit in the area of the left eye by a pellet from the air weapon. The group containing Martin Cook initially regarded the action of aiming the air weapon in their direction as an act of "mucking about" but as a precautionary measure took shelter behind a car. They changed their minds about the actions of the defendant and L. once it was known that Martin Cook had been hit. The injury sustained by Martin Cook amounted to a bruise just below the left eyebrow and fluid filling the front part of his left eye for a time afterwards abnormally contained red blood cells. The defendant and his co-accused had knowledge of the presence of Martin Cook and the three other young people on the opposite side of the road, before they drew level with them. As the two in possession of the air weapon approached the vicinity of the group containing Martin Cook, L. canvassed with the defendant the idea of firing at the group as an act of mischief, with which the defendant concurred. About 20 minutes after the incident the defendant and his friend returned to the scene of the shooting where they learned from another boy that one of the group of four had been hit in the eye with a pellet. On January 25, 1982, the defendant attended Tottenham Police Station with his mother and, in the presence of Mark Handscombe, Police Constable 380 'Y' Division of the Metropolitan Police Force, the defendant was interviewed by the prosecutor, a detective constable of the same police force. The interview commenced at 7.05 p.m. and concluded at 8.35 p.m. on the same day. Each of the questions asked by the prosecutor and each of the answers given by the defendant were recorded in a Metropolitan Police Form 990C. Each of the answers given by the defendant were initialised by both him and his mother as being correct and each of the 12 pages comprising the document was signed at the foot by the defendant, his mother and Police Constable Handscombe. During the course of the interview the defendant maintained initially that the wound caused to Martin Cook had resulted from the air pistol being fired accidentally in efforts by L. to clear the weapon of pellets jammed in the barrel. Later, under questioning from the prosecutor, he admitted that that initial account of how the gun came to be fired was untrue. The defendant himself did not handle the air weapon during the course of events under investigation by the justices.

It was contended by the defendant that he had not been a party to the firing of the air pistol. Although he had been present at the time the weapon had been discharged, his mere presence did not render him guilty of the offence. His friend, L., treated the firing of the air weapon in the direction of Martin Cook and his group as a joke to do no more than

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A frighten them. In so doing L. had not been guilty of acting maliciously within the context of section 20 of the Offences against the Person Act 1861, in that he had not been reckless as to whether the harm coming upon Martin Cook should occur or not, and for that reason neither could it be said that the defendant had acted maliciously. Even if malice within the meaning of the section could be attributed to L. the defendant had not foreseen that harm might be occasioned to Martin Cook. It was the contention of the defendant that he had been taken unaware by the actions of his friend in firing the air pistol; that it was not the prosecutor's case that there had been an intention on the part of the defendant and L. that harm of the kind caused to Martin Cook should be inflicted upon him; that the prosecutor relied upon the legal connotations of recklessness being applied to the definition of "malice" where it appeared in section 20; that in determining whether the defendant or, for that matter, L. had been reckless, the subjective test applied. Having regard to the application of the subjective test to the acts of the defendant, the facts of the case could in no way support a finding that the defendant had been aware of the likelihood of injury to Martin Cook and in which he had acquiesced or had foreseen the possibility but had chosen to disregard it. The air pistol in question was not a precision weapon. The injury sustained by Martin Cook did not constitute a wound within the meaning of the section.

D It was contended by the prosecutor that the defendant joined in participation with L. in the events of the evening of January 21, 1982, culminating in the injury sustained by Martin Cook; that the defendant was aware that L. had with him an air pistol; that the defendant had been with L. at the time of the purchase of the weapon a few days before; that on the evening of the incident the defendant had been aware of the existence of the group amongst whom Martin Cook was one. As the defendant and L. approached that group L. advanced the proposition that the air weapon should be discharged in the direction of that group and with that proposition the defendant had agreed. At the time of the firing of the weapon resulting in the injury of Martin Cook, the defendant had been present providing support and encouragement in that act. The defendant and L. foresaw the risk of physical injury which might be caused by the firing of the weapon, but nevertheless went on to take that risk. The firing of the air pistol in the direction of the group on the opposite side of the road to the defendant and L. was a deliberate act. The injury sustained by Martin Cook amounted to a "wound" within the meaning of the section. Both the defendant and L. were guilty of malicious wounding of Martin Cook within the terms of section 20 of the Offences against the Person Act 1861.

G Having heard the evidence of the witnesses and the defendant, the justices concluded that the facts of the matter were within a small compass. The defendant and L. were out and about with an air weapon. They saw ahead of them the group containing the boy who was ultimately to receive the wound. The temptation to fire the weapon in the direction of the group was incapable of resistance. The defendant endorsed by his actions if not by his words, the suggestion of L. that the weapon should be discharged at the group. The defendant was of an age and understanding of the likely consequences of so doing but carried on in an attitude of encouragement of L.; he aided and abetted his friend in his action, heedless of the outcome. The justices were of opinion that to discharge an air weapon in the direction of a group of people within easy striking distance, on a January evening when it was dark, was a highly dangerous

act. There was no suggestion made to them that the defendant was not aware that an air pistol, if fired, could cause serious injury. The defendant appeared to the justices to be a young man who, at the time of the incident, was a little under three months away from his 16th birthday and was possessed of sufficient intelligence and comprehension to be aware that the firing of the air pistol in the circumstances in which it was discharged could well cause injury of the type inflicted. The justices formed the impression that the defendant was possessed of all the faculties to enable him to make an assessment of the consequences, but had carried on in support of his friend despite that awareness. The justices considered the defendant's initial explanation, made in considerable length to the prosecutor, but accepted by the defendant to be a concoction, and from which he subsequently resiled, that the injury inflicted had been caused by the accidental firing of the air pistol in order to free the barrel from jammed pellets, was a substantial pointer in the direction of the defendant's culpability in the offence. Having regard to those matters the justices were inevitably driven to the conclusion that the defendant and L. were malicious within the meaning of that term in the context of the section of the Act under which they had been charged. They considered that the abnormal presence of red blood cells in the fluid of the left eye of Martin Cook, after being hit by the air gun pellet, indicating at the least the rupturing of a blood vessel or vessels internally was sufficient to constitute a wound for the purposes of section 20 of the Act. They therefore determined to find the defendant guilty of the offence. Since the justices were without sufficient information to deal with the defendant's case in his best interest and in particular, without information relating to his home surroundings and school record they decided to adjourn his case until June 2, 1982, for both a social inquiry report and a school report.

On June 2, 1982, with the information they had sought to hand, and after considering representations made on the defendant's behalf, the justices determined that his interests were best met by the making of a supervision order for a period of two years and appointing a probation officer to provide such supervision. In addition they ordered the defendant to pay compensation in the sum of £5 to the injured person.

The defendant appealed. The question for the opinion of the High Court was whether in the light of the facts as found and the law applied to those facts the justices were right to find the defendant guilty of the offence with which he had been charged.

Glenn Brasse for the defendant.

Robert Rhodes for the prosecutor.

ROBERT GOFF L.J. There is before the court a case stated by Middlesex justices sitting at Tottenham in respect of an information heard by them on May 17, 1982. Under that information two young boys, the defendant and L., were charged with unlawfully and maliciously wounding Martin Cook. The justices on that occasion found the defendant guilty of the offence with which he was charged.

The offence arose in the following circumstances. These two boys were both 15 at the relevant time. L., in company with the defendant, purchased an air pistol and some pellets from a shop. A few days later, on January 21, 1982, they were walking together along Flexmere Road, Tottenham, when they became aware of a young man called Martin Cook, together with another young man and two girls, on the opposite side of

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A the road. As the defendant and L. walked along, L. aimed the air pistol in the direction of those four young people. He fired once. A little later he fired again. Martin Cook was hit in the area of the left eye by a pellet from the air pistol.

B The justices in the case found that the injuries sustained by Martin Cook amounted to a bruise just below the left eyebrow and that fluid filling the front part of his left eye for a time afterwards abnormally contained red blood cells.

C At the trial before the justices, the matters primarily in issue were how far those two boys were involved in the shooting of the air pistol, and how far in particular the defendant—who did not fire the gun—was involved. They also had to consider whether the requirement of malice in section 20 of the Offences against the Persons Act 1861 had been complied with. But the question also arose whether the injuries suffered by Martin Cook could be described as a wound. It is that last question alone which has survived for argument before this court on the question of law posed by the justices in the case. The question stated by the justices is as follows:

D “The question for the opinion of the High Court is whether in the light of the facts as we found them and the law applied to those facts we were right to find the [defendant] guilty of the offence with which he had been charged.”

E The only point argued before us is that the justices were not right to find the defendant guilty of that offence because they were wrong to conclude that the injuries suffered by Martin Cook—which I have described—constituted a wound.

F The justices gave their reason for concluding that it was a wound in the following sentence. They said:

F “We considered that the abnormal presence of red blood cells in the fluid of the left eye of Martin Cook, after being hit by the air gun pellet, indicating at the least the rupturing of a blood vessel or vessels internally, was sufficient to constitute a wound for the purposes of section 20 of the Act.”

G Before us Mr. Brasse for the defendant submitted that those facts did not justify the justices’ conclusion that there was a wound for the purposes of section 20. Mr. Rhodes, for the prosecutor, submitted that the justices were justified in reaching their conclusion that there was a wound on those facts.

H We have been very helpfully taken through all the reported cases discovered by counsel concerned with the meaning of the word “wound.” We are indebted to Mr. Rhodes for having prepared a bundle of the relevant authorities. Those show that the question of what constitutes a wound was considered in a number of cases over a period of about 20 years between 1830 and 1850, but does not appear to have been considered since that date. By 1850 the word “wound” had acquired a meaning which appears to have become the settled meaning. It is certainly true today that judges habitually address juries on the question whether there has been a wounding within section 18 or section 20 of the Offences against the Person Act 1861, on the basis that there is a wound if the skin has been broken. In my judgment, the cases which have been cited to us by counsel support the view that the habitual direction nowadays given by judges to juries is founded on good authority.

The earliest case cited to us was *Rex v. Wood* (1830) 1 Mood. 278. After considering the matter it was concluded by all the judges (except Bailey B. and Park J., who dissented) that there was no wound where the continuity of the skin had not been broken. That test appears to have been consistently applied thereafter.

In later cases the matter was refined in two ways. First in *Reg. v. M'Loughlin* (1838) 8 Car. & P. 635, it was held by Coleridge J., other judges being present, that it must be the whole skin that is broken. He, of course, was referring to the fact that the human skin has two layers, an outer layer called the epidermis or the cuticle, and an underlayer which is sometimes called the dermis or the true skin. In that case there was evidence of an abrasion of the skin, with blood issuing from it. It was made plain to the jury by Coleridge J. that:

"if it is necessary to constitute a wound, that the skin should be broken, it must be the whole skin, and it is not sufficient to shew a separation of the cuticle only."

It was therefore not enough that there had been an abrasion affecting only the cuticle. There had to be a break in the continuity of the whole skin.

The second way in which the point was refined is to be found in two cases, *Rex v. Shadbolt* (1833) 5 Car. & P. 504 and *Reg. v. Waltham* (1849) 3 Cox C.C. 442. These cases show that there can be a break in the continuity of the skin sufficient to constitute a wound if the skin which was broken is the skin of an internal cavity of the body, being a cavity from the outer surface of the body where the skin of the cavity is continuous with the outer skin of the body. So, for example, in *Shadbolt* it was held that it was sufficient if there had been a break in the skin of the internal surface of the lips inside the mouth. In *Waltham*, which is possibly the most extreme of the cases cited to us, it was held by Cresswell J. that there would be a wounding if there had been a rupture of the lining membrane of the urethra causing a small flow of blood into the urine, because that membrane was of precisely the same character as that which lined the cheek and the internal skin of the lip.

So we can see a picture emerging. There must be a break in the continuity of the skin. It must be a break in the continuity of the whole skin, but the skin may include not merely the outer skin of the body but the skin of an internal cavity of the body where the skin of the cavity is continuous with the outer skin of the body.

Mr. Rhodes submitted to us that a wound should include the rupturing of an internal blood vessel. In support of this submission, he referred us in particular to *Reg. v. Warman* (1846) 1 Den. 183. That was a somewhat unusual case. It appears that the case was tried by Alderson B. at the Spring Assizes for the county of Hertford upon a coroner's inquisition. The coroner's inquisition stated that Levi Warman attacked his wife with an instrument called a swingle (made of wood, iron and leather) and struck her with it on the right side of the head thereby causing her one mortal wound. The said mortal wound was such that she then and there instantly died of it. The evidence of the witnesses, in particular the surgeon, was to the effect that on examining the woman's head no external breach of the skin was found, but only a collection of blood in the back part of her head. She died from an extravasation of blood which pressed on the brain. On examining and cutting the scalp the surgeon found a collection of blood between the scalp and the cranium, just above the

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A spot where within the cranium he found the pressure on the brain. He described the injury as a contused wound with effusion of blood, which is the same thing as a bruise. He stated that the internal part of the skin was broken.

B Alderson B. reserved the question whether the mode of death was sufficiently proved by the evidence. He was there certainly referring to the use of the words "one mortal wound" in the inquisition. The matter was considered by Lord Denman C.J., Tindal C.J., Pollock C.B., and a number of other judges, including Parke B. whose note runs:

"All thought that this internal wound was a sufficient wound to support the allegation in the indictment, whether it would have been so or no in an indictment on the statute for cutting or wounding with intent to murder, &c."

C This, Mr. Rhodes submitted, showed that they thought that there could be a wound where there had been no break in the continuity of the skin, but that they did not go on to consider whether technically there would in such circumstances be a wounding for the purposes of a charge of cutting or wounding with intent to murder. Speaking for myself, I am unable to accept that construction. What was considered by the judges
D was not the question whether there was a wound within the statute, but merely whether the words "a mortal wound" used in the coroner's inquisition were proved on the evidence of the particular case. They were not concerned with the construction of the word "wounding" in the statute, but simply with the common sense use of the word "wound" on the facts of the case before them. I do not therefore think that the case
E provides any guidance on the construction of the word "wound" in the statute which we have to consider.

In my judgment, having regard to the cases there is a continuous stream of authority—to which I myself can find no exception—which establishes that a wound is, as I have stated, a break in the continuity of the whole skin. I can see nothing in the authorities which persuades me to think otherwise. This has become such a well-established meaning of
F the word "wound" that in my judgment it would be very wrong for this court to depart from it.

We now turn to the case stated for our consideration by the justices. The justices concluded that there was a wound because, although they described the injury as a bruise just below the left eyebrow with fluid filling the front part of his left eye for a time afterwards which abnormally contained red blood cells, they thought that the abnormal presence of red
G blood cells in the fluid in Martin Cook's left eye indicated at least the rupturing of a blood vessel or vessels internally; and this they thought was sufficient to constitute a wound for the purposes of section 20 of the Offences against the Person Act 1861.

In my judgment, that conclusion was not in accordance with the law. It is not enough that there has been a rupturing of a blood vessel or
H vessels internally for there to be a wound under the statute because it is impossible for a court to conclude from that evidence alone that there has been a break in the continuity of the whole skin. There may have simply been internal bleeding of some kind or another, the cause of which is not established. In these circumstances, the evidence is not enough, in my judgment, to establish a wound within the statute. In my judgment, the justices erred in their conclusion on the evidence before them. The question posed for the opinion of this court is whether, in the light of the

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facts found by the justices and the law applied to those facts, they were right to find the defendant guilty of the offence with which he had been charged, viz., the unlawful and malicious wounding of Martin Cook contrary to section 20 of the Offences against the Person Act 1861. I would answer that question in the negative.

MANN J. I agree

*Appeal allowed.**Conviction quashed.**Legal aid taxation of defendant's costs.**Prosecutor's costs from central funds.*

Solicitors: J. G. Daultry & Co., Enfield; Solicitor, Metropolitan Police.

[Reported by PAUL MAGRATH, Esq., Barrister-at-Law]

[COURT OF APPEAL]

BRITISH AIRWAYS BOARD v. LAKER AIRWAYS LTD. AND OTHERS

[1983 B. No. 342]

BRITISH CALLEDONIAN AIRWAYS LTD. v. LAKER AIRWAYS LTD. AND OTHERS

[1983 B. No. 377]

REGINA v. SECRETARY OF STATE FOR TRADE AND INDUSTRY, *Ex parte* LAKER AIRWAYS LTD. AND ANOTHER

1983 March 22, 23, 24, 25, 28, 29;

May 5, 6; 20

July 4, 5, 6, 7, 8, 11, 13, 19,

20; 26, 27

Parker J.

Sir John Donaldson M.R.,

Oliver and Watkins L.JJ.

Injunction Jurisdiction to grant Restraint of foreign proceedings—United Kingdom airline's antitrust action in United States—No alternative English forum—Secretary of State's intervention—Compliance with United States court's orders prevented—Whether injunction necessary to avoid injustice—Whether "measures . . . under the law" includes statutory provisions—Protection of Trading Interests Act 1980 (c.11), ss.1(1)(2)(3), 1(1)(2)(3)(5), 5, 6—Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (S.I. 1983 No. 900)

Aircraft—International agreements—Bermuda Agreement between U.K. and U.S. Governments—Antitrust action in United States between United Kingdom designated airlines—Whether restrainable in England—Protection of Trading Interests (U.S. Antitrust Measures) Order 1983

From 1977 the rights of British and American airlines to operate transatlantic air services between the United Kingdom and the United States were regulated and controlled by a treaty between the two governments known as Bermuda 2 under which each country had the right to designate airlines of its own nationality to fly particular routes. British airlines were subject to control by the United Kingdom Civil Aviation Authority

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A (C.A.A.) which regulated their fares. The corresponding body for United States airlines was the United States Civil Aviation Board (C.A.B.). Article 12 of Bermuda 2 provided for the fixing of the tariffs of designated airlines which were to be subject to the approval of the C.A.A. and C.A.B. who had to try to ensure that the designated airlines conformed to the agreed tariffs.

B Both the plaintiffs, B.A. and B.C., and the defendants, Lakers, were United Kingdom designated airlines licensed on terms that they charged fares approved by the C.A.A. and only authorised to fly into United States airspace if those fares were approved by the C.A.B. In 1977 Lakers obtained permission to operate a Skytrain, which was a low cost scheduled transatlantic service. Lakers later encountered financial difficulties and went into liquidation.

C In a civil action in the United States District Court for the District of Columbia, Lakers, by a complaint indorsed "jury trial demanded," claimed against B.A. and B.C. and other defendant airlines that its collapse in February 1982 was caused by a conspiracy between the defendants to restrain and to monopolise United States foreign trade and commerce in air transportation between the United States and the United Kingdom and Europe in violation of the United States Sherman Act with the object of eliminating Lakers as an independent competitive force in trade and commerce between the United States and foreign nations (an "antitrust claim") which caused damages to Lakers exceeding U.S.\$350,000,000. If the claim was established, Lakers would be entitled to triple damages under the United States Clayton Act. A further count in respect of "intentional tort" included a claim for "punitive damages of \$700,000,000." The complaint was accompanied by very extensive requests for production of documents and for answers to interrogatories of a far-reaching nature.

E B.A. and B.C. brought actions against Lakers in the Queen's Bench Division and applied for injunctions to restrain Lakers from continuing the American action against them. Parker J. on May 20, 1983, said, *inter alia*, that the essential question was whether it would be an injustice to B.A. and B.C. to allow the action against them to proceed and dismissed the applications. An interim injunction restraining Lakers from taking further steps in the American action was extended pending an appeal.

F B.A. and B.C. appealed. Before the appeal came on for hearing the Secretary of State for Trade and Industry on June 23, 1983, made the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983¹ under section 1(1) of the Protection of Trading Interests Act 1980² and gave two directions under sections 1(3) and 2 respectively of the Act. The direction under section 1 of the Act of 1980 prevented B.A. and B.C. from complying with any judgment in the United States action in so far as it was given pursuant to the Sherman and Clayton Acts. The direction under section 2 prevented B.A. and B.C. from furnishing any of the relevant documentation which was in the United Kingdom or any relevant information wherever situate in so far as B.A. and B.C. had been required to furnish it by the interrogatories.

H ¹ Protection of Trading Interests (U.S. Antitrust Measures) Order 1983: see post, pp. 584D-585A.

² Protection of Trading Interests Act 1980, s. 1. (1) (2) (3): see post, pp. 585A-C, H-586A.

S. 2 (1): "If it appears to the Secretary of State—(a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court . . . of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court . . . the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement".

S. 2 (2) (3): see post, pp. 562A-B, 587D.

At the hearing of their appeals B.A. and B.C. relied upon the Order and directions by the Secretary of State under the Act of 1980. Lakers stated that they wished to challenge the validity of the Order and directions and applied to Woolf J. for leave to apply for judicial review. The refusal of such leave was followed by a renewal of the application to the Court of Appeal which was heard concurrently with B.A.'s and B.C.'s appeals.

On Lakers' application for judicial review:—

Held, dismissing the application, that "measures" was a wide term of generic description and "measures . . . taken by or under the law of any overseas country" in section 1(1)(a) of the Protection of Trading Interests 1980 was intended to include foreign statutory provisions as well as things done under the authority of those provisions (post, p. 585D-E); that by seeking to prevent international trade being conducted on the basis of agreements designed to minimise or eliminate competition the Sherman and Clayton Acts were "regulating or controlling international trade" within the meaning of section 1(1)(a) (post, p. 585F); that subsections (2) and (3) of section 1 of the Act of 1980 were independent of each other and the Secretary of State had power to make a direction under section 1(3) of the Act regarding "any such requirement or prohibition as aforesaid" without first giving a direction for notification under section 1(2) (post, p. 586C-D); that in the absence of challenge to his good faith or establish that he had misdirected himself in law, the Secretary of State, by the use of the words "if it appears" to him in section 2(1) of the Act of 1980, was enabled to state that the specified pre-conditions appeared to him to exist without stating why it appeared to him that they existed (post, p. 586D-E); that further the evidence justified the Secretary of State's view that inadmissible requirements within the meaning of section 2 of the Act might be made (post, p. 587F); and that the terms of the Order and of the two directions were not too wide or general and, accordingly, they were valid and not ultra vires (post, p. 587F-H).

On B.A.'s and B.C.'s appeals:—

Held, allowing the appeals, (1) that the court had jurisdiction, which should be exercised with extreme caution, to enjoin a party over whom it had personal jurisdiction from pursuing litigation before a foreign tribunal; and that the absence of an alternative English forum was not of itself fatal to a claim for such relief the right to which depended upon whether it was appropriate in all the circumstances for it to be granted in order to avoid injustice (post, pp. 575H-576B, G-H, 577H-578A).

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, H.L.(E.) applied.

(2) That the Secretary of State's direction under section 1 of the Act of 1980, which prevented B.A. and B.C. from complying with any judgment of the United States court in so far as it was given pursuant to the Sherman and Clayton Acts, and the direction under section 2, which prevented B.A. and B.C. from furnishing any relevant documentation or information which they were required to give by the wide scope of the discovery and interrogatories administered by Lakers, had produced a wholly different situation from that which was before Parker J.; that they had rendered the issues raised by Lakers in the United States action wholly untriable and that in the circumstances it would amount to a total denial of justice to B.A. and B.C. to allow Lakers to proceed with their claim and appropriate injunctions would be granted accordingly (post, pp. 574E-F, 590G-H, 591A-B, E-F).

Per curiam. (i) As a matter of public policy the courts and the executive should not speak with different voices in relation to foreign affairs (post, p. 582F-G).

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A

Dicta of Lord Wilberforce and Lord Fraser of Tullybelton in *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2)* [1978] A.C. 547, 617, 650-651, H.L.(E.) applied.

(ii) Both Lakers and B.A. and B.C. were designated as United Kingdom carriers under the Bermuda 2 Treaty; and B.A. and B.C. are entitled to place reliance upon the public policy consideration that acceptance by the United States of the United Kingdom's view of the effect of that treaty on the United States would render Lakers' claim unsustainable (post, p. 589G-H).

B

Decision of Parker J., post, pp. 549G et seq., reversed on different grounds.

The following cases are referred to in the judgment of the Court of Appeal:
Atlantic Star, The [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.).

C

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.).

Laker Airways Ltd. v. Department of Trade [1977] Q.B. 643; [1977] 2 W.L.R. 234; [1977] 2 All E.R. 182, C.A.

Practice Direction (Judicial Review: Appeals) [1982] 1 W.L.R. 1375; [1982] 3 All E.R. 800.

D

Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.).

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2), In re [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.).

E

The following additional cases were cited in argument in the Court of Appeal:

Adams v. Adams (Attorney-General intervening) [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572.

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.).

F

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.).

British Nylon Spinners Ltd. v. I.C.I. Ltd. [1953] Ch. 19; [1952] 2 All E.R. 780, C.A.

Chief Constable of Kent v. V. [1983] Q.B. 34; [1982] 3 W.L.R. 462; [1982] 3 All E.R. 36, C.A.

G

Fender v. St. John-Mildmay [1938] A.C. 1; [1937] 3 All E.R. 402, H.L.(E.).

Flintkote Co. v. Lysfjord (1957) 246 F. 2d, 368.

Gorthon Invest AB v. Ford Motor Co. Ltd. [1976] 2 Lloyd's Rep. 720.

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.).

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 2 All E.R. 1042, H.L.(E.).

H

Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] A.C. 308; [1941] 2 All E.R. 93, P.C.

Industrial Investment Development Corporation v. Mitsui & Co. Ltd. (1982) 671 F. 2d, 867.

McEldowney v. Forde [1971] A.C. 632; [1969] 3 W.L.R. 179; [1969] 2 All E.R. 1039, H.L.(N.I.).

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.).

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- Midland Bank P.L.C. v. Laker Airways Ltd.*, The Times, February 8, 1983, Parker J. A
- Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 482; [1968] 1 All E.R. 694, H.L.(E.).
- Pan American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, C.A.
- Reg. v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 Q.B. 21; [1966] 2 W.L.R. 91; [1966] 1 All E.R. 97, C.A. B
- Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014; [1976] 3 W.L.R. 641; [1976] 3 All E.R. 665, C.A. and H.L.(E.).
- Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730; [1983] 2 All E.R. 72, C.A.
- Walker v. Baird* [1892] A.C. 491, P.C.

The following cases are referred to in the judgment of Parker J.: C

- Adams v. Adams (Attorney-General intervening)* [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572.
- Atlantic Star, The* [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.).
- Castanho v. Brown & Root (U.K.) Ltd.* [1980] 1 W.L.R. 833; [1980] 3 All E.R. 72, C.A.; [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.). D
- MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.).
- St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, C.A.
- Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730; [1983] 2 All E.R. 72, C.A.
- Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2), In re* [1978] A.C. 547; [1977] 3 W.L.R. 430; [1977] 3 All E.R. 703, C.A.; [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.). E

The following additional cases were cited in argument before Parker J.:

- Boys v. Chaplin* [1968] 2 Q.B. 1; [1968] 2 W.L.R. 328; [1968] 1 All E.R. 283, C.A. F
- Chief Constable of Kent v. V.* [1983] Q.B. 341; [1982] 3 W.L.R. 462; [1982] 3 All E.R. 36, C.A.
- Dyson v. Attorney-General* [1911] 1 K.B. 410, C.A.; [1912] 1 Ch. 158, C.A.
- Fender v. St. John-Mildmay* [1938] A.C. 1; [1937] 3 All E.R. 402, H.L.(E.).
- Flintkote Co. v. Lysfjord* (1957) 246 F. 2d. 368.
- Gorthon Invest AB v. Ford Motor Car Co. Ltd.* [1976] 2 Lloyd's Rep. 720.
- Gouriet v. Union of Post Office Workers* [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.). G
- Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 K.B. 536, C.A.
- Halley, The* (1868) L.R. 2 P.C. 193, P.C.
- Jones v. Jones* (1889) 22 Q.B. 425.
- Malone v. Metropolitan Police Commissioner* [1979] Ch. 344; [1979] 2 W.L.R. 700; [1979] 2 All E.R. 620.
- Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213n., C.A.
- Midland Bank P.L.C. v. Laker Airways Ltd.* The Times, February 8, 1983, Parker J.
- North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, C.A.
- Pan American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, C.A.

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- A *Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235.
S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd. [1978] Q.B. 279; [1978] 2 W.L.R. 1; [1978] 2 All E.R. 339, Parker J. and C.A.
Simpson v. Fogo (1862) 1 H. & M. 195.
Siskina (Owners of cargo lately taken on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.).
- B *Star Sea Transport Corporation v. Slater* [1979] 1 Lloyd's Rep. 26, C.A.
Trendtex Trading Corporation v. Credit Suisse [1980] Q.B. 629; [1980] 3 W.L.R. 367; [1980] 3 All E.R. 721, C.A.

ACTIONS

C By writ of January 21, 1983, the plaintiffs, British Airways Board ("B.A.") claimed against the defendants, Laker Airways Ltd., Nigel James Hamilton, Christopher Morris, Laker Air Services Ltd. and Laker Airways (International) Ltd., ("Lakers"), declarations that they had not unlawfully engaged in any unlawful combination or conspiracy unreasonably to restrain or monopolise trade and commerce in air transportation between the United States and the United Kingdom or intentionally or unlawfully caused injury to Laker Airways and an order that Lakers be restrained, inter alia, from causing or permitting to be continued against

D B.A. Civil Action 82-3362 in the United States District Court for the District of Columbia between Laker Airways Ltd. and Pan American World Airways Inc. and others.

E By writ of January 24, 1983, the plaintiffs, British Caledonian Airways Ltd., claimed a similar injunction and declaration against the defendants, Lakers, but excluding Nigel James Hamilton.

E Applications by B.A. and B.C. and cross-applications by Lakers were heard by Parker J.

The facts are stated in the judgments of Parker J. and the Court of Appeal.

- F *Richard Scott Q.C.* and *Jonathan Sumption* for British Airways.
Colin Ross-Munro Q.C. and *David Donaldson* for British Caledonian.
David Johnson Q.C., *Michael Crystal* and *Richard Hacker* for Lakers.
Peter Scott Q.C. and *Nicholas Bratza* for the Attorney-General.

Cur. adv. vult.

- G May 20. PARKER J. read the following judgment. There are before the court for decision applications by the plaintiffs and cross-applications by the defendants in two actions commenced respectively by British Airways Board ("B.A.") on January 21, 1983, and by British Caledonian Airways Ltd. ("B.C.") on January 24, 1983. In both actions the first and real defendant is Laker Airways Ltd. ("Lakers"), a Jersey company now in liquidation, but formerly the operator of the well-known transatlantic Skytrain service, whose principal place of business was at all material times in London. The other defendants need no separate mention. They are added for the purpose only of ensuring that if the plaintiffs are granted the relief which they seek against Lakers that relief may be fully effective.
- H Both actions are the direct result of the fact that on November 24, 1982, Lakers commenced proceedings in the United States District Court for the District of Columbia (the American action) against eight defendants, of which two are the present applicants. B.A. and B.C., and the

other six are two American airlines, Pan American and T.W.A.; two European airlines, Lufthansa and Swissair; the American aircraft manufacturers, McDonnell Douglas Corporation, and, finally, the last-mentioned corporation's subsidiary, McDonnell Douglas Finance Corporation. In that action Lakers claim against the eight defendants that their collapse in February 1982 was brought about by a conspiracy between the eight defendants and others or by intentional and unlawful injury caused by the eight defendants jointly and severally. Under both heads the damages claimed exceed U.S.\$1 billion, albeit the damage allegedly suffered by Lakers is, in both cases, presently estimated at some \$350,000,000.

The conspiracy claim, to which I shall refer as "the antitrust claim," alleges a conspiracy unreasonably to restrain and to monopolise United States foreign trade and commerce in air transportation between the United States and the United Kingdom and other European countries in violation of sections 1 and 2 of the United States Sherman Act of 1890, as amended, with the object of eliminating Lakers as an independent competitive force in trade and commerce between the United States and foreign nations. If the claim is established, Lakers are, under section 4 of the United States Clayton Act 1914, as amended, entitled to triple damages. Hence the difference between the damage allegedly suffered and the damages claimed in the action. Under the alternative head that difference is accounted for by a claim for punitive damages in the amount of \$700,000,000.

By their writs B.A. and B.C. claim declarations that they are under no liability to Lakers and injunctions to restrain them from continuing the American action as against them. Each of them, at the time of commencement of their respective actions, applied for and obtained *ex parte* interlocutory injunctions restraining Lakers, pending the determination of a summons for wider relief or further order, from seeking in the American action injunctions or any order which would prevent them from proceeding further with the actions which they had respectively launched in this court, whilst leaving Lakers otherwise free to pursue that action without restraint. On March 2, 1983, however, both of them applied for and obtained further *ex parte* interlocutory relief for the like period preventing Lakers from taking any steps as against them in the American action save as to any applications already in being at the date of notification of the order granting such additional relief.

At that time the hearing of the summonses for further relief was fixed for March 21, some 19 days ahead. The duration of the restraint upon Lakers in their conduct, as against the present plaintiffs, of the American action was therefore of short duration and affected no applications then already pending. Furthermore, the order granting the relief specifically included, as is usual, liberty to Lakers to apply on short notice at any time to discharge or vary the order granting the relief. No such application was made. I mention these matters for it is important that they should be fully understood by the judge seized of the American proceedings. As in America so here, it is and always has been regarded as of great importance that a conflict, or even an apparent conflict, between the courts of one country and another should be avoided if at all possible. However, the courts both in America and here recognise that there may be occasions when it will be necessary for them, by orders in personam, to restrain the pursuit of proceedings in another country. Given that such occasions may exist our procedure enables temporary relief to be granted to hold the position pending full argument and evidence, in order that, if the plaintiff

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A in the end establishes that it is such an occasion, he may not, in the meantime, have suffered irreparable damage. The granting of such relief, when fully understood, involves neither actual nor apparent conflict.

B B.A.'s and B.C.'s applications for the wider relief of an injunction restraining Lakers from pursuing the American action at all and the Lakers' cross-applications, which are to dismiss the actions here, were, save as to two matters, argued and a mass of evidence was tendered on March 22, 23, 24, 25, 28 and 29, 1983. On the conclusion of the argument there was no dispute but that the original *ex parte* injunction should continue until after judgment. B.A. and B.C. submitted that the wider relief afforded by the orders of March 2 should also be continued for a like period, but such continuation was resisted by Lakers. Being then not satisfied that there was good ground for continuation of such wider relief C no matter what might be the decision on B.A.'s and B.C.'s applications, I discharged such orders but granted a short stay in order to enable B.A. and B.C. to seek from the Court of Appeal a reversal of the order of discharge or, possibly, a longer stay to enable the appeal to be fully argued.

D On March 30 Sir John Donaldson M.R., sitting alone, restored the order of March 2 pending the hearing of the appeal from its discharge, reserving to Lakers, as had been done when the injunction was originally granted, liberty to apply in the meantime for discharge or variation of the order.

E The two matters which, on March 29, remained outstanding were any submissions which the parties might wish to make as a result of, first, a reserved judgment of Judge Greene on an application in the American action for which I considered it desirable if possible to wait before giving judgment myself and, secondly, a statement on behalf of the Attorney-General as to executive policy which, in the light of the submissions made on these applications and what had been said in the House of Lords in *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2) [1978] A.C. 547* it appeared to me proper F to invite. Such statement was made on behalf of the Attorney-General by Mr. Peter Scott on May 6. Submissions with regard to this and Judge Greene's judgment, which was by then available, were made on the same day.

G Before considering the background to the issues which arise I should mention certain additional matters. First, B.C., but not B.A., amended their summons to include an application for a mandatory order upon Lakers to discontinue their American action as against them. Secondly, although the applications by both B.A. and B.C. were originally for injunctions restraining pursuit of the American proceedings until trial or further order it was common ground between the parties that I should determine B.A.'s and B.C.'s entitlement to such relief finally.

H The crux of the dispute between the parties is Lakers' antitrust claim in the American action. It is a claim which can only be pursued in a district court in America. Accordingly, if prevented from pursuing it there Lakers cannot pursue it in this country or, indeed, anywhere else. The relief claimed by B.A. and B.C. is not, therefore, sought on the usual basis that the opposing party can equally well litigate here. Furthermore, since B.A. and B.C. have places of business in the United States and conduct part of their operations in, and in the airspace of, the United States it is not suggested that B.A. and B.C. were not properly served in the United States or that the district court lacks jurisdiction to try the

claim. The applications are, therefore, at the least unusual. Indeed, they are probably unique.

Both B.A. and B.C. submit, however, that they are entitled to or should be granted the relief which they seek on the grounds, first that it would be an injustice to them to allow the American action to proceed against them and, secondly, that it would be contrary to public policy to allow it to do so. B.C. advance a further ground, namely, that the claim against them is frivolous and vexatious.

With that preliminary I can now turn to consider the background to B.A.'s and B.C.'s claim for relief. From 1977 B.A., B.C., Lakers and the two American airline defendants in the American action all derived their right to operate scheduled transatlantic air services between the United States and this country from the fact that they were designated respectively by the governments of this country and the United States under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services (1977) (Cmnd. 7016) made or done in Bermuda on July 23, 1977, to which I shall hereafter refer as "Bermuda 2." That agreement replaced an earlier agreement made in 1946 but although Lakers' conspiracy allegations in its antitrust claim go back beyond 1977 it is unnecessary for present purposes to make further reference to such earlier agreement.

By article 2(2) of Bermuda 2 each government grants to the other the rights specified in the agreement for the purpose of operating scheduled international air services on routes specified therein. By article 3(1)(a) each government has the right to designate an airline or airlines for the purpose of operating the agreed services on each of the specified routes, and by article 3(6) it is provided that on receipt of such a designation and on receipt of an application from the designated airline for operating authorisations and technical permissions the other government shall grant the appropriate authorisations and permissions provided certain conditions are satisfied. Once so designated and authorised it is provided that an airline shall be entitled to operate the relevant agreed services on the specified routes provided it complies with the applicable provisions of the agreement.

These are the basic conditions upon which each government permits an airline of the other to fly in its airspace and land on its territory. An airline will, however, have also to obtain from the appropriate authorities of its own country whatever licences or authorisations the law of that country requires.

Article 11 of Bermuda 2 provides for the designated airline or airlines of one country to have a fair and equal opportunity to compete with the designated airline or airlines of the other, but makes no provision as to competition between the airlines of one country, inter se, a matter which is internal to each country. Some reliance was placed on this article by B.A. and B.C.

In the American action Lakers contend, at any rate by implication, that Pan Am and T.W.A. did not afford Lakers a fair opportunity to compete but this takes the matter no further. It may give the government of this country cause for complaint. It may even, if proved, justify the government of this country in withdrawing authorisations for Pan Am and T.W.A. to fly into its airspace and land on its territory, but it does not appear to me to affect matters which presently fall for decision.

A The article principally relied on by B.A. and B.C. is, however, article 12, which provides for the fixing of the tariffs of the designated airlines. Its importance lies in the fact that one of Lakers' principal allegations in the antitrust claim is that the airlines combined to charge predatory fares, i.e. fares which were deliberately and uneconomically low in order to damage Lakers and cause their collapse.

B Article 12(1) provides that the tariffs shall be established in accordance with the procedures set out in the article, and article 12(2) that such tariffs shall be established at the lowest level consistent with a high standard of safety and an adequate return to efficient airlines operating on the agreed routes.

C Article 12(2) further provides that each tariff shall, to the extent feasible, be based on the cost of providing the service in question assuming reasonable load factors and that, amongst other factors to be taken into account, will be the need of an airline to meet competition from scheduled or charter air services taking into account differences in cost and quality of service and the prevention of unjust discrimination and undue preferences or advantages. Finally this sub-article provides that individual airlines should be encouraged to initiate innovative cost-based tariffs.

D There are in the article two basic procedures with regard to the establishment of tariffs. First by article 12(4) any tariff agreement concluded as a result of inter-carrier discussions, including those held under the traffic conference procedures of the International Air Transport Association (I.A.T.A.) and involving the airlines of the contracting parties, is to be subject to the approval of the aeronautical authorities of both the contracting parties and may be disapproved at any time.

E It is provided that such agreements shall be submitted for approval to both aeronautical authorities at least 105 days before the proposed date of effectiveness (unless shorter notice is permitted) accompanied by such justification as each contracting party may require of its own designated airlines. The submission of such an agreement for approval is, however, not the filing of a tariff under article 12(5), which provides the second procedure for the establishment of tariffs. Under it any designated airline may file a tariff with the aeronautical authorities of the other contracting party at least 75 days before the proposed effective date (again unless shorter notice is permitted). It will then become effective unless action is taken to continue the existing tariff in force under article 12(7). Since the designated airlines of both countries require tariff approval from their own authorities it follows that all charges in fact made must have received express or tacit approval from the aeronautical authorities of both countries before they are put into effect. Hence all the fares of which Lakers complain had to be, and it is common ground were, in receipt of such approval before they were put into effect, such approval being given in America by the Civil Aeronautics Board (C.A.B.), and in this country by the Civil Aviation Authority (C.A.A.). Furthermore, before such fares were approved Lakers were given by the respective authorities the opportunity, of which they took advantage, to object to the introduction of such fares.

H Article 12 ends with two provisions of some importance. First, the aeronautical authorities of each government are to use their best endeavours to ensure that the designated airlines conform to the agreed tariffs filed with the aeronautical authorities of the two governments and that no airline rebates any portion of such tariffs by any means, directly or indirectly. Secondly, article 12(9) provides that in order to avoid tariff

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disputes as far as possible: (i) a tariff working group shall be established in accordance with annex 3; (ii) the aeronautical authorities of the two countries shall keep each other informed of such guidance as they may give to their own airlines in advance of or during I.A.T.A. conferences; (iii) during the time when the civil aeronautical authorities of either government have under consideration agreements pursuant to article 12(4), the two governments may exchange views and recommendations which shall, if requested by either government, be presented to the aeronautical authorities of the other who will take them into account in reaching their decision.

It is thus clear that both governments were to be closely involved in the fixing of tariffs and that it was contemplated that all tariff agreements would be placed before the aeronautical authorities of both countries, which authorities would take into account government views before reaching a decision.

So much for Bermuda 2. It is now necessary to refer shortly to the Sherman Act, the Clayton Act, and the Federal Aviation Act of 1958 of the United States.

By section 1 of the Sherman Act every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade between the several states or with foreign nations, is declared illegal and any person who makes any such contract, combination or conspiracy is guilty of a criminal offence. By section 2 every person who monopolises, or attempts to monopolise, or combines or conspires with any other person or persons to monopolise any part of such trade or commerce is also guilty of a criminal offence.

Section 4 of the Clayton Act provides:

"any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws "which include the Sherman Act" may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

These three sections are the foundation of Lakers' antitrust claim. The breaches of sections 1 and 2 of the Sherman Act alleged go back many years, but for present purposes I need mention only events occurring shortly before Lakers' final collapse. By the late summer of 1981 Lakers were, and were known to be, in grave financial trouble, and if they were to survive required massive financial assistance. The substance of what is alleged by Lakers is that B.A. and B.C. and other defendants in the American action, in pursuit of a combination between them to drive Lakers out of business, then did two things. First when Lakers, in order to improve failing business on the Skytrain service, or at least to stop further deterioration in their position, had introduced a fare known as a Regency fare (offering better facilities than the normal Skytrain fare, but lesser facilities than those offered by B.A. and B.C. and other airline defendants), Pan Am, T.W.A. and B.A. dropped their fares for better facilities to match Lakers' fares although it was wholly uneconomic so to do, and thus further damaged Lakers' business and increased their financial difficulties. Next, having done this B.C. and others, in pursuit of the combination, exerted pressure on McDonnell Douglas to prevent them from putting into effect an essential part of a financial rescue operation being negotiated, with the result that it did not reach fruition

A and Lakers could no longer continue in business. I shall return to these matters hereafter.

I now consider two sections of the Federal Aviation Act 1958. Under section 412 as it stood up to 1978 every United States air carrier was obliged to file with C.A.B. a true copy or, if oral, a true and complete memorandum of every contract or agreement affecting air transport between it and any other air carrier, foreign air carrier or other carrier, inter alia, relating to the establishment of fares or controlling, regulating, preventing or otherwise eliminating destructive, oppressive or wasteful competition. C.A.B. was then obliged by order to disapprove any such contract or agreement that it found to be adverse to the public interest and to approve any such contract or agreement that it did not find to be adverse to the public interest or in violation of the Act. Under section 414 any person affected by an order made under section 412 was exempted from the operation of the antitrust laws in so far as might be necessary to enable him to do anything approved by such order.

In 1978 section 412 was amended, inter alia, so as to make the filing of any such agreement optional and to make it possible to apply for authority to discuss possible cooperative working arrangements, and in 1980 it was further amended so as to enable not only a United States air carrier but also a foreign air carrier to file an agreement or request for authority to discuss and thus obtain antitrust exemption.

In summary form the position with regard to exemption may therefore be stated as follows. (1) At the time of Bermuda 2 an American airline was obliged to file any tariff agreement whether with another American airline or a foreign airline, but a foreign airline was under no such obligation. Hence there was no provision under which a British airline, making an agreement only with another British airline, could of its own motion or otherwise obtain antitrust exemption. If, however, an American airline was a party to such an agreement antitrust exemption could be obtained provided that the American airline complied with its obligations under section 412. (2) From 1978 to 1980 the position changed in that a British airline could only obtain exemption if an American airline was a party, and that airline exercised the *option* to file the agreement. (3) From 1980 onwards a British airline could also obtain exemption by obtaining of its own motion an order of the C.A.B. under section 412.

It was in this state of affairs that, at the end of 1980, the matter of antitrust legislation was raised between the two governments in connection with, and at the same time as, an annex 5 to Bermuda 2 providing for air cargo operations was entered into between them. The government of this country was concerned to obtain protection from antitrust laws for agreements between United Kingdom cargo airlines. By letters dated December 4, the same day upon which the annex (annex 5) was added, (a) the United States Government gave no assurances as to exemption but pointed out that under section 412, as recently amended, exemption could be obtained. (b) An Under-Secretary of the Department of Trade, in reply, stated:

"... As you know my government does not accept the jurisdiction which the U.S. claims in respect of these laws, nor their appropriateness in some circumstances to international air service operations. 'It is only fair to advise you that if, after consultation, H.M.G. indicates that it sees no objection to the arrangements proposed but nevertheless antitrust action is brought against the U.K. airlines concerned,

then we might consider such action as a reason for seeking modification and if necessary termination, of the cargo agreement as provided for in part 5 of [the annex].”

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It is to be noted that the specific matters under consideration at the time were agreements (i) between U.K. airlines only, (ii) agreements to which the government of this country saw no objection, (iii) agreements to enable small United Kingdom cargo airlines better to compete with the larger and more experienced American cargo airlines.

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No antitrust question with regard to scheduled passenger services was raised or mentioned either in Bermuda 2 itself or in exchanges between governments at the time it was entered into or thereafter.

To complete the background to the antitrust claim so far as is required for present purposes, it is necessary only to mention that both B.A. and B.C. are United Kingdom companies, the former being statutory and having statutory functions to fulfil, that both have their principal places of business here, that like Lakers they also have, and at all material times had, places of business in the United States from which they conduct and conducted the United States end of the transatlantic air services which they were and are designated under Bermuda 2 to operate and that Lakers, although a Jersey company, not only have, as already mentioned, their principal place of business in London but were also owned and controlled by a United Kingdom company.

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I now turn to those features of the antitrust action itself which are of importance. First it is an action in which triple damages are awarded as of right. Secondly, Lakers, although in liquidation, can institute and pursue it without affording any defendant any security for costs should it in the end fail. Thirdly, if in the end Lakers do fail a successful defendant will not, save in exceptional circumstances, be entitled to recover any costs against them. Fourthly, Lakers will have the advantage of pre-trial procedures for depositions, interrogatories and discovery of documents of a very wide ranging nature which are far more extensive and costly than any procedures known in this country and which would be regarded as onerous or oppressive in this country. Fifthly, save possibly as against B.A. Lakers will be entitled to trial by jury. Sixthly and lastly, but of great importance, there is no right of contribution as between defendants, so that Lakers would be entitled, if successful, to enforce any judgment against, for example, B.A. alone, who would then be unable to recover from any other defendant also held liable.

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So much for the background to B.A.'s and B.C.'s claim. It is next necessary to consider the law applicable where a party seeks an order restraining an opposite party from taking or pursuing proceedings in another country. The principal authorities on this matter are *The Atlantic Star* [1974] A.C. 436; *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795; *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730.

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The Atlantic Star [1974] A.C. 436 was a case in which Dutch owners of a barge had initiated actions both in this country and in Belgium against the Dutch owners of the *Atlantic Star* in respect of a collision in the River Schelde. The owners of the *Atlantic Star* applied for a stay of the English proceedings. This was refused both at first instance and in the Court of Appeal, but was granted by the House of Lords by a majority. The case is of importance in that the earlier authorities were examined, an attempt to introduce the forum non conveniens principle was rejected and there

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A was a broadening of, albeit adherence to, the long-established principle enunciated by Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, to which I shall later revert. For present purposes, however, its principal importance lies in two observations, one by Lord Reid and one by Lord Simon of Glaisdale. Lord Reid said, at p. 453:

B “It is a function of this House to try, so far as possible, to keep the development of the common law in line with the policy of Parliament and the movement of public opinion . . .”

and Lord Simon of Glaisdale said, at pp. 471–472:

C “English courts are normally confined to examining the statutes giving effect to a treaty or international convention, and precluded from scrutinising the treaty itself. But where public policy and international comity are invoked . . . it is permissible (indeed, incumbent) to examine our formal international obligations. As Lord Atkin said in *The Arantzazu Mendi* [1939] A.C. 256, 264: ‘Our state cannot speak with two voices . . . the judiciary saying one thing, the executive another.’ (Though Lord Atkin was speaking of recognition of foreign sovereignty his observations must be of general application in a unitary state in cases such as the present: see *Adams v. Adams* (Attorney-General intervening) [1937] P. 188, 198c)”

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Similar observations are to be found in the *Westinghouse* case [1978] A.C. 547).

E *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795 was also a case where what was sought was a stay of English proceedings, but in that case no other proceedings were pending. Four Scotsmen living and working in Scotland, brought actions against English companies in respect of industrial accidents in Scotland. In two of the actions Robert Goff J. refused the defendants’ application for a stay of the English actions and his decision was affirmed by the Court of Appeal. In the other two cases, which fell for consideration after the decision of the Court of Appeal, F Griffiths J., considering himself bound by that decision, also refused a stay. On appeal to the House of Lords (in the latter two cases in pursuance of the “leap frog” procedure) a stay was granted, and the plaintiffs were left to pursue their remedy in Scotland.

The case is of great importance to a decision in the instant case and it is necessary to quote certain passages. In reference to *The Atlantic Star* Lord Diplock said, at pp. 811–812:

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“the gist of the three speeches of Lord Reid, Lord Wilberforce and Lord Kilbrandon, in my opinion, enables the second part of [Scott L.J.’s statement in the *St. Pierre* case [1936] 1 K.B. 382] to be restated thus: ‘(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court’ . . .”

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The above formulation removed the requirement originally contained that the defendant must show that the continuance of the action would work

an injustice to him "because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way." Both Lord Salmon and Lord Fraser of Tullybelton also expressly negated any such requirement: see pp. 819B and 822H-823A. Lord Salmon expressed the matter on a very broad basis as follows, at pp. 818-819:

"the question as to whether it should be stayed depends upon whether the defendants can establish that to refuse a stay would produce injustice. . . . To my mind, the real test of stay or no stay depends upon what the court in its discretion considers that justice demands."

This approach was also adopted by Lord Russell of Killowen and Lord Keith of Kinkel.

Before leaving this case it is necessary to mention that on behalf of Lakers Mr. Johnson relied on certain passages which were said to indicate that questions of public policy must be considered irrelevant in applications such as were then and are here under consideration. These passages appear in the speeches of Lord Salmon at p. 822C-E, Lord Fraser of Tullybelton at p. 822H, Lord Russell of Killowen at p. 823G and Lord Keith of Kinkel at p. 833D. In my judgment the "public policy" which was there canvassed was of a very different nature to that which is advanced here. What was argued was that the courts should, as a matter of policy, discourage the bringing of proceedings in England in respect of industrial accidents in Scotland. This argument was rejected, the House expressing the clear view that the question to be determined was in each individual case whether, as between an individual defendant and an individual plaintiff, justice demanded a stay.

Both the foregoing cases involved the question of a stay of English proceedings, but in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, the question of a stay of foreign proceedings was considered. The opinion of the House is to be found in the speech of Lord Scarman, with which the four other members of the Judicial Committee of the House concurred. When considering that case it is important to bear in mind that the plaintiff had instituted an action in this country and also in the United States. He desired to discontinue here and pursue his action in the United States. The defendant sought to obtain an injunction to restrain him from proceeding further in the United States. There was thus no question of the plaintiff being deprived of a remedy if the injunction was granted. He could obtain justice here. The stay was, however, refused.

Having affirmed the existence of the jurisdiction to restrain foreign proceedings, albeit the necessity to exercise that jurisdiction with caution, Lord Scarman referred to a submission that the jurisdiction had only been exercised in two classes of case, namely (1) to prevent harassment by two actions and (2) where there is a right justiciable in England which the court seeks to protect. He then said, at p. 573:

"No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."

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A By "properly before the court" Lord Scarman was, it appears, referring to the question whether the party suing abroad had sufficient connection with England to justify the granting of an injunction at all: see p. 574. In the instant case there is no question about this. As a designated airline under Bermuda 2 with a principal place of business in London, owned and controlled by an English company, in turn owned and controlled by Sir Freddie Laker, Laker Airways Ltd. clearly had the closest connections with England. Although no longer carrying on business it still has, for its liquidator is an English chartered accountant carrying on his profession in London.

B Next Lord Scarman considered the criteria which should govern the exercise of the discretion. "The principle is the same," he said at p. 574, "whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings." He then referred to Lord Diplock's formulation of the principle in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, and said, at p. 575:

C "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

D This formulation, like that propounded by Lord Diplock in the *MacShannon* case, has, as an element, the existence of another forum in which, as between the plaintiff and the defendant, justice can be done, but this requirement, if regarded as being of universal application, would, it seems to me, undermine the flexibility of equity by categorisation, for it would mean either (a) that justice could *never* demand a stay of foreign proceedings unless the plaintiff in those proceedings could pursue his remedy here or elsewhere or (b) that even if justice clearly did demand a stay in a particular case the courts were prohibited from doing justice. In the light of Lord Scarman's very general statement I cannot accept that the House was intending to lay down either of these two rules.

E Suppose, for example, that two United Kingdom companies, neither of which traded in or to America, openly made a price agreement lawful in this country but that the purchasers of their goods in this country exported them to the United States. Suppose further that some time later both United Kingdom companies appointed agents in the United States and thus enabled United States proceedings to be served upon them and that a United Kingdom company, with a place of business in the United States who had purchased the goods, launched an antitrust action. In such circumstances it appears to me that justice might well demand that the plaintiff be prevented from pursuing an action in respect of acts performed wholly in this country and wholly lawful here even though, if so prevented, the plaintiff would be left without a remedy. To allow such an action to proceed at the suit of a United Kingdom company would involve exposing United Kingdom defendants to an action based on what is regarded here as an exorbitant assertion of extra-territoriality.

H No doubt, where there is no alternative forum, the jurisdiction to restrain should be exercised with even greater caution than is required when there is such a forum, but I am not prepared, unless compelled by precedent, to hold that the courts of this country are powerless to protect

residents of this country from being pursued abroad by other residents of this country in respect of acts which are lawful in this country and wholly committed in this country. Such protection may well be necessary to avoid injustice at least in some circumstances.

The last of the four cases principally relied on by the plaintiffs is *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730, where an injunction staying proceedings in the United States was granted and the plaintiff in the action there was left to pursue any claim which he might have either by way of counterclaim in the pending English action in which the plaintiffs here were seeking a declaration of non-liability or by way of separate proceedings. That case, in my judgment, takes matters no further. The general principles must be taken to be those culled from the three cases in the House of Lords.

Those principles, so far as immediately relevant, appear to me to be as follows: (1) the jurisdiction to stay proceedings in this country is a general equitable jurisdiction which can be exercised whenever its exercise is necessary to prevent injustice. (2) Although the cases may show specific categories in which the jurisdiction has been exercised in the past and although the formula enunciated by Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, will or may cover most cases the flexibility of equity is not to be limited or undermined by either categorisation or formula. (3) In exercising the jurisdiction general considerations as to the desirability or otherwise of the type of proceedings sought to be stayed or restrained are irrelevant, the question in each case being what, as between the two parties, justice requires. (4) Nevertheless, in exercising the discretion, it is legitimate in some cases to take into account specific matters of policy be it judicially recognised public policy as revealed by the cases, parliamentary, as revealed by legislation, or governmental, as revealed by treaty or convention to which the government is a party. (5) The same principles apply where it is sought to restrain a party properly before the court from instituting or pursuing proceedings abroad. (6) Both jurisdictions must be exercised with caution, but more caution is required in exercising the jurisdiction to restrain the pursuit of proceedings abroad than to stay proceedings here (see, as to this, *per* Brandon L.J. in *Castanho v. Brown & Root (U.K.) Ltd.* in the Court of Appeal [1980] 1 W.L.R. 833, 869 and more caution still where the result of any restraint will leave the party restrained without a remedy.

It appears to me also to follow from *Adams v. Adams (Attorney-General intervening)* [1971] P. 188; *The Atlantic Star* [1974] A.C. 436; and *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2)* [1978] A.C. 547, that in ascertaining specific governmental policy it may be legitimate for the court in certain cases to receive any statement as to such policy which may be tendered through the Attorney-General. The extent, however, to which any such statement should be taken into account in any particular case will be very limited for it is of the essence of the rule of law that the rights and obligations of individuals depend upon the law and not upon executive policy, which does not and must never be allowed to override the law for, if it is so allowed, the rule of law will cease to exist.

In the *Westinghouse* case [1978] A.C. 547 the Attorney-General intervened, whereas in the present case he did not intervene but was invited by the court to attend, for the purpose of stating the views of the government. There the question for decision was whether certain letters rogatory, issued by the court in Virginia in proceedings in which Westing-

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A house were defendants and in which they alleged in their defence that the
contracts for breach for which they were being sued were incapable of
performance by reason of a cartel of uranium producers including two
United Kingdom companies, Rio Tinto Corporation Ltd. and R.T.Z.
Services Ltd., should be given effect. These companies were also defend-
ants in antitrust proceedings in Illinois, in which triple damages were
being claimed. There was, in addition, in existence a grand jury investi-
B gation into possible violation of antitrust laws by the alleged cartel. After
the letters rogatory had been issued, indeed after orders implementing
them had been made and upheld by the Court of Appeal, the United
States Department of Justice intervened and, in effect, converted the
letters rogatory into a request for evidence for the purpose of the grand
C jury investigation. The House of Lords held, *inter alia*, that this attempt
to extend the grand jury's investigation internationally was not permissible
and constituted an infringement of United Kingdom sovereignty. The
decision of the Court of Appeal was reversed. The foregoing description
of the case constitutes a drastic simplification but is sufficient for present
purposes.

D In that case what was held to be an invasion of sovereignty was the
attempt by the United States Government to enforce its antitrust laws in
their criminal aspect against individuals not subject to United States
jurisdiction in respect of acts taking place exclusively outside the United
States on the ground that such acts had had an effect within the United
States: see Lord Fraser of Tullybelton at p. 650E-G. This is the "effects"
doctrine asserted by the United States which has been a long standing
source of dispute between the United States and this and other countries,
E some attempt to counter which by legislation had already been made in
the Shipping Contracts and Commercial Documents Act 1944.

Although, in argument, objection was taken to the letters rogatory
also on the ground that the evidence sought would be available in the
antitrust suit in Illinois (in which R.T.Z. were taking no part on the basis
that the court lacked jurisdiction) this formed no part of the decision of
the House and was specifically left open by Viscount Dilhorne, at
F p. 632A-B.

For this reason and also because there has since been further Parlia-
mentary intervention to counter further invasion of sovereignty the case
itself and the content of the Attorney-General's intervention in it are of
limited assistance for present purposes. It appears to me to follow,
however, that if, in the present case, it was established that in pursuing
G their claim in the United States against the present plaintiffs, Lakers were
a party to any invasion of sovereignty it would follow that an injunction
should be granted, or at least that the position constituted a powerful
factor in favour of the grant of an injunction.

H The subsequent Parliamentary intervention is to be found in the
Protection of Trading Interests Act 1980. This Act gives to the Secretary
of State wide powers. Under section 1(1) if it appears to him that under
the law of a foreign country measures have been taken or are proposed
to be taken for regulating or controlling the international trade and that
those measures, in so far as they apply or would apply to things done or
to be done outside the territorial jurisdiction of that country by persons
carrying on business in the United Kingdom, are damaging or threaten to
damage the trading interests of the United Kingdom he may direct that
the section shall apply to those measures. Under section 1(3) he may then

give to any person carrying on business in the United Kingdom directions forbidding compliance with such measures. A

Section 2 further empowers the Secretary of State to prohibit any person in the United Kingdom from producing pursuant to the requirement of any court tribunal or authority of a foreign country any commercial document outside the territorial jurisdiction of that country if the requirement infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. No relevant directions have been given. B

Under section 4 the courts of the United Kingdom are prohibited from making orders under section 2 of the Evidence (Proceedings in other Jurisdictions) Act 1975 giving effect to requests from a foreign tribunal if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial is conclusive evidence to that effect. C

Sections 1, 2 and 4 thus give the Secretary of State the power where he sees fit effectively to counter exorbitant assertions of jurisdiction.

Next the Act concerns itself with judgments. By section 5 no foreign judgment is enforceable in this country inter alia if it is a judgment for multiple damages. This is aimed directly at judgments in antitrust actions and goes to the whole of the judgment not merely the multiple or penal part of it. D

B.A. and B.C. not unnaturally rely upon this as showing Parliamentary disapproval of antitrust actions as a whole. Section 5 however must be considered together with section 6. By subsection (1) that section applies where a foreign court has given a judgment for multiple damages against a "qualifying defendant" namely: (a) a citizen of the United Kingdom or Colonies or (b) a United Kingdom company or a company incorporated in a territory for whose international relations Her Majesty's Government in the United Kingdom is responsible or (c) a person carrying on business in the United Kingdom, and the qualifying defendant has paid an amount on account of damages either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of damage. E F

The primary substantive provision is contained in subsection (2). This gives the qualifying defendant the right to recover against the party in whose favour the judgment was given, in effect, that part of any sum paid which represents the excess over compensation. In antitrust actions therefore a qualifying defendant is entitled to recover against the plaintiff two-thirds of any amount which he may have paid. G

The overall disapproval demonstrated by section 5 is thus only taken as far as non-enforcement. If a qualifying defendant has paid the whole amount he cannot recover the whole. He can only recover, in the case of triple damages two-thirds. It is thus for the excess over compensation that maximum disapproval is demonstrated. H

There follow in subsections (3) and (4) of section 6 two important qualifications. The right of recovery given by subsection (2) does not apply in the case of:

"(3) . . . an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place

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A of business there *at that time*.” (The emphasis is mine).
 “(4) . . . where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.”

B In the instant case the right of recovery would be of very limited use to B.A. or B.C. for Lakers are in liquidation, albeit neither would be deprived of the remedy by subsections (3) or (4) since (a) neither had its principal place of business in the United States at any time; (b) although both carried on business in the United States the antitrust claim (and indeed the alternative claim) is not concerned exclusively with activities carried on in the United States.

C It is in my view clear that section 5 has nothing whatever to do with sovereignty. It would for example prevent one United States corporation enforcing in this country a judgment in an antitrust suit against another United States corporation which had assets and a place of business here, notwithstanding that the antitrust infringements took place wholly within the United States. In such a case no question of any invasion of sovereignty could arise.

D Section 6 requires closer examination for to give a right of recovery in respect of moneys properly paid under the judgment of a foreign court would on the face of it seem to require for its justification some such strong ground as that the proceedings in which the judgment was given constituted in whole or in part an invasion of sovereignty. Subsections (3) and (4) may seem to suggest that this is indeed the basis of the right given, but in my view this is not so.

E Under subsection (3) a qualifying individual defendant will have no right of recovery if at the time the proceedings in question were instituted he was ordinarily resident in the country in which the judgment was given and the same will apply to a corporate defendant with its principal place of business in that country at that time.

F The proceedings may however be concerned exclusively with acts carried out outside the foreign country and lawful where they were so carried out and the defendant or defendants concerned may at the time they were carried out have neither resided nor had a principal or indeed any place of business there. To seek to make such defendants answerable in the foreign court in such circumstances is the sort of excess of sovereignty which was, at least in the criminal field, held unacceptable in the *Westinghouse* case [1978] A.C. 547, yet the subsection appears to accept that so long as the defendants are fully within the jurisdiction of the foreign court at the time when proceedings are instituted there should be no right of recovery.

G Subsection (4) does concern itself with the subject matter of the proceedings but it excludes the right of recovery only where the qualifying defendant was carrying on business in the foreign country and the proceedings are concerned with activities *exclusively* carried on in the foreign country. It is therefore taking objection to the triple element of the damages in a positive way, as opposed to the negative refusal to enforce judgments, even where the defendant was carrying on business in the foreign country and even where the proceedings concerned activities which were carried on for the most part in that country. This goes further than the *Westinghouse* case [1978] A.C. 547 and further than would, as it seems to me to be justified by any principle of comity or international

law. It is moreover to be considered in the earlier sections of the Act. Under section 1 there is power to prohibit compliance with foreign law in so far as it would apply to things outside the territory of the country in which the law is in force. This is clearly aimed, although not in express words, at invasion of sovereignty and under section 2 there is express reference to prejudice to the sovereignty of the United Kingdom.

I conclude, therefore, that whilst section 5 is based in essence on the principle that the courts here will not enforce the penal laws of another country and section 6 extends that principle so as to enable the penal element of any amount paid to be recovered in certain circumstances, they cannot be regarded as a sound foundation for any submission that an antitrust action based in part, or even substantially, on acts committed outside the United States by English companies carrying on business in the United States in relation to the carrying on of that business constitutes such an invasion of sovereignty that a United Kingdom company engaged in a like business should be restrained from pursuing his claim.

In essence the position is that a United Kingdom designated airline with its principal place of business in the United Kingdom, but also carrying on business in the United States as an essential part of the operation of the services which it is designated by the United Kingdom and permitted by the United States to perform, is suing two other United Kingdom airlines in like case in respect of actions which could only be effective if C.A.B. approval was obtained and thus necessarily involved action being taken in the United States.

Parliament has said that if judgment is recovered in that action it will not be enforced here. Parliament has also said that the defendants, if they pay under any such action, shall be entitled to recover back the penal element from the plaintiff but it has not said that such an action shall not be pursued. If Parliament has not said so then some other ground must be shown for preventing Lakers from pursuing it.

That the penal nature of an antitrust suit affords no such ground is in my judgment plain. It has, as I have said, been dealt with by Parliament so far as Parliament has seen fit to deal with it and Mr. Peter Scott for the Attorney-General, not surprisingly, did not suggest that there was any policy basis upon which the penal element should be given any wider effect than Parliament has seen fit to give it.

It is equally clear that invasion of sovereignty or extra-territoriality afford no ground. They too have been dealt with by Parliament, to some extent directly and to some extent by giving to the Secretary of State wide powers to act in case of need. The direct Parliamentary intervention does not avail B.A. and B.C. The powers conferred by Parliament have not been exercised and a United Kingdom designated airline carrying on business in the United States by permission of the United States Government must *prima facie* comply with United States law or take the consequences.

This conclusion fully accords with the statement by Mr. Peter Scott on behalf of the Attorney-General:

"Her Majesty's Government has consistently taken the position that British enterprises engaged in transnational business operations should comply with the laws and governmental policies of the countries in which they transact business."

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A It is said, however, both by B.A. and B.C. and on behalf of the government that this prima facie position is vitally affected by the relationship between the antitrust laws and the provisions of Bermuda 2.

B Her Majesty's Government regards the Government of the United States as being in breach of its obligations under Bermuda 2 in allowing antitrust laws to be applied directly or indirectly, in respect of damage
B alleged to have flowed from tariffs approved under Bermuda 2 or scheduling arrangements made under the provisions of Bermuda 2 for, it is said, any such application will undermine Bermuda 2. This position is disputed by the Government of the United States and as between the two governments the dispute procedure has been invoked. If the dispute is not resolved by agreement, I was informed that an arbitral decision could be obtained in about a year. It is to be noted that Her Majesty's
C Government's position is all embracing and covers the case not merely where one United Kingdom designated airline seeks to invoke antitrust laws in respect of damage flowing from the application of approved tariffs against another United Kingdom designated airline but also where any plaintiff claims against any defendant airline on a like basis. No doubt in so far as defendants were American airlines Her Majesty's Government,
D might not seek to complain but the proposition involves the contention that an American plaintiff should not be permitted to bring such an action against American defendants.

B.A. and B.C. do not seek to go so far. They limit their proposition to cases where a designated United Kingdom airline is suing other designated United Kingdom airlines for damage alleged to flow from tariffs approved under Bermuda 2. Such cases it is said involve an airline,
E which only operates in right of Her Majesty's Government, taking part in a derogation of the rights granted to Her Majesty's Government under Bermuda 2 and, as I understand it, passed on to other United Kingdom airlines who also thus operate in right of Her Majesty's Government.

For the Attorney-General, Mr. Peter Scott developed his contention in some 16 separate points all of which are recorded in the transcript and I will not lengthen this judgment by setting them out here. Mr. Richard
F Scott and Mr. Ross-Munro for B.A. and B.C. also presented their arguments in a number of ways all of which are also recorded. For the same reasons I will not rehearse them here. I shall simply set out the reasons which lead me to the conclusion that the relationship between the antitrust laws and Bermuda 2 afford no ground upon which it would be in my judgment right to grant an injunction. They are as follows: 1. An
G injunction would deprive Lakers of a cause of action which can only be asserted in proceedings properly brought in America against American defendants and B.A. and B.C. 2. It is possible that under American law Bermuda 2 becomes part of that law without further enactment. If this is right, the American courts will decide whether its effect is to grant antitrust exemption or not. It may be that the American courts will so hold, in which case the antitrust claim will fail. If they do not so hold,
H then, if other conditions are established, it will succeed. 3. Bermuda 2 is not part of English domestic law and to use it to deprive Lakers of the right to pursue a claim would at the very least require a very strong case. 4. I cannot accept that Lakers' claim involves an undermining of Bermuda 2 or any derogation of rights. The essence of Lakers' case is that there was a tariff agreement not submitted for approval under Bermuda 2 which provides for the submission of tariff agreements. Furthermore, it is conceded by B.A. and B.C. that if any combination went as far as to

constitute a common law conspiracy, Lakers could sue without undermining or derogating from the rights granted under Bermuda 2. For the Attorney-General, Mr. Peter Scott made no such express concession but said that each case would depend on its own circumstances.

If this be so, it is clear that there is no settled policy or clear international right or obligation preventing the pursuit of a conspiracy claim. An antitrust claim need not establish anything like as much as is required in the case of a common law conspiracy, although Lakers' allegations in the American action amount very nearly, if not quite, to the assertion of a common law conspiracy. An antitrust claim as was stressed by Judge Greene in his recent judgment is of a different and special kind. Nevertheless if there is no obstacle to a conspiracy claim and if by obtaining authority to discuss and laying before the C.A.B., any agreement reached antitrust exemption can be obtained, I see no reason for saying that the application of antitrust laws undermines Bermuda 2. What, if anything, would undermine it, is a secret agreement not disclosed to C.A.B. followed by the filing of a tariff presented as an individual tariff when it was in fact filed pursuant to the secret agreement and possibly accompanied by the advancing of false or misleading information as to costs.

5. Finally, it is not to be forgotten that the final alleged blow to Lakers was the frustration of the rescue scheme by pressure on McDonnell Douglas. As to this, Mr. Peter Scott made no submissions. It has in my judgment nothing to do with Bermuda 2.

If then public or governmental policy, extra-territoriality and the penal nature of the remedy do not avail as special factors, one comes back to the essential question: "Would it be an injustice to B.A. and B.C. to allow the action against them in America to proceed?"

The claim is for damage to a United Kingdom designated airline in its transatlantic air transport operations carried on alike in the United States by permission of the United States Government, and in the United Kingdom by permission of Her Majesty's Government. The defendants include both United Kingdom and United States designated airlines. Lakers allege that the United States and United Kingdom airlines carrying on like operations have combined to damage them by means which necessarily involve acts taking place in the United States and which affect the fares paid by American citizens. What is unjust in allowing the United Kingdom airlines, if the facts are established, from answering alike with the American airlines for breach of the laws of the country by permission of whose government they were operating? I can see no injustice. Suppose, for example, that there was in a given case an antitrust conspiracy. Suppose, further, that two United Kingdom airlines hatched up a scheme to drive another airline out of business, and persuaded Pan Am and T.W.A. to join in, making sure that their agreement to do so was secured on British soil. Suppose, finally, that in order to disguise what was happening the United Kingdom airlines proposed, and the others agreed that initially one of them would file with C.A.A. and C.A.B. for approval what appeared to be an individual tariff and that thereafter, when it had been approved, the others would file like tariffs on the basis that it was merely to meet competition. In such circumstances whether the damaged airline was a United States or a United Kingdom designated airline, I can see no injustice in allowing the instigators of the scheme to be answerable to the plaintiffs as well as those whom they had persuaded to join it. Indeed, it would seem a manifest injustice to allow them to escape, the

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A more particularly when their actions would constitute a plain abuse of the hospitality of and permission to operate given by the United States Government.

It is true that an antitrust claim has the undesirable features which I have already mentioned but some of these are common to all United States actions, and the others appear to me to have been dealt with by Parliament, so far as Parliament has deemed it to be necessary to do so.

B This court should, in my judgment, go no further.

If then there is a *prima facie* cause of action in America, I can see no ground for restraining Lakers from pursuing it. In the result, B.A.'s application must fail. As to B.C., there still remains the argument that the action as against them is frivolous or vexatious. In pursuit of this argument, Mr. Ross-Munro took me through the evidence as it presently stands in great detail. If, however, the action, as such, is one which affords no ground for a stay, it is in principle a matter for the American courts to decide whether it should proceed to trial. They might decide that it should not for any one of a number of reasons, e.g. because as a matter of law antitrust laws cannot apply to combinations with regard to the establishment of fares approved by C.A.B., and C.A.A. under the Bermuda agreement or because the allegations against B.C. are manifestly without foundation.

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I do not say that there can be no case where the plaintiff in a foreign action which sets up a cause of action which can only be pursued in that action, cannot be restrained on the ground that it is vexatious or oppressive. If for example the plaintiff's claim was firmly tied to an agreement alleged to have been made at a single meeting and there were incontrovertible evidence that the defendant had not been at the meeting, e.g. because he had been in some entirely different part of the world at the time, it might well be that it would be held that the plaintiff was pursuing the action for some ulterior purpose and that to avoid injustice to the defendant the plaintiff must be stopped.

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But that is not this case. I accept that the evidence as presently before me is not strong but I am quite unable to say that the position is so clear that Lakers must be prevented from pursuing the action at all. Speaking of late events, Mr. Ross-Munro stressed that when in the winter of 1981 Pan Am, T.W.A. and B.A. dropped their fares B.C. had not done so. He also stressed that although B.C. had objected strongly to McDonnell Douglas becoming a major shareholder in Lakers, which was its main contribution to the rescue scheme, this was, on the evidence, merely because McDonnell Douglas was its aircraft supplier, and it did not wish to have such a supplier a shareholder in a competitor. This is so, but there is certainly some evidence that McDonnell Douglas was influenced by pressure coming, *inter alia*, from B.C., and its evidence as to the reason for it might in the end be rejected. If it was, then taken with all other matters including cross-examination of B.C.'s witnesses, an inference might be drawn that the pressure was exerted pursuant to a combined scheme. Lakers were at the time seeking to get into Europe and it was in the interests of B.C. and others that it should not do so.

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Again, with regard to the fact that B.C. did not lower its fares this is of little significance. It was not flying on any routes then being operated by Lakers and for it to lower its fares would have therefore had much less impact than a lowering of fares by the other three. It is possible that it was nevertheless a party to an agreement that fares would be lowered by those flying competing routes.

These matters must, in my judgment, be left for the United States' court to determine.

I have considered the matters now before me at considerable length in deference to the arguments advanced but, in my judgment, the applications by B.A. and B.C. could be shortly disposed of on the grounds: (1) that there is nothing in Bermuda 2 to justify a court in saying it would be unjust to allow the action to proceed. It is conceded that, notwithstanding Bermuda 2, a common law action for conspiracy could properly be brought. Hence, it cannot be alleged that Bermuda 2 provides a complete code, provided its provisions are complied with. Furthermore, even if it could, it is inherent in the allegations that the provisions of Bermuda 2 have not been complied with. If there was an agreement then it should under article 12 have been submitted for approval. It was not. (2) Since, if there was a fares agreement, antitrust exemption could have been sought and since both B.A. and B.C. (a) carried on business in the United States at the material time, (b) whilst so doing are alleged to have combined with American airlines in breach of the antitrust laws, (c) had necessarily, in order to put the alleged combination into effect to put fares before C.A.B. for approval, (d) also concealed from C.A.B. the existence of the alleged agreement, I can see nothing unjust in allowing Lakers to proceed. (3) The submission that if the antitrust laws continue to operate it would be a derogation from the grant by the United States of rights under Bermuda 2, is wholly unsustainable unless Bermuda 2 can be construed as granting to the United Kingdom a blanket exemption from antitrust actions against its designated airlines by others of its designated airlines. I can see no basis on which it can be so construed. (4) I am unable to accept that there is any invasion of sovereignty involved in applying antitrust laws to companies carrying on business in the United States under Bermuda 2 in respect of their operation of such business even if part or even the very much greater part of what is complained of took place outside the United States and in this country. I would regard it as being inherent in the grant of permission to operate in the United States that the designated airlines comply with United States law. If at any time the Secretary of State were to consider that the application of antitrust laws damaged the essential trading interests of this country he could take action under section 1 of the Act of 1980 in respect of acts taking place outside the United States. If and when such action is taken it might well be that an action by one United Kingdom company against another could not be allowed to proceed for such an action might constitute an attempt to obtain damages for doing that which was expressly authorised under English law. (5) Accordingly, the attempt to prevent Lakers from proceeding fails and the airlines antitrust action must be allowed to proceed. This being so, I need not deal separately with the alternative claim. It is common ground that it too must be allowed to proceed.

As to the counter-applications, it is common ground that if Lakers are allowed to pursue the American action B.A.'s and B.C.'s actions should be stayed or dismissed. They would serve no useful purpose and would merely involve both sides in unnecessary expense.

Accordingly the applications by B.A. and B.C. will be dismissed. On Lakers' counter-applications, the appropriate order appears to me to be that the B.A. and B.C. actions be stayed, rather than dismissed, if only to ensure that no confusion can arise. If the actions were dismissed, my experience of this litigation leads me to believe that someone might seek

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- A to raise some res judicata argument. This would of course be quite wrong. I wish to make it clear that nothing which I have said must be taken to indicate that I consider, much less that I find, that B.A., B.C. or anyone else has acted in any way in breach of the Sherman Act or caused damage to Lakers otherwise than by that lawful competition which the Sherman Act is designed to secure and which Bermuda 2 expressly encourages. I am concerned only with the question whether Lakers should be prevented from seeking to establish in the sole forum available to them that there have been breaches of the Sherman Act and that damage to Lakers has been thereby caused. I conclude only that Lakers should not be so prevented.
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- C There remains the question of the injunctions presently in force. In the light of the decision of Sir John Donaldson M.R. on March 30 in relation to the injunction of March 2, it would seem clear that the appropriate order will be that the injunctions will be continued for a fixed period and if, within that time, notice of appeal is given, they be continued thereafter until the determination of such appeal or further order.

- D I will hear the parties as to suggestions on time, and also with regard to the question of stay, if anybody wants to suggest dismissal rather than a stay ought to be granted.

- E *B.A.'s and B.C.'s applications dismissed with costs.*
Order that actions be stayed with costs.
Original injunction and injunctions of March 2, if not already extended by Court of Appeal extended for 14 days; if notice of appeal be given within that time, continued thereafter until determination of appeal, with liberty to apply.

- F Solicitors: *Richards Butler & Co.; Herbert Smith & Co.; Durrant Piesse; Treasury Solicitor.*

[Reported by PAUL MAGRATH, ESQ., Barrister-at-Law]

APPEALS from Parker J.

APPLICATION for judicial review.

- G British Airways Board ("B.A.") and British Caledonian Airways Ltd. ("B.C.") appealed from the judgment of Parker J. on May 20, 1983. The grounds of appeal of B.A. were that the judge (1) erred in law in holding that civil action 82 3362 brought by the first defendant ("Lakers") in the United States District Court for the District of Columbia did not involve an invasion of the sovereignty of the United Kingdom. (2) The judge ought to have held that the action invaded the sovereignty of the United Kingdom in that (i) in the action Lakers sought redress from B.A. in respect of damage alleged to have been caused to Lakers by B.A. in implementing and charging certain tariffs notwithstanding that B.A. were bound by the law of England to implement and charge the tariffs; (ii) the action was based on an allegation by Lakers that the tariffs were improper, notwithstanding that by virtue of a treaty between the United Kingdom and the United States done at Bermuda on July 23, 1977 ("Bermuda 2"), the United Kingdom was entitled to have B.A., as its designated airline, implement and charge the tariffs; (iii) the action was based on allegations
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of fact which, so far as they were particularised, occurred wholly or alternatively substantially outside the United States and/or in England; (iv) the allegation was based on the assumption that the municipal law of the United States was effective to regulate air transport between the United Kingdom and the United States; (v) the action was an attempt by British nationals to employ foreign remedies and procedures which were injurious to the international aviation interests of the United Kingdom. (3) The judge held that the action, an antitrust action in respect of international air transport brought by one British designated airline against another British designated airline was not contrary to public policy; in that the judge was wrong, in particular, (i) he was wrong in holding (in effect) that the fact that B.A.'s business involved operations in the United States was conclusive against the operation of such a public policy; (ii) he was wrong in holding that the Protection of Trading Interests Act 1980, on its true construction, embodied no public policy against antitrust actions as such and/or antitrust actions concerned with matters occurring outside or substantially outside the United States; (iii) he was wrong in holding that the policy embodied in the Act was confined to an objection to the penal element of a judgment for multiple damages; (iv) he attached insufficient weight to the statement of executive policy made on behalf of the Attorney-General; (v) he attached insufficient weight to the insolvency of Lakers and the effect of that insolvency on the potential remedy provided to B.A. by section 6 of the Act of 1980; (vi) he attached insufficient weight to B.A.'s statutory obligation to provide air transport services between the United States and the United Kingdom and to the effect of that obligation on Lakers' ability to enforce a triple damages award against B.A. notwithstanding the provisions of section 5 of the Act. (4) The judge erred in law in holding or proceeding on the basis that the application of the United States antitrust law to tariff agreements was consistent with the terms and/or the general tenor of Bermuda 2, in particular he, (i) ought to have held that Bermuda 2 expressly envisaged that tariffs would be filed for approval with the aeronautical authorities of the United Kingdom and the United States after consultation and/or agreements in that regard as between airlines seeking to charge such tariffs; (ii) erred in holding that on the proper construction of Bermuda 2 the filing of any such agreement, qua agreement, was an essential part of the tariff fixing procedure; (iii) erred in regarding as relevant the fact that antitrust immunity might, as a matter of discretion, be granted for such agreements or discussions by the authorities in the United States; (iv) attached insufficient weight to the fact that at the time Bermuda 2 was concluded, no such immunity was available in respect of agreements between British airlines and that until 1980 no British airline could apply for such immunity; (v) was wrong in stating that B.A. had conceded that in respect of a combination regarding tariffs which represented common law conspiracy, an action could be brought by Lakers without derogating from the rights granted under Bermuda 2; B.A.'s submission was that although such action would represent a derogation from the rights granted under and would be inconsistent with the provisions of Bermuda 2, nevertheless, since such an action would, *prima facie*, be permissible in England, such an action would not, as a matter of discretion, be likely to be stayed in the United States. (5) The judge attached insufficient weight to those features of United States antitrust procedure which, on the evidence, rendered the action oppressive to B.A. (6) The judge erred in holding that the prosecution of the action by Lakers against B.A. was not

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- A an injustice and ought to have held that the prosecution was an injustice in that (i) Lakers were wholly-owned by British nationals and operated a transatlantic aviation business headquartered in England pursuant to licence from the Civil Aviation Authority (C.A.A.) and by designation of the Government of the United Kingdom pursuant to rights conferred on the United Kingdom under the Bermuda 2 agreement; (ii) B.A. were
- B created by Parliament to carry out British aviation interests and were at all times operating under licence from the C.A.A. and by designation of the British Government; (iii) the protection of Lakers against injuries inflicted in the course of competition on U.K.-U.S. routes was the primary concern of the United Kingdom; (iv) Lakers sought in the U.S. antitrust action to penalise B.A. for implementing fares approved by the C.A.A. and which B.A. were bound to implement; (v) the invocation of the
- C United States antitrust laws and the procedures by which they were enforced was oppressive and threatened injury to B.A. and the aviation interests which they were created by Parliament to serve and the interests of the British Government in international aviation; (vi) the United States antitrust remedies invoked by Lakers and the procedures used to enforce them were contrary to British public policy; (vii) Lakers were prosecuting the United States antitrust action in order to obtain juridical advantages of United States law which were contrary to British public policy; (viii) there was no legitimate justification for Lakers to seek relief against B.A., except under the laws of England, to the extent that such laws provided a remedy for the conduct alleged.

- By a supplementary notice of appeal, B.A. gave notice that on the hearing of the appeal B.A. would rely upon the following grounds of
- E appeal, in addition to the grounds set forth in the notice of appeal, namely: (1) (i) The Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (S.I. 1983 No. 900) made on June 23, 1983; (ii) the general direction which was made on June 23, 1983, by the Secretary of State for Trade and Industry under section 1 of the Protection of Trading Interests Act 1980 and which came into operation on June 27, 1983; and
- F (iii) the general direction which was made on June 23, 1983, by the Secretary of State under section 2 of the Act of 1980 and which came into operation on June 27, 1983; (2) by virtue of the Order and the directions it would be unlawful for B.A., inter alia, to comply or to cause or permit compliance with any requirement imposed on B.A. by order made in the action entitled "Laker Airways Ltd. against Pan American World Airways Inc. et al" which was pending in the United States District Court for the
- G District of Columbia (Civil Action No. 82-3362 H.G.), being an order made pursuant to sections 1 and 2 of the United States' Sherman Act, section 4 of the United States' Clayton Act or any of those sections; in particular, it would be unlawful for B.A. to comply with or to cause or permit compliance with an order for damages and with discovery obligations made in the action pursuant to the sections; (3) B.A. contended that the prosecution of the action by Lakers against B.A. represented an
- H injustice to B.A., was an invasion of sovereignty and was contrary to public policy and would rely on the matters set forth in the foregoing paragraphs in addition to the matters relied on before the judge.

By a respondents' notice under R.S.C., Ord. 59, r. 6, the defendants gave notice of intention upon the hearing of B.A.'s notice of appeal to contend that Parker J.'s order should be affirmed on the following grounds additional to those relied upon by the judge, that (1) the issue of B.A.'s liability to Lakers under the antitrust laws of the United States was not

justiciable in the English courts; (2) none of the defendants in the action had made or asserted any claim against B.A. based upon English law; (3) the court's jurisdiction to make a declaration of non-liability was limited to cases in which a defendant had made or asserted a claim against a plaintiff which was justiciable in the English courts and the proper or governing law of which was English law; (4) in the premises: (a) the court had no jurisdiction to make the declaration sought by B.A. in the action; (b) the writ of summons disclosed no cause of action; and (c) accordingly the court had no jurisdiction to grant to B.A. the injunction sought in the writ.

B.C.'s grounds of appeal were that the judge (1) erred in holding that (a) it would not be an injustice to B.C. to allow Lakers to prosecute the United States action against B.C.; (b) the United States action against B.C. was not vexatious or oppressive; (c) there was no public policy of which the courts should take cognisance that foreign claims for multiple damages and in particular United States antitrust suits brought by United Kingdom-based plaintiffs and/or claims brought before foreign courts in respect of matters occurring in part or substantially outside the territorial jurisdiction of such states constituted such an invasion of the sovereignty of the United Kingdom that such plaintiffs should be restrained from pursuing such claims; (d) the antitrust claim made by one United Kingdom designated airline against other United Kingdom designated airlines in the United States action did not involve a derogation of rights granted to the United Kingdom government under the Bermuda 2 agreement. (2) The judge should have held that (a) there was no material which could properly justify the making of an allegation by Lakers that B.C. conspired with other airlines to damage Lakers by charging "predatory fares" between the United Kingdom and the United States; (b) the opposition expressed by B.C. (and other airlines) to McDonnell Douglas' proposed participation in a financial restructuring and rescue of Lakers could not properly justify the making of an allegation by Lakers that B.C. thereby became party to a pre-existing conspiracy between other airlines to damage Lakers by the use of "predatory fares"; (c) there was no material which could properly justify the making of an allegation by Lakers that the opposition referred to in (b) above caused the collapse of Lakers; (d) the negotiations concerning the financial restructuring and rescue of Lakers and the acts and events relating to such negotiations and their failure took place outside the United States and in particular in England; (e) the commencement and prosecution of the United States action was vexatious and oppressive and motivated by the collateral purpose of pressurising B.C. into paying a substantial sum in settlement of the action against them in order to avoid the financial and other prejudice and risk involved in the defence thereof; (f) B.C. would be seriously prejudiced in and by the United States action having regard in particular to (i) the oppressive extent and expense of pre-trial discovery and interrogatories; (ii) the cost of the litigation; (iii) the irrecoverability of legal costs by a defendant (thought not by a plaintiff in an antitrust suit) and the consequent inability to obtain security from an insolvent plaintiff; (iv) the standards of proof and of liability under the Sherman Act; (v) trial by jury; (vi) the absence of any right to contribution against co-defendants; (vii) the ability of Lakers to finance the United States action by the contingency fee system; (viii) the possible inability of B.C. to exercise any rights under section 6 of the Act of 1980 by reason of Lakers' insolvency; (g) the appropriate or convenient forum for the trial of matters referred

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A to in (d) above was England having regard in particular to (i) the identity and location of the parties; (ii) the identity and location of the relevant witnesses; (iii) the location and ownership of relevant documents; (iv) the role played in those events by the Civil Aviation Authority, the Bank of England and the Midland Bank; (v) the place where the events occurred; (vi) the law properly applicable to those matters; (h) it was contrary to public policy (as expressed in the Act of 1980 and whether or not the Secretary of State exercised his powers under the Act in the present case) for a United Kingdom-based plaintiff to sue a United Kingdom-based defendant in a foreign court for multiple penal damages (i) at all, or (ii) in relation to extra-territorial matters such as those referred to in (d) above occurring outside the jurisdiction of the foreign state and in particular in England; (i) it was contrary to public policy (as expressed in the Act of 1980 and whether or not the Secretary of State exercised his powers under the Act in the present case) and involved an invasion of United Kingdom sovereignty for a United Kingdom-based plaintiff to invoke the antitrust jurisdiction of a United States court in relation to matters such as those referred to in (d) above occurring outside the United States and in particular in England; (j) the assumption of jurisdiction by a United States court over matters relating to the alleged conspiracy to charge "predatory fares" undermined and was incompatible with the Bermuda 2 agreement and the invocation of such jurisdiction by Laker was contrary to public policy; (k) in all the circumstances of the case it would be unjust and/or contrary to public policy and/or vexatious and oppressive to permit Laker to continue the United States action against B.C.

E B.A.'s and B.C.'s appeal came on for hearing on July 4, 1983. On July 13, 1983, Laker Airways Ltd. and Christopher Morris, their liquidator, applied to Woolf J. for leave to apply for judicial review of the Order and directions given by the Secretary of State for Trade and Industry under the Protection of Trading Interests Act 1980. Woolf J. refused leave stating that in the interests of justice the matter should go straight to the Court of Appeal and on July 13, 1983, the Court of Appeal granted leave and gave directions as to service.

F On July 19, 1983, the Court of Appeal refused, for reasons to be given later, an application by Laker Airways and Mr. Morris for a declaration that each of the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (S.I. 1983 No. 900) and general directions of June 23, 1983, and July 1, 1983, made by the Secretary of State for Trade and Industry under sections 1 and 2 respectively was ultra vires, null, void and of no effect. The court gave its reasons for dismissing the application in its judgment on B.A.'s and B.C.'s appeals.

G *Richard Scott Q.C.* and *Jonathan Sumption* for British Airways.
Colin Ross-Munro Q.C. and *David Donaldson* for British Caledonian.
David Johnson Q.C., *Michael Crystal* and *Richard Hacker* for Laker.
Peter Scott Q.C. and *Christopher Clarke* for the Attorney-General.
Peter Scott Q.C., *Simon D. Brown* and *Timothy Walker* for the Secretary of State on Laker's application for judicial review.

Cur. adv. vult.

July 26. SIR JOHN DONALDSON M.R. handed down the following judgment of the court.

Introduction

In these appeals plaintiffs, British Airways Board ("B.A.") and British Caledonian Airways Ltd. ("B.C.") seek to reverse decisions of Parker J. given on May 20, 1983. Although he was concerned with two separate actions brought by B.A. and B.C. respectively, there was a large measure of common ground and the two actions were heard together and were the subject matter of a single judgment.

In hearing the appeals, we have adopted a similar approach, save that we have not heard counsel for B.C. in so far as he wished to contend that there were special features depending upon the evidence or lack of evidence in their case which, in his submission, entitle them to succeed in their appeal, even if the appeal of B.A. is dismissed.

In each of the actions B.A. and B.C. respectively sought injunctions restraining the defendants, to whom we will refer collectively as "Lakers", from causing or permitting the continuance against B.A. and B.C. of a civil action, no. 82-3362, which Lakers had instituted in the United States District Court for the District of Columbia. Although the matter came before the judge at an early stage in the life of the actions and would normally have been considered solely on the basis of what relief, if any, should be granted pending their trial, all concerned were agreed that in the general interest Parker J. should decide the matter on the materials then available as if he were concerned with claims for final relief. On this basis the judge refused the relief sought by B.A. and B.C. and, on the application of Lakers, stayed the actions.

Since Parker J. gave judgment, the Secretary of State for Trade and Industry has made the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 (S.I. 1983 No. 900) under the Protection of Trading Interests Act 1980, and has given directions under that Order. We do not have to decide whether or not Parker J. was correct in the decision which he reached in the circumstances as they then existed, having regard to the effects of this legislative and executive intervention of which we have had to take account and which, on any view, produces a wholly different situation.

During the hearing of the appeals, Lakers indicated that they wished to challenge the validity both of the Order and the directions by judicial review. For this purpose they applied to Woolf J. for leave to apply for judicial review. Woolf J. rightly took the view that the interests of justice would best be served if the issues which would be raised by such an application were able to be considered by this court concurrently with the instant appeals. This result could be and was achieved by his refusal of leave to apply for judicial review followed, as he intended, by a renewal of that application to this court. We granted leave and directed that the application be served on the Secretary of State and on B.A. and B.C. and that notice of it be given to any other bodies, such as other airlines, which might have a sufficient interest in the matter to justify their applying to be joined if they so wished: see R.S.C., Ord. 53, r. 3(7). In the Supreme Court *Practice Direction (Judicial Review: Appeals)* [1982] 1 W.L.R. 1375, it was stated that where the Court of Appeal grants leave to apply for judicial review the substantive application should be made to the Divisional Court unless the Court of Appeal otherwise ordered. In the exceptional circumstances, we ordered that the substantive application be heard before us and it has been heard accordingly.

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A It follows that in determining these appeals not only have we had to take account of the legislative order and executive directions made thereunder, but we have also had to determine the validity of that Order and of those directions.

Jurisdiction

B The jurisdiction of the High Court, and of this court on appeal from it, to grant the relief sought has been challenged by Laker. In addition, Judge Harold H. Greene of the United States District Court which is seised of United States civil action no. 82-3362 has expressed strong views on the propriety of the English courts granting the relief sought. We refer in particular to the judge's opinion dated March 9, 1983, on a motion by Laker for a preliminary injunction.

C Whatever the ultimate conclusion in this litigation—and it seems likely that the unsuccessful party or parties will wish to take the matter to the House of Lords—we and all other English judges would deeply regret any misunderstanding on the part of our brethren in the United States of what exactly we are doing and why we are doing it. I personally sought to avoid any such misunderstanding in relation to the interim order which I made on March 30, 1983, in my judgment of that date and we wish now to extend that effort in relation to the present decision of this court. Accordingly, we propose to consider the issue of jurisdiction in greater detail than might otherwise have been necessary.

D First let it be said, and said loud and clear, that no one has ever suggested that the United States District Court is without jurisdiction to try Laker's complaint against B.A. and B.C. both under the Sherman and Clayton Acts and in respect of the commission of an intentional tort. Both E B.A. and B.C. carry on business in the United States of America sufficiently to make them amenable to the jurisdiction of its courts. If any such submission had been made, it would have been rejected out of hand.

Second, let it be said at no less volume and with no less clarity that no submission has been made to this court that the civil procedures of the United States courts and, in particular, the system of pre-trial discovery F by the taking of depositions, the administration of interrogatories and the disclosure of documents, the limited circumstances in which a successful defendant would be awarded costs and the conduct of litigation upon the basis of contingency fees are in any way to be criticised. They are different from English civil procedures, but the days are long past when the English courts and judges thought that there was only one way of administering G justice and that was the English way. Each nation must decide for itself which way is appropriate to its needs and there is nothing strange in two nations which enjoy a common legal heritage and could be described as "cousins-in-law" rightly deciding that different procedures suited them best.

H Third, let it be said no less loudly and clearly that neither the English courts nor the English judges entertain any feelings of hostility towards the American antitrust laws or would ever wish to denigrate that or any other American law. Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards. In the context of the United Kingdom and the United States, this comes naturally and, so far as we are concerned, effortlessly.

We learn from Judge Greene's opinion that a United States court "has power to enjoin a party over whom it has personal jurisdiction from

pursuing litigation before a foreign tribunal", but that it is a jurisdiction which is only exercised in "unusual very narrow circumstances". We also learn that an examination of the reported circumstances in which it has been used shows that the circumstances were there quite different from those obtaining in the present case.

Precisely the same situation obtains under English law in relation to the English courts. The jurisdiction exists, but it is to be exercised with extreme caution. Furthermore, the reported authorities do not disclose any case in which consideration has ever been given to restraining the prosecution of proceedings in a foreign court when, as here, there is no alternative English forum before which the same, or substantially the same, right could be asserted.

All this Mr. David Johnson for Lakers accepts. But he goes a little further and submits that there is an obvious reason why the reports do not reveal any case in which the prosecution of proceedings in a foreign court has been restrained in the absence of an alternative English forum. It is that an injunction can only issue in support of a legal or equitable right or interest justiciable in the English courts: *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210.

In *The Siskina* the plaintiffs, who were cargo-owners, were in dispute with shipowners and were seeking a *Mareva* injunction freezing insurance moneys owing to the shipowners. They had no legal or equitable right or interest over or in respect of those insurance moneys and, although they may well have had such a right or interest enforceable against the shipowners, the shipowners were outside the jurisdiction of the English courts. By contrast there is no territorial limitation on the courts' jurisdiction in the present case, all concerned being admittedly subject to that jurisdiction. Accordingly the sole question is whether B.A. and B.C. are seeking to enforce a justiciable legal or equitable right against Lakers. Many years ago it might have been debatable whether a plaintiff could have a legal or equitable right not to be a defendant in litigation before a foreign tribunal. But that debate is long since over. The sole question now open concerns the circumstances in which the jurisdiction is to be exercised. Accordingly we conclude that, properly analysed, Mr. Johnson's submission is not that this court has no jurisdiction to grant the relief sought by B.A. and B.C., but that, regardless of any other circumstance, it should not exercise that jurisdiction unless there is an alternative English forum available to Lakers. This submission, if accepted, would dispose of the appeal and we therefore examine it before any other consideration of the issues in dispute.

Fortunately we have the benefit of a very recent decision of the House of Lords, *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 which, in our judgment, is decisive in establishing that the absence of an alternative English forum is not, of itself, fatal to B.A.'s and B.C.'s claims to relief, although the absence of such a forum is without doubt a major obstacle which powerfully reinforces the caution which, as a matter of English law, English judges are bidden to display and do display when considering the exercise of this jurisdiction.

Equally fortunately Lord Wilberforce, Lord Diplock, Lord Keith of Kinkel and Lord Bridge of Harwich agreed with the speech of Lord Scarman and accordingly we are not faced with the problem of interpreting different shades of judicial opinion.

Lord Scarman, at p. 574D, in considering the criteria which should govern the exercise of the courts' discretion either to impose a stay in

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A English proceedings or to grant an injunction restraining a person who is subject to the jurisdiction of the English courts from prosecuting a claim in a foreign court, said that whichever remedy was sought the principle was the same. In determining and defining that principle, it was no longer necessary to examine the older case law since the modern statement of the law was to be found in the majority speeches in *The Atlantic Star* [1974] A.C. 436. Lord Scarman continued, at p. 575:

B “In *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812 my noble and learned friend, Lord Diplock, interpreted the majority speeches in *The Atlantic Star* [1974] A.C. 436, as an invitation to drop the use of the words ‘vexatious’ and ‘oppressive’ (an invitation which I gladly accept) and formulated his distillation of principle in words which are now very familiar: ‘In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court’.

D “Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.

E “The formula is not, however, to be construed as a statute. No time should be spent in speculating as to what is meant by ‘legitimate’. It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the ‘critical equation’ between advantage to the plaintiff and disadvantage to the defendants.”

F Mr. Johnson’s submission that the critical equation presupposes an alternative forum to whose jurisdiction the parties are amenable and that, in its absence, the jurisdiction can never be exercised is, as it seems to us, a mere variant of the submission by Mr. Castanho’s counsel (see p. 573B) that the jurisdiction is to be found to have been exercised only in two classes of case: (1) “*Lis alibi pendens*” where the object is to prevent harassment; and (2) where there is a right justiciable in England, which the court seeks to protect.

G Commenting on this submission, Lord Scarman said, at p. 573E:

H “No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice.”

In our judgment that passage confirms the existence of the jurisdiction which we are asked to exercise and poses the question which we have to ask ourselves, namely, “In all the circumstances, is it appropriate to grant

the relief sought in order to avoid injustice?" In the context of this case, the avoidance of injustice to all parties may not be possible but, that failing, we have to ask ourselves whether the grant or the refusal of the relief sought will create the lesser injustice. We have, in Lord Scarman's words, to resolve that "critical equation." That involves taking account of a number of circumstances to which we now turn.

The Laker story

The story of the rise and fall of Laker Airways is well-known. Suffice it to say that Sir Freddie Laker conceived the idea of creating an airline which would provide low cost scheduled air services across the Atlantic and elsewhere. He founded Laker Airways in 1966 and entered the air charter business. In 1971, at a time when Laker Airways were already undertaking transatlantic charter flights, he applied for permission to operate a "Skytrain" scheduled service between London and New York. The basic distinction between the proposed service and existing services was that, in the case of "Skytrain", passengers would buy tickets at the airport on the day of travel on a "First come, first served" basis and that the ticket would not entitle the passenger to a free meal service. There were other distinctions, such as the inability to purchase through tickets for travel by Laker Airways and other airlines, and the whole concept could be summed up by saying that it was intended to be a "No frills, low cost" operation.

Transatlantic scheduled air services between the United Kingdom and the United States are controlled by an inter-governmental licensing system and it was not until 1977 that Laker Airways obtained permission to operate the "Skytrain" scheduled service. The reasons for this delay are recorded *sub. nom. Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643. Their first route was London–New York, but the service was extended to London–Los Angeles in September 1978, London–Miami in May 1980 and London–Tampa in April 1981. Laker Airways hoped to continue this expansionary process and, with that end in view, obtained licences from the United Kingdom Government for a trans-Pacific route from Los Angeles and San Francisco to Hong Kong via Honolulu and Tokyo, a London–Hong Kong route via the Middle East and European routes between London and Berlin and London and Zurich.

Unfortunately in the second half of 1981 Laker Airways encountered financial difficulties engendered, in part at least, by a drop in the dollar value of the pound sterling and was unable to service the large loans which it had obtained. Despite considerable efforts to rescue it, Laker Airways was forced to cease trading in early February 1982.

The United States proceedings

On November 24, 1982, Lakers instituted civil action no. 82–3362 in the United States District Court for the District of Columbia by a complaint endorsed "Jury trial demanded." Lest any summary do less than justice to Lakers, we append a copy (post, pp. 592 et seq.). By the consolidation of a further action, K.L.M. and Sabena have been added as defendants. As will be seen, it alleges a combination and conspiracy in restraint of trade and to monopolise in violation of the United States Sherman Act causing damage to Lakers in excess of U.S.\$350,000,000. It also repeats the same narrative as a basis for an allegation of a further cause of action, namely, "intentional tort." The relief claimed is

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- A U.S.\$350,000,000 compensatory damages in respect of both causes of action and U.S.\$700,000,000 as punitive damages in respect of the cause of action under the Sherman Act together with interest, costs and attorneys' fees.

B The complaint itself was accompanied by a very extensive request for the production of documents and another request for answers to interrogatories of a far-reaching nature. The requests were respectively made pursuant to rules 33 and 34 of the Federal Rules of Civil Procedure, and we have no reason to believe that they were not proper requests in accordance with those rules.

C It is or may be material that they appear to be requests which were made in circumstances in which a requirement to the same effect could be imposed pursuant to rule 37 (see section 2(5) of the Protection of Trading Interests Act 1980). These were followed a month later by a second request for the production of documents and a second request for answers to interrogatories to which similar considerations appear to apply.

D We should perhaps explain that the word "predatory", which is frequently referred to in the pleadings, is defined in and for the purpose of the United States Federal Aviation Act 1958 (section 101(35)) as "any practice which would constitute a violation of the antitrust laws as set forth in the first section of the Clayton Act (15 U.S.C. 12)." In the context of the dispute between Lakers and the other airline defendants, it is usually used adjectivally in conjunction with the word "fares" as meaning a loss-making level of fares having no commercial justification and intended solely to eliminate Lakers as a competitor.

E B.A. and B.C. responded in the United States action to such extent as was necessary to avoid being in contempt of the District Court or having a default judgment signed, but no more, and in January 1983 they began the present actions seeking to restrain Lakers from further prosecuting the United States action against them.

F Since then Lakers have been restrained from proceeding further with that action as against B.A. and B.C. by a series of interim injunctions. These have been granted solely on the basis that justice requires that the status quo be preserved whilst B.A.'s and B.C.'s claims to relief were being considered by Parker J. and, after he had refused that relief, by this court on appeal from his decision.

G Section 1 of the Sherman Act, which was enacted in 1890, subject to immaterial exceptions, renders every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, illegal and provides, as amended, that every person who makes any contract or engages in any combination or conspiracy thereby declared to be illegal shall be guilty of a felony and on conviction shall, if a corporation, be punishable by a fine not exceeding one million dollars and, if any other person, by a fine not exceeding \$100,000 or by imprisonment not exceeding three years or both in the discretion of the court.

H Section 2 of the Sherman Act provides that every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall also be guilty of a felony and subject to similar penalties.

Section 4 of the Clayton Act, enacted in 1914, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws (which is defined to include the

Sherman Act) may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4A provides a similar right of recovery for the United States, limited to actual damages sustained and the cost of the suit. There is a four year limitation period on suits under sections 4 and 4A.

The Bermuda 2 Treaty

Since the Second World War, United Kingdom airlines, including B.A. and B.C. and also Laker, together with their aircraft, have been subject to control by the United Kingdom Civil Aviation Authority (C.A.A.). The corresponding body for United States airlines and aircraft is the United States Civil Aviation Board (C.A.B.). The C.A.A. regulates, inter alia, the fares chargeable by British airlines. A similar regulatory function is performed by the C.A.B. Neither body can, of course, authorise a flight into foreign territory although they can no doubt forbid it.

In the absence of a treaty between the United States and the United Kingdom, United Kingdom airlines could only fly to the United States upon such terms as the United States Government in its absolute discretion saw fit to impose. Furthermore, that government could alter those terms at any time and from time to time. Equally United States airlines seeking to fly to the United Kingdom would have been at the mercy of the United Kingdom Government. Faced with this impossible situation, the two nations concluded bilateral treaties: first Bermuda 1 in 1946 and then Bermuda 2 in 1977. The essence of both treaties was equality of opportunity for the airlines of each country.

It is important to bear in mind that, as a matter of English law, treaties are not part of the domestic laws of the United Kingdom and give rise to no private rights under English law. They are agreements between states and they can only be honoured or breached by states. If and in so far as they involve an obligation to ensure that domestic laws conform with the treaty, this is a matter for the states concerned. There have been indications that the position may be different under United States law and that the provisions of treaties to which the United States is a party may themselves vary or limit the scope of pre-existing United States laws. We express no view on whether or not that is the case and do not think it material for present purposes. We mention the status of a treaty in English law, solely because there are passages in the judgment of Parker J. which might be taken to suggest that he thought that if Laker's complaints were proved, it would follow that B.A. and B.C. were in breach of article 12 of the Treaty which deals with tariffs. This article cannot bind either Laker or B.A. and B.C. and they cannot be in breach of it.

For present purposes, the essence of the Treaty was that each country had the right to designate airlines of its own nationality to fly particular routes and enter through specified "gateways". But each country had the right to refuse to accept the other's designation of an airline and each national civil aviation authority had the right to refuse to accept tariffs and other licensing matters approved by the other authority. In practice, as one would expect, the two national authorities were at one on issues such as safety. Where they differed was on the acceptability of particular

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A fare structures and similar commercial considerations in terms of their respective national interests which, inevitably, were liable to differ.

B This is amply demonstrated on the evidence, but it is important to note that both the C.A.A. and the C.A.B. when asked to approve tariffs gave every opportunity to all who might be affected to make representations. Both Laker and B.A. and B.C. as United Kingdom airlines were licensed on terms that they charged fares approved by the C.A.A. and were only authorised to fly into the territory and airspace of the United States if those fares were also approved by the C.A.B. Thus Laker had the opportunity of objecting to the fares now characterised as "predatory" both before the C.A.A. and the C.A.B. and availed themselves of that opportunity.

C It is also clear, as one would expect, that the C.A.B. applied the same criteria as those prescribed by the Sherman Act, which has been described by Judge Greene as "the charter of economic freedom" comparing its role to that which the Bill of Rights plays with respect to personal freedoms. The interrelationship between the Sherman Act and the C.A.B.'s duties under the United States Federal Aviation Act 1958 is underlined by the fact that under section 414 of that Act the C.A.B. is empowered to grant exemption from the operations of the "antitrust laws" set forth in subsection 1(a) of the Clayton Act. The exercise of this exemptive power is referred to by the rather quaint term of "immunisation", which, by inference, we feel does less than justice to the United States Economic Bill of Rights. Furthermore, if the C.A.B. approves a tariff agreement, it is required to "immunise" the parties to such extent as is necessary to enable them to proceed with the transactions specifically approved by the board. Curiously, if the C.A.B. refuses to approve such an agreement, but its decision is overridden by the President of the United States, the President appears to have neither the power nor the duty to grant "immunisation" and it would be necessary to ask the C.A.B. for relief which it might or might not grant in the exercise of its discretion.

F It is reasonably clear on the evidence that throughout the currency of Bermuda 1 and Bermuda 2 the application of United States antitrust laws to United Kingdom designated airlines was a potential source of disagreement between the two governments. However, all concerned avoided anything in the nature of a confrontation until Laker sought to avail themselves of the Sherman and Clayton Acts in a suit against B.A. and B.C. and Pan American and Trans World airlines in 1974 which was speedily settled and in the present United States litigation. As the latter action has not been settled and indeed has led directly or indirectly to a grand jury investigation, this sensible "agreement to differ" has been impossible to sustain any longer.

G As we have said, as a matter of English law, a treaty is an agreement between sovereign states which does not of itself give rise to either rights or obligations in private individuals. Consistently with this approach this court has no jurisdiction to determine the meaning or effect of any treaty to which the Government of the United Kingdom is a party and indeed is not equipped to do so, that being a matter of public international law. This court is, however, concerned to be informed of the views of Her Majesty's Government concerning any treaty which forms part of the background to a dispute between private persons. In the present appeals we have been so informed in the usual way, namely, by a statement in open court by or on behalf of Her Majesty's Attorney-General. Mr. Peter Scott, who has appeared on behalf of the Attorney-General, has stated

H

that Her Majesty's Government regard the Government of the United States as being in breach of its obligations under Bermuda 2 in applying or permitting the application of United States antitrust laws to international commerce and, in particular, to operations carried out under or pursuant to Bermuda 2.

The Treaty itself provides the mechanism for the resolution of inter-governmental disputes. First there must be formal consultations under article 16 and then, if this does not resolve the dispute, either side may invoke the compulsory arbitral procedure provided under article 17. In March 1983 Her Majesty's Government requested formal consultations under article 16 on the question of whether it is consistent with the rights and obligations of the contracting parties for the provisions of the United States antitrust laws to apply to the activities of the designated airlines. Although the United States Government claims that the application of these laws is wholly outside the scope of Bermuda 2 and, therefore, not a matter for consultation under article 16, they agreed to take part in such consultations and they have taken place. We were told that Her Majesty's Government hopes to resolve the dispute by negotiation, but that deep differences remain between the two governments over the question of whether and to what extent the United States antitrust laws are incompatible with the arrangements contained in Bermuda 2 and what steps are called for to remedy the situation. At present neither government has begun arbitration proceedings against the other, but Her Majesty's Government has fully reserved its right to do so.

Public policy

It is a matter of considerable constitutional importance that the courts should be wholly independent of the executive, and they are. Thus, whilst the judges, as private citizens, will be aware of the "policy" of the government of the day, in the sense of its political purpose, aspirations and programme, these are not matters which are in any way relevant to the courts' decisions and are wholly ignored. In matters of home policy, the courts have regard only to the will of Parliament as expressed in the statutes, in subordinate legislation and in executive acts authorised by Parliament.

The position is different in relation to foreign affairs. Relations between the United Kingdom and foreign states are not the subject of direct Parliamentary action, but are a matter for Her Majesty acting on the advice of Her Government. The foreign policy which is adopted is referred to as that of the United Kingdom Government, but this is misleading since in reality it is that of the nation. Accordingly it would be strange if in this field the courts and the executive spoke with different voices and they should not do so: see *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2)* [1978] A.C. 547, 617, 650-651, *per* Lord Wilberforce and Lord Fraser of Tullybelton respectively.

We have already recorded the attitude and contentions of the United Kingdom Government in relation to Bermuda 2. Its policy externally and that of Parliament internally is also indicated by the terms of the Protection of Trading Interests Act 1980 and the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983. However, we have also been assisted by fuller information on the United Kingdom Government's foreign policy which has been provided by Mr. Peter Scott on the instructions of the Attorney-General and to this we must now turn.

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A It was contended by Mr. Johnson in the course of argument that the concern of the United Kingdom Government over the United States antitrust laws was confined to the extra-territorial operation claimed for them under the "effects doctrine". This was coupled with a repeated contention that the United Kingdom Government accepted unreservedly the obligation of all those who carried on business within the United States to comply with the laws of that country. Mr. Peter Scott made it clear that both contentions are over-simplified.

B B.A. and B.C. carry on business in a large number of different countries, including the United States. This is inherent in the business of an international airline. The United Kingdom Government accepts that it follows that each of these countries will have an in personam jurisdiction over B.A. and B.C. in accordance with international law. However, Mr. C Peter Scott told us that the United Kingdom Government takes the view that there is another sense in which jurisdiction has to be considered, namely, in relation to its subject matter and that it is here that it parts company with the Government of the United States. He put the matter this way:

D "In general, substantive jurisdiction in antitrust matters, in the view of the British Government, should only be taken on the basis either of the territorial principle or the nationality principle. There is nothing in the nature of antitrust proceedings as such which justifies a wider application of these principles. That is to say, a wider application than is generally accepted in other matters. On the contrary, there is much in the nature of antitrust which is the reflection of the public economic law of the state which calls for a narrower application of these principles.

E "As your Lordships will appreciate, in inherently international activity, like aviation or shipping, it may be difficult to apply these principles with precision, but the activities can take place in both of the states concerned. In those cases, Her Majesty's Government would expect a state enforcing its regulatory laws to do so with restraint and only after paying due attention and due regard to the interests of the other state concerned, and to its own treaty obligations.

F "The matter is complicated, of course—I say 'complicated', I perhaps should say 'enforced' [reinforced] by the peculiar nature of the Sherman Act and Clayton Act procedures, with the penal nature of the judgments sought, the breadth of discovery, the cost, and the other elements which are relied upon by [B.A. and B.C.]. These are all matters which, in a sense, only make a fortiori the submission that one would make even if it was an ordinary claim for compensation."

G Earlier in his address to the court, Mr. Peter Scott had referred to remarks made by him before Parker J., and said:

H "What I was attempting to do was to lay the foundation for the submissions which I wish to make in the particular circumstances of this case and certainly not to make some broad statement that in all and any circumstances Her Majesty's Government would expect nationals of this country to obey domestic laws in the course of trans-national business operations. In the ordinary way, of course, Her Majesty's Government would not wish to intervene between the laws of other countries and people who find themselves for one

reason or another in those other countries, but there most certainly are cases where they would wish to do so.” A

He then went on to refer to the recent dispute concerning British companies who carried on business in the United States and had contracted outside the United States to deliver goods which were also outside the United States to contractors working on the Russia to Western Europe gas pipe-line. On the basis of the undoubted United States in personam jurisdiction over these companies, the United States Government had claimed the right to issue executive orders requiring the companies not to deliver. This right was disputed by the United Kingdom Government which took action to prevent the companies complying with the United States executive order. B

The Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 and general directions dated June 23 and July 11, 1983 C

The making of this Order and the giving of these directions have, on any view, fundamentally altered the “critical equation” if they are valid. However, their validity is challenged by way of judicial review.

The Order, which came into operation on June 27, 1983, over a month after Parker J. gave judgment, is in the following terms, omitting footnotes: D

“Whereas it appears to the Secretary of State that the measures to which this Order relates have been taken by or under the law of the United States of America (‘the United States’) for regulating or controlling international trade and that those measures, in so far as they apply to things done or to be done outside the territorial jurisdiction of the United States by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom: Now therefore the Secretary of State, in exercise of his powers under section 1(1) of the Protection of Trading Interests Act 1980 (‘the Act of 1980’) and of all other powers enabling him in that behalf, hereby makes the following Order:— E

“1. (1) This Order may be cited as the Protection of Trading Interests (US Antitrust Measures) Order 1983 and shall come into operation on June 27, 1983. (2) In this Order—‘the Bermuda 2 Agreement’ means the agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States signed at Bermuda on July 23, 1977, concerning air services; ‘air service’ and ‘tariff’ shall be construed in accordance with the Bermuda 2 Agreement; ‘U.K. designated airline’ means a British airline (within the meaning of section 4(2) of the Civil Aviation Act 1982) designated by the Government of the United Kingdom under the Bermuda 2 Agreement. F

“2. (1) The Secretary of State hereby directs that section 1 of the 1980 Act shall apply to sections 1 and 2 of the United States’ Sherman Act and sections 4 and 4A of the United States’ Clayton Act in their application to the cases described in the following paragraph. (2) The cases mentioned in paragraph (1) of this article are—(i) an agreement or arrangement (whether legally enforceable or not) to which a U.K. designated airline is a party; (ii) a discussion or communication to which a U.K. designated airline is a party; (iii) any act done by a U.K. designated airline, which, in respect of each case, concerns the G H

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- A tariffs charged or to be charged by any such airline or otherwise relates to the operation by it of an air service authorised pursuant to the Bermuda 2 Agreement.”

The power to make such an order is derived from section 1(1) of the Protection of Trading Interests Act 1980 which is in the following terms:

- B “1. (1) If it appears to the Secretary of State—(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and (b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,
- C the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.”

- Mr. Johnson submits that the order is ultra vires the power for two reasons. The first reason is that “measures” in the Act can only refer to things done under the authority of the statute or executive power and cannot refer to the authority itself. In Mr. Johnson’s submission this is supported by the references to requests, requirements and prohibitions in subsections (2) and (3) of section 1 and in sections 2, 3, and 4. Accordingly, whilst the Order could apply section 1 of the Act of 1980 to measures taken under the Sherman and Clayton Acts, it could not apply the section to the Acts themselves or any specified sections of those Acts. We do not accept this submission. “Measures” is a very wide term of generic description, which could well include statutes and, far from limiting the prima facie width of the meaning of the term, section 1(1)(a) by referring to “measures . . . taken by . . . the law of any overseas country” confirms that “measures” is intended to include foreign statutory provisions.
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- Second, it is submitted that in any event the measures to which section 1 can be applied must be restrictive or regulatory of international trade, whereas the Sherman and Clayton Acts are intended to free international trade from the constrictions of anti-competitive cartels. This submission seems to us to be disingenuous and we reject it. A statute is none the less controlling or regulatory because it seeks to prevent international trade being conducted on the basis of co-operative agreements designed to minimise or eliminate competition.
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- There is a further objection to the Order, but as it also applies to the directions, we will defer consideration of it until after we have considered the specific objections to the directions.
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There are two directions to be considered. The first is dated June 23, 1983, and was made under section 1 of the Act of 1980. The second is dated July 1, 1983 (in replacement of another direction dated June 23) and was made under section 2 of that Act.

- H The specific objection to the section 1 direction is that, as Mr. Johnson submits, there is no power to make a direction under section 1(3) unless a direction has first been made under section 1(2) and no such direction has been made. The subsections are in the following terms:

“(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures

in so far as this section applies to them by virtue of an order under subsection (1) above. (3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.”

The issue here is one of construction. Does “any such requirement or prohibition as aforesaid” mean a prohibition or requirement of which notice is required to be given pursuant to a direction under section 1(2) or does it mean a “requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above?” We can see no reason why Parliament should have intended to limit the powers of the Secretary of State to prohibiting compliance with requirements or prohibitions which have been notified to him. The clear intention is that his prohibitory power shall extend to a category of requirements and prohibitions, whether he knows of them or not, and that, in addition, he can, if he wishes, obtain information as to what requirements or prohibitions are being made. In other words the two subsections are quite independent of one another.

The specific objection to the section 2 direction is that it does not specify the ground or grounds upon which the requirements to which it relates appear to the Secretary of State to be “inadmissible” within the meaning of section 2 of the Act of 1980. It is well settled that in using this form of enabling power a Secretary of State need only state that it appears to him that the specified pre-conditions exist. It is then for an objector to challenge his good faith, which has not been done in this case, or to show that the Secretary of State has misdirected himself in law. The Secretary of State does not have to explain why it appears to him that the pre-conditions exist. If authority be required for this proposition, it is to be found in the *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455.

The section 2 direction recites:

“Whereas it appears to the Secretary of State: (a) that the United States’ Department of Justice has begun an investigation into alleged price fixing and other allegations relating to the air transport of passengers over the North Atlantic for possible violations of sections 1 and 2 of the ‘Sherman’ Act; and that for this purpose a grand jury (‘the grand jury’) has been empanelled in the District of Columbia in the United States of America; (b) that a requirement may be imposed on a person or persons in the United Kingdom to produce to the United States Department of Justice or the grand jury commercial documents which are not within the territorial jurisdiction of the United States or to furnish to the United States Department of Justice or the grand jury commercial information; (c) that civil antitrust proceedings of a penal nature are now pending in the United States District Court for the District of Columbia (‘the District Court’) relating to similar matters to those which are the subject of the United States Department of Justice investigation and that commercial documents and commercial information which are produced in the civil antitrust proceedings may be utilised in the Department of Justice investigation or before the grand jury; (d) that a requirement may be imposed on a person or persons in the United

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A Kingdom to produce to the District Court commercial documents which are not within the territorial jurisdiction of the United States or to furnish to the District Court commercial information; (e) that any such requirement would be inadmissible within the meaning of section 2(2) and (3) of the Protection of Trading Interests Act 1980 (the '1980 Act')."

B If there were nothing more, there would be no reason to doubt the Secretary of State's assertion since he might very well consider that requirements by the United States Department of Justice would infringe "the jurisdiction of the United Kingdom" or otherwise be prejudicial to its sovereignty (see section 2(2)(a)) and/or compliance with such a requirement would be prejudicial to the relations of the Government of the United Kingdom with the government of another country (see section 2(2)(b)).

C He might also very well consider that a requirement in the context of a grand jury investigation would be one "made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country" (see section 2(3)(a)) and that a requirement in the context of the district court proceedings satisfied section 2(3)(b) as requiring

D "a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement."

E However, there is more. Mr. Andrew Turek, a legal assistant in the Office of the Treasury Solicitor, has deposed that the substance of correspondence between the liquidator of Laker Airways Ltd. and the C.A.A. and between the C.A.A. and the Department of Trade and Industry, which he exhibited, was brought to the attention of the Secretary of State before he made the directions. This correspondence clearly shows the link between the district court proceedings and the grand jury investigation and that the United States Department of Justice was seeking to use the liquidator as its agent to obtain discovery from B.A. and B.C. for the purposes of the grand jury investigation. This abundantly justifies the Secretary of State's view that "inadmissible requirements" might be made.

F Lastly, Lakers object to the Order and to both directions on the grounds:

G "The terms of the Order and of the two general directions are (a) so wide as to exceed the sections under which they purport to be made and (b) so general as insufficiently to indicate what is and what is not sought to be prohibited."

H We accept the possibility that circumstances may arise in which it may be debatable whether or not the Order or directions apply, but we do so not because of any excessive width or generality in the words, but because any order or direction which is not all embracing—and this Order and directions are not—is capable of giving rise to problems on the periphery of its ambit. Certainly, in our judgment, the Secretary of State has in no way exceeded his jurisdiction.

It was for these reasons that we dismissed the application for judicial review.

The critical equation

We now come back to the "critical equation" and ask ourselves the question

"In all the circumstances, is it appropriate in the interests of avoiding injustice to enjoin Lakers from pursuing their claim against B.A. and B.C. in the United States courts?"

If we are to grant B.A. and B.C. the relief which they seek, it will, so far as is known, be the first occasion upon which an English court has exercised its jurisdiction to prevent the further prosecution of proceedings before a foreign court or tribunal when there is no alternative forum in England or elsewhere to which the defendants can have resort. It follows that B.A. and B.C. have a very heavy burden to discharge.

The starting point must be what Lakers will lose. B.A. and B.C. are only two of ten defendants against whom Lakers are making the same or substantially the same claim. If they were to be wholly successful, they could levy execution against any or all and the defendants who satisfied the judgment would have no right of contribution inter se or from other defendants. Accordingly, it might appear that the disappearance of B.A. and B.C. as defendants in the United States action would leave both Lakers and the other defendants in exactly the same position as if Lakers had succeeded against all, but only levied execution upon the other defendants. There is no suggestion that the other defendants could not satisfy such a judgment and it may be asked whether Lakers really stand to lose anything at all.

This in our judgment is too simple a view of the position. First, it is possible that other actions might be brought by the other defendants seeking similar relief. We express no view on whether they would succeed, because different considerations might apply in their cases. By way of illustration, we would mention that only the two United States airlines would appear to have been flying under the auspices of Bermuda 2 and they have the benefit of a consent from the Secretary of State disapplying the general direction under section 1 of the Act of 1980. The other airlines presumably fly under the auspices of other bilateral treaties. And there will probably, if not inevitably, be other distinctions. Furthermore it was suggested in argument, and may be correct, that the burden of fighting an antitrust claim is so heavy in terms of time, expense and disruption to the carrying on of a business, that defendants are often willing to settle with the plaintiff. On this assumption, the more defendants there are, the greater the chances of achieving settlements which, in the aggregate, will be as satisfactory as a judgment. Yet again the elimination of two defendants will mean that fewer parties are available to give discovery which may assist in proving the claim against all, although account must be taken of the inhibitions upon B.A. and B.C. giving Lakers assistance in this respect in the light of the Secretary of State's Order and directions.

Accordingly we assume, for the purposes of the critical equation, that the grant of the relief sought by B.A. and B.C. might well have far-reaching adverse effects upon what would otherwise be Lakers' prospects of success in the United States litigation and might indeed eliminate them. Logically this must lead on to a consideration of what is the value of those prospects, if no relief is granted to B.A. and B.C. In this connection it is tempting to speculate whether, and, if so, how Lakers will overcome the argument that their real loss flows from the fact that B.A. and B.C. and the other airlines adopted fares and schedules which were authorised and largely "immunised" for antitrust purposes. However, it is a temptation

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A which must be resolutely resisted, because it would involve this court in virtually trying a United States antitrust action which we are wholly incompetent to do.

B This may be a convenient moment to notice the argument that this court should not in any event restrain Lakers from pursuing their claim against B.C. in so far as it is alleged that B.C. interfered with the Laker financial rescue operation by bringing pressure to bear on McDonnell Douglas since this activity, unlike the charging of "predatory" fares, was outside the scope of Bermuda 2. Again it is said that this court should not in any event restrain Lakers from pursuing their claim based upon "intentional tort", as contrasted with that based upon the Sherman and Clayton Acts and that similar considerations would apply if Lakers were minded to start an action claiming damages in the United States for common law conspiracy under United States law.

C We are at the moment only concerned with a claim for relief in respect of the proceedings in the United States District Court for the District of Columbia and no claims have been made in that court on the basis of common law conspiracy. However, the claims which have been made seem to us not to be capable of severance. The allegation of "intentional tort" is in terms based upon exactly the same material as that which forms the basis of the antitrust claim and, save that penal damages cannot be claimed for "intentional tort", the two causes of action seem to us to be indistinguishable. So far as the financing allegation is concerned, it is clear that this is but one aspect of the overall antitrust conspiracy which is alleged and could not stand by itself. We therefore conclude that it is a case of "all or nothing". Either we must wholly restrain the further prosecution of the district court proceedings by Lakers against B.A. and B.C. or we must refuse B.A. and B.C. any relief.

D So much for Lakers' side of the equation. We now turn to B.A.'s and B.C.'s side. They have no right to submit, and do not submit, that the United States civil procedures create any injustice whatsoever. But they are entitled to rely upon the fact that these procedures impose a great burden on defendants in terms of time, expense and disruption to their business and that in no circumstances will this be made good by Lakers. Similarly a United States company would have no right to submit that United Kingdom civil procedures create any injustice. But they would be entitled to rely upon the fact that our rules as to costs, which involve an unsuccessful claimant in paying the costs of the defendant and may involve him in giving security for these costs, together with the refusal by the legal professions to permit legal assistance to be provided on a contingency basis can impose a very heavy burden in terms of actual and potential expense. These burdens are facts which have to be faced and facing them involves no criticism of the legal system concerned. There can be no doubt that in antitrust suits this burden is of formidable proportions.

E So much for Lakers' side of the equation. We now turn to B.A.'s and B.C.'s side. They have no right to submit, and do not submit, that the United States civil procedures create any injustice whatsoever. But they are entitled to rely upon the fact that these procedures impose a great burden on defendants in terms of time, expense and disruption to their business and that in no circumstances will this be made good by Lakers. Similarly a United States company would have no right to submit that United Kingdom civil procedures create any injustice. But they would be entitled to rely upon the fact that our rules as to costs, which involve an unsuccessful claimant in paying the costs of the defendant and may involve him in giving security for these costs, together with the refusal by the legal professions to permit legal assistance to be provided on a contingency basis can impose a very heavy burden in terms of actual and potential expense. These burdens are facts which have to be faced and facing them involves no criticism of the legal system concerned. There can be no doubt that in antitrust suits this burden is of formidable proportions.

F Next, contrary to the views of Parker J., we think that B.A. and B.C. are entitled to rely indirectly upon Bermuda 2, in the sense that account must be taken of the United Kingdom's view of the effect of Bermuda 2 on the United States. The acceptance of that view by the United States would render Lakers' claim unsustainable. This is a public policy consideration. Both Lakers and B.A. and B.C. were designated as United Kingdom carriers under that treaty. The United Kingdom Government is of the opinion that the United States Government is in breach of its obligations under the treaty in permitting the bringing of a claim such as that which Lakers are advancing in the district court and is threatening to

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invade its sovereign rights by instituting grand jury proceedings and seeking to use material obtained in the civil proceedings for that purpose. Laker Airways are a United Kingdom corporation which is entitled to look, and would in appropriate circumstances look, to the protection of the United Kingdom and its government if it were being unfairly treated abroad. This benefit seems to us to carry with it some degree of obligation and to cast some doubt on the legitimacy of the juridical advantage which they seek to preserve in the United States.

Added to this is the fact that Lakers are seeking triple damages under foreign penal legislation and, which is a separate point, that under the Act of 1980, B.A. and B.C. would be entitled to reclaim the excess over compensatory damages. In fact, of course, this right of recovery may not be as valuable as it would seem at first in the light of Lakers' insolvency. It was suggested in argument that this consideration works in Lakers' favour in that Parliament has expressed a clear intention not to intervene in so far as the damages are compensatory. This is fallacious. The Act of 1980 is concerned with a situation in which the claimants may well be of foreign nationality and perhaps not subject to the jurisdiction of the English courts. Different considerations can well apply where the claimant is not only subject to the jurisdiction of these courts but is also a United Kingdom company.

Regard must also be had to the extent to which Lakers' claim depends upon action taken outside the territory of the United States. In English proceedings this would be easier to evaluate, because Lakers would have first to allege the conspiracy, including any overt acts relied upon, with some degree of particularity and only then would obtain discovery. In United States proceedings it is permissible to make a largely unparticularised allegation, as Lakers have done, and then see what turns upon discovery. However it appears at present that only two overt acts within the United States are relied upon. The first is a meeting in September 1974 in Washington D.C. with respect to capacity levels to be operated in the 1974-75 winter season, which we would have expected to be irrelevant as having occurred more than four years before the proceedings were begun in the district court. The second is a meeting which took place on the occasion of the I.A.T.A. conference at Hollywood, Florida, in January 1982. The conference machinery itself was "immunised", but it is said that this was a secret and collateral meeting. To this can perhaps be added the sending by B.C. from England of a threatening telex message to McDonnell Douglas in the U.S.A., but there is obviously room for debate whether this was an act done inside or outside the United States.

Finally B.A. and B.C. can and do rely upon the new situation which has been created by the making of the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 and the giving of directions under sections 1 and 2 of the Act of 1980. The direction under section 1 prevents B.A. and B.C. complying with any judgment of the district court, in so far as it is given pursuant to the Sherman and Clayton Acts. B.A. and B.C. would thus be forced into a situation in which execution was levied on their aircraft. The direction under section 2 creates a more immediate problem and a wholly impossible situation for both Lakers and for B.A. and B.C. Due to the very wide scope of the requests for discovery and interrogatories administered by Lakers, which, by section 2(5) of the Act of 1980 constitute "requirements" of the district court, B.A. and B.C. are unable to furnish Lakers or the district court with any of the relevant documentation which is in the United Kingdom or with any relevant

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A information, wherever situate, in so far as they have been required to give it by the terms of the interrogatories. Lakers seem to think that this damages them more than B.A. and B.C., but this is based upon an assumption that there was an antitrust conspiracy. If there was not, it is B.A. and B.C. who will be the sufferers, since they will be unable to defend themselves before the district court. The likelihood is, of course, that both will be seriously affected, but that the main effect will be upon B.A. and B.C., since Lakers may be able to obtain discovery from other parties. The evidence so disclosed may point the finger at B.A. and B.C., who will be prevented from explaining their conduct.

B In this context, we have an affidavit from Mr. Simon Chamberlain, one of B.A.'s solicitors, which confirms that we would in any event have assumed to be the case, namely:

C "British Airways has an enormous volume of documentation located exclusively within the United Kingdom and falling within the very wide scope of the request for document discovery made by Laker in the United States proceedings. British Airways has not nearly completed its investigation of these documents. It is, however, apparent, on the basis of work already carried out, that they include a substantial number of documents on which British Airways would wish to rely for the purpose of defending itself against the allegations made by D Laker in the United States proceedings."

Mr. Ross-Munro, for B.C., wished to file a similar affidavit in relation to his clients' position, but we did not think that this was necessary at this stage.

E Whatever weight may or may not be given to the other factors in the critical equation, in our judgment the effect of the Order and directions is decisive. They have rendered the issues raised by Lakers in the district court action wholly untriable as between Lakers and the appellants, B.A. and B.C. To allow Lakers to proceed with their claim in these circumstances would amount to a total denial of justice to B.A. and B.C. In our judgment this cannot be allowed to occur and in principle, we consider F that relief of the nature sought by B.A. and B.C. should be granted. The details of what order is appropriate can be discussed at a later date when the parties have had time to consider the court's judgment.

G *Appeals allowed and application for judicial review dismissed with costs. Leave to appeal refused.*

Injunctions in form to be settled including mandatory order that Lakers use their best endeavours to procure that B.A. and B.C. cease to be parties to United States action.

H *Orders suspended pending petition to House of Lords for leave to appeal.*

Solicitors: Richards Butler & Co.; Herbert Smith & Co.; Durrant Piesse; Treasury Solicitor.

A. H. B.

APPENDIX

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3362

COMPLAINT
Jury Trial Demanded

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Laker Airways Ltd., a foreign corporation in liquidation, Hill House, 1 Little New Street, London EC4, England, plaintiff,
against

Pan American World Airways Inc., a domestic corporation, Pan Am Building, 200 Park Avenue New York; Trans World Airlines Inc., a domestic corporation, 605 Third Avenue, New York; British Airways Board ("B.A."), a foreign corporation, Heathrow Airport—London, Hounslow, England; Lufthansa German Airlines, a foreign corporation, Von-Gablenz-Strasse 2-6, Cologne, Federal Republic of Germany; Swissair, Swiss Air Transport Co. Ltd., a foreign corporation, Balsberg Building, Zurich Airport, Switzerland; British Caledonian Airways Ltd., a foreign corporation, Caledonian House, Crawley, West Surrey, England; McDonnell Douglas Corporation, a domestic corporation, St. Louis, Missouri; McDonnell Douglas Finance Corporation, a domestic corporation, Long Beach, California, defendants

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COMPLAINT
Antitrust Violation

Laker Airways Ltd. ("Laker"), acting through its attorneys, brings this civil action against the defendants named above and complains and alleges as follows:

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JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under section 4 of the Clayton Act (15 U.S.C. § 15), to secure damages for defendants' violations, as alleged in this complaint, of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and for other relief, as set forth below. Jurisdiction is conferred upon this court by 15 U.S.C. § 15, by 28 U.S.C. § 1337 and under the doctrine of pendent jurisdiction. Venue is properly laid in this district pursuant to sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22) and 28 U.S.C. § 1391.

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2. Each of the defendants transacts and does business, can be found or has an agent within the District of Columbia and is otherwise amenable to the personal jurisdiction of this court.

THE PARTIES

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3. Plaintiff Laker Airways Ltd. ("Laker") is a foreign corporation registered under the laws of Jersey, Channel Islands. Laker maintain its principal office in London, England. Laker is a subsidiary of Laker Airways (International) Ltd., which is in turn controlled by Sir Freddie Laker. Prior to February 5, 1982, Laker was the largest individually controlled scheduled air carrier in the world and provided 42 widebodied jet aircraft flights per week in scheduled airline service between various points in the United Kingdom and the United States. Laker also provided extensive charter services between the United States and the United Kingdom, and to numerous other countries. On February 5, 1982, Laker ceased trading and, pursuant to the laws of Jersey, liquidators were subsequently appointed.

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4. Defendant Pan American World Airways Inc. ("Pan Am") is a New York corporation with its headquarters in New York, New York. Pan Am provides scheduled and charter air transportation between various states in the United States and between the United States and the United Kingdom and other

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A countries. Pan Am transacts and does business within the District of Columbia at 1600 K Street, N.W., Washington, D.C. 20036.

5. Defendant Trans World Airlines Inc. ("T.W.A.") is a Delaware corporation with its corporate headquarters in New York, New York. T.W.A. provides scheduled and charter air transportation between various states in the United States and between the United States and the United Kingdom and other countries. T.W.A. transacts and does business within the District of Columbia at 1000 16th Street N.W., Washington, D.C. 20036.

B 6. Defendant British Airways Board ("B.A.") is a foreign corporation with its headquarters in Hounslow, Middlesex, England. B.A. provides scheduled and charter air transportation between the United Kingdom and the United States, including Washington, D.C. B.A. transacts and does business within the District of Columbia at 1850 K Street, N.W., Washington, D.C. 20006.

C 7. Defendant Lufthansa German Airlines (Deutsche Lufthansa Aktiengesellschaft) ("Lufthansa") is a foreign corporation with its headquarters in Cologne, Federal Republic of Germany. Lufthansa provides scheduled and charter air transportation between the Federal Republic of Germany and several points in the United States. Lufthansa transacts and does business within the District of Columbia at 1101 Sixteenth Street, N.W., Washington, D.C. 20036.

D 8. Defendant Swissair, Swiss Air Transport Co. Ltd. ("Swissair"), is a foreign corporation with its headquarters in Zurich, Switzerland. Swissair provides scheduled and charter air transportation between Switzerland and several points in the United States. Swissair transacts and does business within the District of Columbia at 1717 K Street, N.W., Washington, D.C. 20006.

9. Defendant British Caledonian Airways Ltd. ("B.C.") is a foreign corporation with its headquarters in Crawley, West Surrey, England. B.C. provides scheduled and charter air transportation between the United Kingdom and several points in the United States. B.C. transacts and does business within the District of Columbia through various agents.

E 10. Defendant McDonnell Douglas Corporation ("M.D.C.") is a Maryland corporation with its headquarters in St. Louis, Missouri. M.D.C. is a manufacturer of aircraft and aerospace equipment and sells its products in interstate and foreign commerce. M.D.C. transacts and does business within the District of Columbia at Suite 500, 1150 Seventeenth Street, N.W., Washington, D.C. 20036.

F 11. Defendant McDonnell Douglas Finance Corporation ("M.D.F.C.") is a Delaware corporation with its headquarters in Long Beach, California. M.D.F.C. is a wholly-owned subsidiary of M.D.C. and finances sales of aircraft and other equipment sold in interstate and foreign commerce by M.D.C. M.D.F.C. transacts and does business within the District of Columbia at Suite 500, 1150 Seventeenth Street, N.W., Washington, D.C. 20036.

12. Defendants Pan Am, T.W.A., B.A., Lufthansa, Swissair and B.C. will be referred to below as the "airline defendants". Defendants M.D.C. and M.D.F.C. will be referred to below as the "lender defendants".

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TRADE AND COMMERCE

13. Since 1946, the fares for scheduled air transportation on North Atlantic airline routes have been set, with very few exceptions, by government approved agreements among the airline members of the International Air Transport Association (I.A.T.A.). I.A.T.A. agreements set fares at a higher level than would prevail in a competitive market.

H 14. The I.A.T.A. airlines sell several types of tickets for their scheduled services which include a number of privileges such as the ability to make and change a reservation; to get a refund without charge; to buy a ticket at any one of the thousands of travel agency offices throughout the world, or from a different airline than the one that provided the transportation; to make connections with other airlines on the same ticket and have baggage automatically transferred; to travel on routings that are not the most direct route; to make stopovers; to be served meals and refreshments; to have hotel and car reservations made by the airline and many other extra services. These extra services are included in the

price of the ticket whether the passenger wants them or not. Before 1977, many charter (non-scheduled) air carriers operated over the North Atlantic, attracting large numbers of passengers primarily because charter prices were lower than fares offered by the I.A.T.A. carriers on their scheduled flights. Charter flights, however, were and are subject to a number of foreign government restrictions such as a requirement that the passenger pay for the ticket far in advance and minimum stay requirements. Also, charter programmes typically offer only a limited number of flights and destinations from which to choose.

15. Laker was founded in 1966, and rapidly grew into a major operator of charter air transportation. Laker began charter flight operations between the United Kingdom and North America in 1970 and continued as a North Atlantic charter operator until February 5, 1982. Despite the success of Laker's charter business, Laker recognized in 1971 that the types of international airline service then in existence did not meet the needs of passengers who were not willing or able to plan far in advance and conform to the many restrictions on charter air transportation, or who could not afford or were not willing to pay the high prices charged by the I.A.T.A. airlines.

16. Laker proposed a novel "Skytrain" service which was designed to provide a new type of low-cost air transportation that would meet the needs of these passengers on simple terms at the lowest possible price. Skytrain service passengers would arrive at the airport on the day chosen for travel and purchase a ticket there on a first-come, first-served basis. Passengers could bring their own food or purchase meal service at an additional price from Laker. If a passenger wished to travel beyond Laker's routes, he could buy another ticket separately from another airline or a travel agent.

17. Commencing on June 15, 1971, Laker sought authority from the British government and then the United States government to operate Skytrain service between New York and London. The airline defendants resisted Laker's efforts to the limits of their ability in the United States and the United Kingdom. The resistance of the airline defendants delayed implementation of Laker's Skytrain service until 1977.

18. Before the advent of Laker's Skytrain service, the I.A.T.A.-fixed economy fare from New York to London was \$313 for a one-way ticket. Laker offered New York-London service for \$115. The I.A.T.A. members, including the airline defendants, saw Laker's Skytrain service as a threat to the entire I.A.T.A. system of maintaining high prices by airline agreement. The airline defendants agreed to a predatory scheme to destroy transatlantic charters and Laker's scheduled Skytrain service by offering, among other things, high-cost service at prices below the costs of those services. The I.A.T.A. members agreed which of them would offer below-cost services on the New York-London route. The airline defendants expected to experience short-term financial losses in carrying out this scheme, but intended to recoup these losses by raising prices after they had eliminated the competition of charter services and Laker's scheduled Skytrain service.

19. When their concerted predatory action failed to destroy or deter Laker, the airline defendants expanded the scope of their predatory scheme as described below. Laker nevertheless survived, expanded its scheduled operations, and showed profits until 1981, although its profits were lower than they would have been in a market free of predatory activity.

20. Despite the joint efforts by its competitors, Laker increased the number of routes on which it offered scheduled airline service between the United States and the United Kingdom. Even while Laker was applying for government permission to provide scheduled service between Los Angeles and London, Pan Am, T.W.A. and B.A. instituted below-cost fares on that route, seeking to prevent Laker's entry. After Laker began providing Los Angeles-London Skytrain service in 1978, Pan Am, T.W.A. and B.A. coordinated their fares, services and schedules so as to take as many passengers from Laker as possible. When Laker provided Skytrain service between Miami and London, Pan Am and B.A. agreed to offer below-cost services on that route. Pan Am, T.W.A. and B.A. acted in concert to target their below-cost services on Laker's routes.

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A 21. By 1981, Laker was operating nine scheduled nonstop U.S.-U.K. routes: New York-London, New York-Manchester, Los Angeles-London, Los Angeles-Manchester, Los Angeles-Prestwick (Scotland), Miami-London, Miami-Manchester, Miami-Prestwick, and Tampa-London. In 1981, Laker carried one out of every seven air passengers between the United States and the United Kingdom, and Laker's total North Atlantic passenger traffic ranked sixth out of the 43 airlines operating scheduled air services between North America and Europe.

B 22. Many passengers going to or from continental European countries such as Germany and Switzerland arranged to travel via London in order to use Laker's Skytrain service across the Atlantic. European I.A.T.A. members, including defendants Lufthansa and Swissair, found that Laker was attracting many passengers travelling between continental Europe and the United States, thereby competing with those airlines and putting downward pressure on their fares.

C 23. In addition to its North Atlantic routes, by 1981 Laker held licenses from the United Kingdom government for a transpacific route from Los Angeles and San Francisco to Hong Kong via Honolulu and Tokyo; a London-Hong Kong route via Sharjah, United Arab Emirates; and European routes between London and Berlin and between London and Zurich. Laker was actively pursuing authority from the other governments involved and planning the commencement of world-wide low-fare service. Laker also had instituted legal proceedings to declare unlawful under the Treaty of Rome the denial of Laker's application to provide low-fare Skytrain services throughout Europe. Laker's successful low-fare operations and its efforts to expand the scope and availability of those operations were a unique competitive threat to the airline defendants.

D 24. In 1981, the precipitous drop in the U.S. dollar value of the pound sterling affected Laker's ability to pay its dollar debts. Already weakened by the airline defendants' concerted predatory attacks, Laker realized in May 1981 that it might be unable to meet its aircraft loan repayment requirements in January 1982 and explained the situation to its lenders. Laker made clear that it was prepared, if necessary, to terminate its business in an orderly manner so that no passengers would be inconvenienced, but sought refinancing of its obligations in order to continue in business.

E 25. At approximately the same time as Laker's financial problems became publicly known in the summer of 1981, Pan Am raised approximately \$800 million from the sale of assets. Without these large sales of assets, the company would have been in default of its own loan agreements. Although these extraordinary sales of assets temporarily provided Pan Am with a large amount of cash, it continued to suffer massive losses on its airline operations.

F 26. B.A. also suffered massive losses in 1980 and 1981, which were financed by the British government. B.A.'s auditors said later, in October 1982, that the company could be considered a "going concern" only because the British government guaranteed \$1.7 billion of its debt. B.A. also sold significant assets to raise cash in 1980 and 1981. T.W.A. was also losing large sums on its U.S.-U.K. operations in 1981. All the airline defendants stated in public that they needed to increase their fares, particularly their lowest fares.

G 27. The airline defendants realized that Laker's financial condition presented them with an opportunity finally to eliminate Laker's price competition and to recoup their losses by raising their fares in 1982 through an I.A.T.A. agreement. In the fall of 1981, Pan Am, T.W.A. and B.A. threatened to drop the prices for their higher-cost, more attractive services to the same level as Laker's Skytrain service fares, thereby causing Laker enormous losses, unless Laker abandoned its policy of price competition. Laker refused, and insisted that its less valuable services required lower fares in order for Laker to compete. In October 1981, Pan Am, T.W.A. and B.A. agreed to and did carry out their threat to offer their more attractive, higher-cost services at Laker's prices on all of Laker's routes served by those defendants.

H 28. As part of their predatory scheme, Pan Am, T.W.A. and B.A. agreed to pay extraordinarily high secret commissions to travel agents, at great loss, to divert potential Laker passengers. These defendants also pressured large Laker

clients to switch their business from Laker, and spread false rumors that Laker was going bankrupt. A

29. The aforesaid predatory conduct was successful and prevented Laker from offering the public a price differential. To the detriment of Laker and the public, Laker was forced to charge the prices that its I.A.T.A. competitors agreed among themselves to charge.

30. In the meantime, Laker had reached an agreement with its lenders for financial support which assured Laker's survival notwithstanding the losses Laker suffered due to the predatory conduct of its I.A.T.A. competitors. By Christmas Eve, 1981, Laker was advised that all of the lenders had agreed to provide the necessary finance. The lender defendants authorized a public announcement to this effect and authorized Laker to state publicly that Laker's long-term financial future had been assured. B

31. When they learned of the financing agreement, defendants Lufthansa, Swissair and B.C., knowing of the predatory scheme described above, pressured Laker's lenders to further the objectives of the scheme by denying Laker the necessary finance and forcing Laker out of business. As late as February 3, 1982, the lender defendants continued to mislead Laker into believing that the financing was being provided as agreed, even though the lender defendants had joined with the airline defendants to withhold such financing and thereby destroy Laker. C

32. Laker relied on the lender defendants' misrepresentations that its financing was assured and therefore did not seek other sources of finance which were available to it. On February 4-5, 1982, the lender defendants, without warning, forced Laker to cease trading. D

OFFENSES

Count 1

Combination and conspiracy in restraint of trade and to monopolize

33. Laker repeats and realleges paragraphs 1 through 32 of this complaint.

34. This count is instituted against all defendants named in this complaint. Beginning at a time presently unknown to Laker, but at least as early as 1974 and continuing thereafter at least until February 5, 1982, defendants and co-conspirators have engaged in an unlawful combination and conspiracy unreasonably to restrain and to monopolize United States foreign trade and commerce in air transportation between the United States and the United Kingdom and other European countries in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. F

35. The unlawful conduct of the defendants and their co-conspirators had direct, substantial and foreseeable effects on United States foreign trade and commerce, and on trade and commerce which is not trade or commerce with foreign nations, on import trade or import commerce with foreign nations, and on export trade and export commerce with foreign nations of persons engaged in such trade or commerce in the United States.

36. Pursuant to this unlawful combination and conspiracy each defendant has taken a number of actions, including the actions set forth in this complaint, with the intent to further the purpose and objective of the combination and conspiracy, which was to eliminate Laker as an independent competitive force in trade and commerce between the United States and foreign nations. G

37. Various other persons, firms and corporations have participated as co-conspirators with the defendants in the offenses charged in this count and have performed acts in furtherance of those offenses. These co-conspirators include: C. Edward Acker, chairman and chief executive officer of defendant Pan Am; Herbert Culmann, director and former chairman of defendant Lufthansa; Gerald C. Draper, director and former commercial director of defendant B.A.; Sandford N. McDonnell, chairman and chief executive officer of defendant M.D.C.; James T. McMillan, president of defendant M.D.F.C.; David E. Sedgewick, senior vice president—planning of defendant M.D.F.C.; Robert Staubli, president of defendant Swissair; and William Waltrip, formerly president and chief operating officer of defendant Pan Am, now president, Purolator Courier Corporation. H

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A 38. By the actions alleged in this complaint, and by other actions, each and every defendant named herein, acting in concert with some or all of the other defendants and co-conspirators and others, directly or indirectly violated or participated in the violation of, or aided and abetted the violation of, sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

39. As a direct result of the defendants' unlawful conduct, Laker has suffered substantial injury to its business and property.

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Count 2

Intentional tort

40. Laker repeats and realleges paragraphs 1 through 32 of this complaint.

41. This count is instituted against all defendants named in this complaint. Without justification, the defendants have intentionally and unlawfully caused injury to Laker.

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42. As a direct result of defendants' unlawful and tortious acts, Laker has suffered substantial injury to its business and property.

PRAYER FOR RELIEF

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43. Because of defendants' unlawful conduct as alleged in this complaint, Laker demands judgment on each count and prays: a. Under count one, for judgment against the defendants, jointly and severally, for the injury to Laker's business and property, in such amount as shall be determined after trial, now estimated to be in excess of \$350 million, to be trebled as provided by law; b. Under count two, for compensatory damages from the defendants, jointly and severally, in an amount in excess of \$350 million, plus punitive damages of \$700 million; c. Under both causes of action, for interest, costs, and attorneys' fees as provided by law; and d. For such other and further relief as the court decides is just and proper.

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44. Plaintiff demands a jury trial.

November 24, 1982

Reporter's note. The Appendix to the judgment of the court also set out the "very extensive request for production of documents and . . . for answers to interrogatories of a far-reaching nature" referred to in the judgment (ante, p. 579A).

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[COURT OF APPEAL]

MOHAMMED-HOLGATE v. DUKE

1983 July 12, 13

Sir John Arnold P. and Latey J.

Arrest—Without warrant—Validity—Suspect arrested for questioning—Reasonable grounds for suspicion of commission of offence—Object of arrest to induce confession—No improper pressure applied—Whether proper exercise of power of arrest—Criminal Law Act 1967 (c.58), s.2(4)

A police constable, exercising his powers under section 2(4) of the Criminal Law Act 1967,¹ arrested the plaintiff on suspicion that she had stolen jewellery and took her to the police station where she was questioned. She was not charged with an offence and was released from detention within six hours of her arrest. The plaintiff brought an action against the chief constable for damages for wrongful arrest. The judge found that the constable had had reasonable grounds to suspect the plaintiff of having committed an arrestable offence and that the period of detention was not excessive but, because the constable had decided not to interview her under caution but to subject her to the greater pressure of arrest and detention so as to induce a confession, there had been a wrongful exercise of the power of arrest. The plaintiff was awarded £1,000 damages.

On appeal by the chief constable:—

Held, allowing the appeal, that one of the purposes for the exercise of the power of arrest of a suspect under section 2(4) of the Act was to dispel or confirm the reasonable suspicion that the suspect had committed an offence by questioning, and seeking the assistance of, the suspect for the purpose of confirming or developing the available evidence; that, although the constable had considered that he would not obtain a confession without arresting and detaining the plaintiff, there was no suggestion that the constable exercised his power of arrest other than bona fide and the fact that he had had an alternative means of investigation did not render the arrest unlawful (post, pp. 601G—602c, F—603A, H—604E).

Dictum of Lord Devlin in *Hussien v. Chong Fook Kam* [1970] A.C. 942, 948, P.C. considered.

The following cases are referred to in the judgments:

Dumbell v. Roberts [1944] 1 All E.R. 326, C.A.

Hussien v. Chong Fook Kam [1970] A.C. 942; [1970] 2 W.L.R. 441; [1969] 3 All E.R. 1626, P.C.

The following additional cases were cited in argument:

Davis v. Russell (1829) 5 Bing. 354.

Walters v. W.H. Smith & Son Ltd. [1914] 1 K.B. 595.

APPEAL from Judge Hampden Inskip Q.C. sitting at Portsmouth County Court.

The plaintiff, Mariam Mohammed-Holgate, brought proceedings in the Portsmouth County Court in which she claimed damages from the defendant, John Duke, the Chief Constable of Hampshire, for, inter alia, false arrest and wrongful imprisonment. At the hearing on December 20,

¹ Criminal Law Act 1967, s.2: "(4) Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence."

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Mohammed-Holgate v. Duke (C.A.)

A 1982, the judge found that the constable had reasonable grounds to suspect the plaintiff of having committed an arrestable offence and that the period of detention was not excessive. He found that there had been a wrongful exercise of the power of arrest because the object was to induce the plaintiff to confess by depriving her of her liberty when it was open to the constable to question under caution. The plaintiff was awarded £1,000 damages.

B The chief constable appealed on the grounds that the judge had misdirected himself in law in that, having found as facts that the constable had reasonable grounds to suspect the plaintiff of having committed an arrestable offence, that the period in custody was not excessive and that the constable regarded his action in arresting the plaintiff as a proper exercise of the power of arrest conferred by section 2 of the Criminal Law Act 1967, the judge then held that it was an unnecessary and wrongful exercise of the power of arrest merely to exercise it for the purpose of conducting an interview with the plaintiff at the police station or, alternatively, the conclusion drawn by the judge as an inference from the facts that the exercise of the power of arrest was unnecessary was not a proper inference to draw.

C By a respondent's notice dated February 21, 1983, the plaintiff sought to support the judge's order and to cross appeal against the sum awarded on the additional grounds that the judge should have found on the evidence that the arresting officer had no reasonable grounds to suspect that the plaintiff had committed an arrestable offence and that the judge should have found on the evidence that the period in detention was in any event excessive. In judgments of July 12 and July 13, 1983, the court rejected both grounds of the plaintiff's cross-appeal.

E The case is reported solely on the question raised in the appeal of the chief constable of whether the arrest was lawful.

The facts are stated in the judgment of Sir John Arnold P.

Robert Beecroft for the chief constable.

Robin Belben for the plaintiff.

F SIR JOHN ARNOLD P. This appeal arises out of an arrest of the plaintiff, Mrs. Mohammed-Holgate, in May 1980. The arrest was carried out by Detective Constable Offin for reasons which date back to an incident which occurred in December 1979. On December 8, 1979, a Mrs. Stainer had had stolen from her accommodation a jewellery box containing some jewellery, and part of the stolen jewellery was subsequently sold to a jeweller and as a result of that sale the investigation, which had died away in the meantime, was re-opened.

G For various reasons, including the reason that the plaintiff had been present at the premises at the date of the theft and that her description was somewhat similar to that which had been given by the manager of the jeweller's shop, a state of things had been reached by the time of the arrest, as the judge in the county court found and as we have in a previous judgment in this case concurred, that the conditions of section 2(4) of the Criminal Law Act 1967 were satisfied, that is to say the constable, with reasonable cause, suspected that an arrestable offence had been committed and that he, with reasonable cause, suspected the plaintiff to be guilty of the offence. But the arrest is complained of as being unlawful because, as is alleged by the plaintiff and as is not disputed by the defendant, it is not enough to comply with the terms of section 2(4) of the Criminal Law Act

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1967. In addition to that it must be reasonable to exercise the power thus made available. That is not a matter which has been argued before us. It has been disposed of by assertion and acceptance.

The question that we have to decide, as was the question which the judge in the court below had to decide, is: was it reasonable to exercise the power in this case? The judge found that it was not for a perfectly plain and clearly stated reason, which he expressed in these terms:

“If, as I find here, the power of arrest was only exercised for the purpose of putting someone under greater pressure to confess than if interviewed under caution without being arrested, it is an unreasonable exercise of the power of arrest given by the statute.”

That was the reason and that was the sole reason advanced by the judge for his conclusion.

The matter of the motive or purpose had earlier been dealt with in slightly expanded terms, where the judge said:

“I am driven to the conclusion by the evidence of what happened or what failed to happen that the only reason why D.C. Offin decided to arrest the plaintiff rather than pursue his investigations which he could have done in the case of a woman of good character without arresting her and then interview her under caution was to subject her to the greater stress and pressure involved in arrest and deprivation of liberty in the belief that if she was going to confess she was more likely to do so in a state of arrest.”

Those then are the two passages, and the only two passages, in the judgment of the judge which deal with the purpose of the arrest of this plaintiff and the judge's reason for holding that arrest wrongful.

The practice of interrogating persons under arrest for the purpose of obtaining a statement while they are in custody is of course wholly familiar. It is something which is recognised as happening under the Judges' Rules, to which we have been referred. There is no doubt that it is a common practice. But what the plaintiff says is that, although that is common practice and, if properly conducted, entirely permissible practice once the person has been arrested, it is not by itself a legitimate cause of arrest or purpose of the exercise of the power of arrest otherwise available.

This proposition is advanced on two bases. One is that there must be present in the mind of the person who effects the arrest, if it is to be reasonably effected, a fear that the process of interrogation will be vitiated by the presence of one or other of the following circumstances: the destruction of evidence, interference with other potential witnesses, the warning of an accomplice, a repetition of the offence or the escape of the suspect. The other is that if there are other steps which the arresting constable could take for the furtherance of the investigation, then the constable should take those other steps first, unless it is demonstrated to be necessary or at least desirable that the other steps should not be taken first.

As to each of those matters, there is no authority at all to which we have been referred to sustain them. In a Privy Council case, *Hussien v. Chong Fook Kam* [1970] A.C. 942, Lord Devlin, giving the judgment of the committee, said, at p. 948:

“To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be

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Sir John Arnold P.

A considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar."

Then he went on to point out that there was no danger in a large measure of executive discretion because of other safeguards which were available in the form of granting bail and the necessity of deciding quickly whether to bring proceedings or to release. That by no possible canon of construction can be regarded as a concatenation intended to be exhaustive of the, as Lord Devlin calls them, many factors which have to be considered or of those factors which alone could justify the exercise of the power of arrest.

C The other matter to which we have been referred as bearing upon this aspect of the case are some observations which were made by the Royal Commission on Criminal Procedure in England and Wales in the report (Cmnd. 8092) which it produced in January 1981, from which paragraphs 3.65 and 3.66 have been read to us; read, I may say, by both sides without any debate as to their admissibility. They are describing at this point the existing powers of arrest. Paragraph 3.65 reads:

D "The ultimate purpose of arrest is to bring before a court for trial a person who commits a criminal offence or is reasonably suspected of so doing. But because arrest deprives the citizen of his liberty its use is to be restricted generally to offences that carry the penalty of imprisonment"—that is to say of course arrestable offences—"and to persons against whom the summons procedure will not be effective

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Paragraph 3.66 reads:

F "The period of detention upon arrest may be used for certain purposes, and the power of arrest is also related to these. Indeed the purposes for which the existing powers of arrest are used in practice can be put in the following terms. It may be used to prevent the suspect destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested. Where there is good reason to suspect a repetition of the offence, especially but not exclusively offences of violence, it may be used to stop such an occurrence. Finally, the criterion of having reasonable grounds for suspicion sufficient to justify arrest is not necessarily sufficient to justify a charge; hearsay evidence, for example, may be sufficient grounds for reasonable suspicion, but it is not sufficient for a person to be charged, since it will not be admissible as evidence at trial. Accordingly, the period of detention may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance."

H In my judgment that passage, where it lists the purposes for which the existing powers of arrest are used in practice, in the final two sentences which I have read is deliberately designed to include among those purposes the purpose of dispelling or confirming the reasonable suspicion which must antecede the arrest by questioning the suspect or seeking further material evidence. The penultimate sentence is used to introduce and to illustrate the necessity for that last conclusion. In my judgment paragraph 3.66 entirely assimilates to the purposes for which the period of detention

may be used those purposes for which the existing powers of arrest are used, and that, in my judgment, negatives the proposition that there is a distinction between those purposes which are legitimately furthered during the period of arrest and those which may be used for the purpose of justifying the exercise of the powers of arrest. Moreover, it is plain, in my judgment, from that paragraph that the concatenation of circumstances put forward by the plaintiff as being necessary for the exercise of the power of arrest are not exhaustive, and at any rate the purpose of questioning the suspect for the purpose of confirming or otherwise developing the available evidence is to be included in those purposes, and, in my judgment, that purpose is one which, if in truth the purpose in the mind of the arresting constable, and genuinely in the mind of the arresting constable, will, if the circumstances of section 2(4) of the Criminal Law Act 1967 are fulfilled, justify the arrest.

But it is suggested here that there were other circumstances which ought to have negated that state of things. It is absolutely correct to say that the constable thought that without a confession he would never have a charge which he could place before examining magistrates or a jury and that it was necessary if he was to prefer such a charge that he should obtain a confession. It is also true that he thought that the greater stress and pressure—and I quote from the judgment—involved in the arrest and deprivation of liberty made it more likely that the suspect would confess. Those are the two circumstances which are advanced as casting a doubt upon whether there was in the mind of the arresting constable a pure and proper and justifiable motive for this arrest.

It would follow, if the purpose of the constable had been to subject the suspect to improper questioning or improper pressure during the contemplated period which would follow the arrest which would be occupied by the questioning, that that would be an impure motive which could not be relied upon, but that is tantamount, in my judgment, to saying that the officer was not acting bona fide, and there is no suggestion of that. It would also, I think, be right that if the obtaining of a statement by the arresting constable in accordance with the intention that he had formed at the time of arrest would render, because of the manner of its obtaining as then contemplated, that statement inadmissible before a jury, it would again cast doubts sufficiently strong upon the bona fides of the officer to preclude him from relying upon that purpose as a proper purpose for the arrest. But in this case there is nothing of that sort at all, and in my judgment, again using the judge's language, the obtaining of a statement by means of the greater stress and pressure involved in arrest and deprivation of liberty would in no way by itself make that statement a statement which was improperly obtained or a statement which would be rejected at a criminal trial. In my judgment the purpose for which the officer exercised the power of arrest was a proper purpose.

As to the proposition that there were other things which he might have done, no doubt there were other things which he might have done first. He might have obtained a statement from her otherwise than under arrest to see how far he could get. He might have obtained a specimen of her handwriting and sent that off for forensic examination against a specimen of the writing of the person who had obtained the money by selling the stolen jewellery, which happened to exist in the case. All those things he might have done. He might have carried out finger print investigations if he had first obtained a print from the plaintiff. But the fact that there were other things which he might have done does not, in

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A my judgment, make that which he did do into an unreasonable exercise of the power of arrest if what he did do, namely to arrest, was within the range of reasonable choices available to him. In my judgment it was, and in my judgment this appeal ought to be allowed.

B LATEY J. I agree. Counsel have said, and rightly so, that this part of the appeal raises a question of some general importance, and in deference to their research and careful arguments I add some sentences. Under section 2(4) of the Criminal Law Act 1967 the exercise of the power of arrest is discretionary. The constable "may arrest without warrant." Was it a reasonable exercise of the discretionary power in this case for the purpose found by the judge in the passages of his judgment which Sir C John Arnold P. has read and which I need not repeat? It is surprisingly, and indeed perhaps significantly, bare of direct authority. The judge had to reach his decision without the help of direct authority, as do we. It seems that he did not have the benefit of having the report of the Royal Commission on Criminal Procedure (Comd. Paper 8092) brought to his attention. This records that once the pre-requisites exist to bring into being the power of arrest it is a long established and wide spread practice D to use it for the purpose of questioning the suspect under detention. Indeed, the last two sentences of paragraph 3.66 say:

E "Accordingly, the period of detention may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest."

F Mr. Beecroft in his address paid tribute to the way the judge heard this case and to the succinctness and clarity of his judgment and has criticised only his conclusion on this central question. For my part, I take the opportunity of echoing that tribute. Whether or not the judge would have reached the conclusion he did had his attention been drawn to the Royal Commission report recording this well established practice we cannot know. Parliament from time to time enacts laws concerning the role and powers of the police, but leaves a wide area often where it is for the courts to give such guidance as they can or think it proper to give. Where in the language of the statute Parliament has invested the police with an apparently unfettered discretion, as it has in section 2(4) of the Act of 1962, it behoves the courts, in my opinion, to be chary of imposing G fetters where Parliament has not, bearing in mind that Parliament has laid down certain pre-requisites which must exist before the power can be exercised, and those pre-requisites are themselves substantial safeguards against improper or capricious use of the power. It is the fact of course that an exercise of a discretionary power of arrest deprives the person arrested of his or her liberty. It also results in indignity and distress. H Parliament of course was well aware of that when it enacted the statute. The other side of the coin, which no doubt was the reason and purpose of the enactment, was that it provided the police with an important, indeed necessary, resource or means or weapon for upholding law and order and bringing criminals to justice. So there are two public interests to be balanced: the interest that the subject should not be deprived of his liberty and the interest that law and order should be upheld so that the persons and property of law-abiding citizens are protected.

Latey J.

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[1983]

Speaking for myself, I do not doubt that Parliament has left it to the courts to give guidance and, if it thinks right, to impose fetters on this particular power and its exercise, and therefore that it is within the proper jurisdiction of the court to do so. But where the power is exercised for a particular purpose, as that recorded in the Royal Commission's report, and has for a long period been so exercised without apparently any question or challenge until the instant case, I do not myself think that it would be right for the courts, at any rate below the level of the House of Lords, to say that it is being wrongly exercised and by inference has always been wrongly exercised.

The matter does not stop there. In the first place, it would be unreal and wrong for the courts to lose touch with contemporary circumstances. From time to time Parliament and the courts have deprived the police, no doubt rightly, of weapons which might otherwise be in their armoury, but this is surely a time when further deprivation should only be made for cogent reasons; if, that is to say, the interest of the law-abiding citizen—the victim or the potential victim—is to be given at least as much consideration as the liberty of the reasonably suspected person.

In the second place, as Mr. Beecroft submitted, the exercise of the power may well enure to the benefit of the suspect. It may well bring to an immediate or at any rate speedier end the investigation and the cloud of suspicion hanging over the suspect's head, as indeed it did in this case.

There is nothing, in my view, in Lord Devlin's speech in *Hussien v. Chong Fook Kam* [1970] A.C. 942 or the dicta of Scott L.J. in *Dumbell v. Roberts* [1944] 1 All E.R. 326 to vitiate the views I have ventured to express.

Accordingly, for those reasons and for those which Sir John Arnold P. has expressed, with all of which I wholly agree, the discretion to exercise this power was not wrongly exercised in this case, in my judgment, and I too would allow the appeal on this part of the case.

Appeal allowed.

No order for costs save legal aid taxation.

Leave to appeal refused.

Solicitors: *R. A. Leyland, Winchester; H. F. E. Mathews, Portsmouth.*

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[COURT OF APPEAL]

O'KELLY AND OTHERS v. TRUSTHOUSE FORTE P.L.C.

1983 June 20, 21;
July 20Sir John Donaldson M.R.,
Ackner and Fox L.JJ.

B

Employment—Contract of employment—Service of, or for services—Casual banqueting staff engaged on regular basis—Whether “employees” under “contract of employment” or independent contractors supplying services—Employment Protection (Consolidation) Act 1978 (c.44), ss. 55, 58, 77, 136 (1), 153 (1), Sch. 11, para. 21 (1)

C

Fact or Law—Employment—Contract of service or for services—Whether question of pure law—Tribunal’s findings of fact—Duty of appellate court—Employment Protection (Consolidation) Act 1978, s. 136 (1)

D

The banqueting department of an hotel company kept a list of some 100 casual catering staff who were known as “regulars” because they could be relied upon to offer their services regularly and in return were assured of preference in the allocation of available work. Some of the “regulars,” including the three applicants, had no other regular employment. The applicants complained to an industrial tribunal that the company had unfairly dismissed them from their employment. The tribunal directed the hearing of a preliminary issue as to whether or not the applicants were “employees” who had worked under a contract of employment within the meaning of section 153 (1) of the Employment Protection (Consolidation) Act 1978¹ or whether they were independent contractors who worked under a contract for services. The majority decision of the industrial tribunal was that, although the relationship of the company to the applicants had many of the characteristics of a contract of service, the one important ingredient of mutuality of obligation was missing and that the applicants were in business on their own account as independent contractors supplying services and were not “employees.” The appeal tribunal allowed the applicants’ appeal holding that each individual contract was a separate contract of employment and not a contract for services.

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F

On appeal by the company and cross-appeal by the applicants who contended that there was a continuing contractual obligation on the part of the company to offer work as and when it was available and for the applicants to make themselves available for such work:—

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Held, allowing the appeal and dismissing the cross-appeal, (1) that the question whether the applicants were “employees” under a “contract of employment” within section 153 (1) of the Employment Protection (Consolidation) Act 1978 was a question of law but that (*per* Sir John Donaldson M.R. and Fox L.J.) the answer involved questions of degree and fact which it was for the industrial tribunal to determine and the appeal tribunal was not entitled to interfere with the industrial tribunal’s decision unless the industrial tribunal had misdirected itself in law or its decision was one which no tribunal, properly directing itself on the relevant facts, could have reached (post, pp. 623A–C, 627G, 628C–D, 629H–630A, B–C, 632C–D).

H

Simmons v. Heath Laundry Co. [1910] 1 K.B. 543, C.A.; *Currie v. Inland Revenue Commissioners* [1921] 2 K.B. 332, C.A. and *Edwards v. Bairstow* [1956] A.C. 14, H.L.(E.) applied.

Young & Woods Ltd. v. West [1980] I.R.L.R. 201, C.A. considered.

¹ Employment Protection (Consolidation) Act 1978, s. 153 (1): see post, p. 610D–E.

Per Sir John Donaldson M.R. An appellate court must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene (post, p. 631D-E). The appeal tribunal has jurisdiction to consider any question of mixed fact and law until it has extracted a question of pure law (post, p. 631B-C).

Per Ackner L.J. Whether or not two parties have entered into a contract is a question of law and not a question of degree and what on the facts found is the true nature or quality of the legal relationship is equally a question of law (post, p. 623A-C).

(2) That the industrial tribunal had not misdirected itself or come to a conclusion which no reasonable tribunal, properly instructed, could have reached in deciding that there was no overall contract of employment and that the appeal tribunal had properly concluded that that decision must stand (post, pp. 626F-G, 630B-C, 632G).

(3) That (*per* Sir John Donaldson M.R. and Fox L.J.) the industrial tribunal's conclusion that the applicants were in business on their own account and were not employees who worked under a contract of employment was inconsistent with the contention that there was a series of separate individual contracts of employment and was good ground for holding that the individual contracts were contracts for services (post, pp. 630F-H, 633E-G).

Per Sir John Donaldson M.R. If it is an open question how the industrial tribunal would have decided the matter the appeal tribunal can only remit the case for further consideration. The appeal tribunal usurped the function of the industrial tribunal in deciding that there was a series of ad hoc contracts of employment (post, p. 634B, D-E).

Per Ackner L.J. The appeal tribunal, having allowed the individual contract point to be raised, should have remitted it to the industrial tribunal to consider whether such individual contracts were contracts of service or for services and also whether each such contract was discharged by performance at the conclusion of the work involved in the session and whether in such circumstances there was a "dismissal" within the meaning of section 55 of the Act of 1978. The "single or successive contract" issue should be remitted to the industrial tribunal (post, p. 627C-D).

Decision of the Employment Appeal Tribunal reversed.

The following cases are referred to in the judgments:

Addison v. London Philharmonic Orchestra Ltd. [1981] I.C.R. 261, E.A.T.
Ahmet v. Trusthouse Forte Catering Ltd. (unreported), January 13, 1983, E.A.T.

Airfix Footwear Ltd. v. Cope [1978] I.C.R. 1210, C.A.

Construction Industry Training Board v. Labour Force Ltd. [1970] 3 All E.R. 220, D.C.

Currie v. Inland Revenue Commissioners [1921] 2 K.B. 332, C.A.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.).

Ferguson v. John Dawson & Partners (Contractors) Ltd. [1976] 1 W.L.R. 1213; [1976] 3 All E.R. 817, C.A.

Global Plant Ltd. v. Secretary of State for Social Services [1972] 1 Q.B. 139; [1971] 3 W.L.R. 269; [1971] 3 All E.R. 385.

Massey v. Crown Life Insurance Co. [1978] 1 W.L.R. 676; [1978] I.C.R. 590; [1978] 2 All E.R. 576, C.A.

Melon v. Hector Powe Ltd. [1981] I.C.R. 43; [1981] 1 All E.R. 313, H.L.(Sc.).

Morren v. Swinton and Pendlebury Borough Council [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349, D.C.

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- A** *Nethermere (St. Neots) Ltd. v. Gardiner* [1983] I.C.R. 319, E.A.T.
Percival Ltd. v. London County Council Asylums and Mental Deficiency Committee (1918) 87 L.J.K.B. 677.
Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. [1982] A.C. 724; [1981] 3 W.L.R. 292; [1981] 2 All E.R. 1030, H.L.(E.).
Ready Mixed Concrete (South East) Ltd. v. Ministry of Pensions and National Insurance [1968] 2 Q.B. 497; [1968] 2 W.L.R. 775; [1968] 1 All E.R. 433.
- B** *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543, C.A.
Union of Construction, Allied Trades and Technicians v. Brain [1981] I.C.R. 542, C.A.
Wiltshire County Council v. National Association of Teachers in Further and Higher Education [1980] I.C.R. 455, C.A.
Woods v. W. M. Car Services (Peterborough) Ltd. [1982] I.C.R. 693, C.A.
- C** *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201, C.A.

The following additional cases were cited in argument:

- Challinor v. Taylor* [1972] I.C.R. 129, N.I.R.C.
Coates v. Modern Methods & Materials Ltd. [1983] Q.B. 192; [1982] 3 W.L.R. 764; [1982] I.C.R. 763, C.A.
Devonald v. Rosser & Sons [1906] 2 K.B. 728, C.A.
- D** *Edwards v. Skyways Ltd.* [1964] 1 W.L.R. 349; [1964] 1 All E.R. 494.
Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173; [1969] 2 W.L.R. 1; [1968] 3 All E.R. 732.
Martin v. MBS Fastenings (Glynwed) Distribution Ltd. [1983] I.R.L.R. 198, C.A.
National Coal Board v. Galley [1958] 1 W.L.R. 16; [1958] 1 All E.R. 91 C.A.
Pedersen v. Camden London Borough Council (Note) [1981] I.C.R. 674, C.A.
- E** *Puttick v. John Wright & Sons (Blackwall) Ltd.* [1972] I.C.R. 457, N.I.R.C.
Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen (trading as H.E. Hansen-Tangen) [1976] 1 W.L.R. 989; [1976] 3 All E.R. 570, H.L.(E.).
Retarded Children's Aid Society Ltd. v. Day [1978] 1 W.L.R. 763; [1978] I.C.R. 437, C.A.

F **APPEAL from the Employment Appeal Tribunal.**

The applicants, Mr. H. O'Kelly, Mr. T. M. Pearman and Mr. P. Florent, applied to an industrial tribunal (Mr. G. E. Hegg, Mrs. S. E. Fisher and Mr. P. O'Connell) for interim relief under section 77 of the Employment Protection (Consolidation) Act 1978, as amended by the Employment Act 1982. Their complaint was that by letter of February 26, 1983, the respondent company, Trusthouse Forte P.L.C. (trading as Grosvenor House), unfairly dismissed them from their employment at Grosvenor House Hotel, Park Lane, London, W.1. The majority decision of the tribunal on March 31 and April 11, 1983, was that the applicants were not qualified for interim relief because they were not employees who worked under a contract of employment.

G On May 11, 1983, the Employment Appeal Tribunal (Browne-Wilkinson J., Mr. J. D. Anderson and Mrs. M. L. Boyle) allowed the applicants' appeal and gave leave to the company to appeal to the Court of Appeal.

H The company appealed on the grounds that the appeal tribunal (1) wrongly decided to consider for themselves whether the applicants were engaged under separate contracts of service for each engagement worked at the Grosvenor House Hotel ("the individual contracts of service" point); (2) ought not to have considered the "individual contracts" point

when (i) by their originating applications the applicants each made an allegation of dismissal by letter of February 26, 1983, which was irreconcilable with the individual contracts point, under which "dismissal" occurred, if at all, on the ending of any particular engagement; (ii) the applicants had advanced no submissions before the industrial tribunal in support of the individual contracts point; (iii) the applicants advanced no submissions before the appeal tribunal in support of the individual contracts point, but simply stated that it was open to the appeal tribunal (contrary to the primary case of the applicants) to hold that individual contracts existed; (3) accordingly, the appeal tribunal ought either to have refused to hold that the "individual contracts" were contracts of employment or ought to have remitted the matter to the industrial tribunal for their decisions on that issue; (4) if it was proper for them to consider the individual contracts point, they wrongly concluded that those contracts were contracts of employment; (5) wrongly held that there was no evidence before the industrial tribunal which justified the findings at paragraph 23 (q) and (r) of the decision (post, p. 615c); (i) as to (q), there was evidence before the industrial tribunal that the applicants were aware of their status as "regular casuals" and of the custom and practice hereinafter referred to and sought to change their status to that of employees; the industrial tribunal were entitled to conclude that that amounted to an awareness of their status as casual workers properly so-called, i.e. that they were not employees; (ii) As to (r), there was evidence before the industrial tribunal of the "custom and practice" of the industry and of the factual background against which the applicants worked at the Grosvenor House Hotel; the industrial tribunal were entitled therefore to conclude that there was a recognised custom and practice which could be taken into account in determining whether or not a contract was a contract of employment; (6) in the light of the position legitimately found by the industrial tribunal as to the parties' intentions and as to the recognised custom and practice of the industry, they ought to have concluded that the "individual contracts" were not contracts of employment; (7) further and in any event, they failed to give sufficient weight to the fact that there was no continuity in the contractual relationship between the applicants and the company, and wrongly took into account the evidence of the applicants that they worked only for the company in practice; the lack of continuity was, in the circumstances of the case, fatal to the contention that the individual contracts were contracts of employment; (8) the appeal tribunal were not entitled to regard the rota operated by the company as a factor which distinguished the nature of the contracts of regular casuals from the nature of the contracts of casual casuals, in particular because the industrial tribunal found that the "assurance" of regular work given to regular casuals was not contractual.

By a respondents' notice the applicants gave notice of intention upon the hearing of the appeal to contend that the contracts of service correctly found by the appeal tribunal to exist were continuous and not intermittent contracts. By cross-appeal the applicants sought an order that there was a continuing contractual obligation on the part of the company to offer work as and when it was available and on the part of the applicants to make themselves available for such work on the grounds that the appeal tribunal wrongly held that on the facts found there was no continuous mutuality of obligation and ought to have held (a) that economic forces did not negative but supported a contractual obligation and/or (b) that

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A the relationship of the parties was only or best explicable as one of continuing mutual obligation.

The facts are stated in the judgment of Ackner L.J.

Alexander Irvine Q.C. and *Timothy Charlton* for the company.
Stephen Sedley Q.C. for the applicants.

B

Cur. adv. vult.

July 20. The following judgments were handed down.

ACKNER L.J. At the Grosvenor House Hotel, the company Trusthouse Forte P.L.C. carry on two distinct operations. They operate an hotel and a restaurant business which is open to the public, and by reason of the regular and continuous nature of that business the staff engaged are all employees working under contracts of employment. The company also carry on the business of hiring out rooms for private functions for which they provide the catering and other services. This part of the business is undertaken by the banqueting department. Because of the fluctuating and seasonal nature of this trade there are only 34 permanent staff, including the banqueting staff manager, Mr. Hourigan, the bar manager, Mr. Mardel, and the managerial and supervisory staff and the head waiters. All the other staff in the department are known as casual staff and they are paid at a set rate for the work actually performed.

Because of the large number of casual staff required during the busy season and the difficulty of finding staff in sufficient numbers during the slack season Mr. Hourigan maintains a list of some 44 wine butlers and 60 food service waiters and waitresses. They are known as "regulars" and are rostered in preference to other casual staff, numbering between 200 and 300, who work less regularly and are employed for fewer functions. The "regulars" are members of staff who can be relied upon by the company to offer their services regularly and, in return, have the assurance of preference in the allocation of any available work. They receive exactly the same rate of remuneration as other casuals, but have the ability to earn more money by being offered more frequent engagements, and there is more regularity in their earnings. "Regulars" are offered any available engagement during the slack season. Because of the extent of the work they are offered they may work longer hours than the permanent staff working a regular 40 hour week. Because of the extent to which they make their services available to the company some "regulars," including the applicants, have no other regular employment.

The company's practice of staffing banquets and other functions with workers designated as casual staff is widespread throughout the hotel and catering industry in London, although there may be individual variations in rates and conditions. The staff are considered by the employers to be casual workers and not employees engaged under a contract of employment. The separate position of casual workers is recognised by the Wages Council and in Appendix 2 of the current Wages Council Order (LR (65) issued by order of the Wages Council October 8, 1982) a "casual worker" is defined as meaning: "A worker who undertakes engagements on either an hourly or day to day basis and has the right to choose, without penalty, whether or not to come to work."

The applicants are members and stewards of the Hotel Catering Workers Union. They have made an application to an industrial tribunal

for interim relief under section 77 of the Employment Protection (Consolidation) Act 1978, as amended by the Employment Act 1982, section 8, Schedule 3, para. 24 ("the Act"). By their letter of March 9, 1983 (following a letter by the company to each of the applicants of February 26, 1983, which stated that it was unlikely that their services would be needed again) they complained that the company unfairly dismissed them from their employment at the Grosvenor House Hotel, and that their dismissal was to be regarded as unfair by virtue of section 58 of the Act of 1978, that is to say, they were dismissed for an inadmissible reason, the alleged reason for the dismissal being that they were members of a trade union and had taken part in its activities. The industrial tribunal directed the hearing of a preliminary issue, namely, whether or not the applicants were "employees" who worked under a contract of employment within the meaning of section 153 (1) of the Act, or whether they were independent contractors who worked under a contract for services. If the applicants were not "employees" of the company it followed that their complaint of unfair dismissal and their application for interim relief must necessarily fail. After a hearing which lasted some two days the industrial tribunal held that the applicants were not "employees." The company appealed to the Employment Appeal Tribunal, and after a hearing which lasted some three days it allowed the appeal, but gave leave to appeal to this court.

Section 153 (1) of the Act defines "employment" as being "employment under a contract of employment." It defines "employee" as meaning "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." It defines "contract of employment" as meaning "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing."

This appeal therefore raises the familiar problem: were the applicants working under a contract *of service* or under a contract *for services*?

As the appeal tribunal pointed out, just because a person is an "employee" within the meaning of the Act, he does not automatically enjoy all the rights and protection accorded by the Act. For most purposes an "employee" does not enjoy such protection unless he has a period of qualifying continuous employment with the employer against whom he brings his case, the most common example of which is the requirement that an employee shall have 52 weeks of continuous employment with that employer before becoming entitled to bring a claim for unfair dismissal. The period of continuous employment is calculated in accordance with the provisions of Schedule 13 to the Act which, amongst other things, normally requires the minimum number of hours employment in each week in order for that week to be counted. However, there is one exception to the requirement for a qualifying period of employment: Where the claim is based on dismissal for an inadmissible reason there is no minimum period before an employee may bring a claim for unfair dismissal: see section 64 (3). Dismissal because of taking part in trade union activities is an inadmissible reason: see section 58 (1) and (5).

So far as the applicants are concerned, Mr. O'Kelly and Mr. Pearman were wine butlers, and Mr. Florent was a dispense barman. They were "regular" casuals in regard to whom the evidence established that in practice they worked virtually every week for hours varying in number from as little as three in some weeks up to as much as 57 in others. In the last year they each had only two weeks in which they did not work. Over

A this period of 52 weeks two had worked an average of 31 hours per week and one 42 hours per week.

I join in the tribute which the appeal tribunal paid to the industrial tribunal for the most careful way in which they investigated the facts and for the detailed grounds which they gave for their decision. They found:

B "The principles on which a casual worker is employed are simple. There is no obligation for the worker to offer his services and there is no obligation for the employer to provide work."

The accuracy of this proposition, in so far as it related to "regulars," was strongly contested before us.

C "If an engagement is undertaken the worker is paid at the appropriate hourly or sessional rate for the work performed. During the function the casual worker works under the direction and control of the employer as part of his organisation and the relationship ends automatically at the end of the function without the need of notice on either side. Many casual workers have other regular employment."

D The industrial tribunal conveniently set out a number of headings under which they considered the facts of the case, and it would be convenient if I now referred to these in summary form.

E *Engagement.* Mr. Hourigan has the responsibility of engaging staff for functions. He receives a list of functions for the following month and this is up-dated weekly on Thursday mornings. He prepares a list of wine service staff and a separate list of food service staff required for the following days. The lists are posted on Thursday evenings showing the names of the casual staff rostered for each function. Thus, the casual staff know what work, if any, is available for them for the week commencing on a Friday. During the slack period the lists are posted fortnightly. A similar roster of bar staff is prepared by Mr. Mardel.

F *Tax treatment and payment.* The Inland Revenue requires the company to deduct from the remuneration they pay to casual workers income tax under P.A.Y.E. and social security contributions and to account to the Inland Revenue for the money deducted. As a matter of necessary convenience the company ensure that any casual staff working regularly at the hotel are entered on the computer payroll and they are paid weekly, in arrear, on Thursdays like any weekly paid employees. The industrial tribunal accepted that the tax and social security contributions are deducted as a requirement imposed upon the company by the Inland Revenue and that this is not, of itself, indicative of the legal basis of the relationship between the company and the casual staff, for employment protection purposes.

H *Holiday pay.* Although casual workers were not assured of any regular work and received no sick pay and did not participate in the company pension scheme or enjoy any of the other fringe benefits accorded to their permanent staff, and they were not included in the annual pay review, casual workers had a holiday pay entitlement based on the number of full weeks worked during the preceding year. However, unlike the holiday pay entitlement of permanent staff, the payment was not made when they took their holiday but during the last two years it was paid to them at the commencement of the new banqueting season in September. The industrial tribunal accepted that it was in reality a discretionary incentive payment to workers who were prepared to continue offering their services during the new season.

Disciplinary and grievance procedures. The company adapted their existing disciplinary and appeal procedure and recognised a formal grievance procedure for their casual staff. The industrial tribunal did not find that this was tantamount to recognising that the casual worker was an employee. They were merely using a fair procedure appropriate to a reasonable management and it said nothing about the underlying nature of the relationship.

Incorporation in the organisation. Casual workers in the banqueting department were supplied with jackets, as is the practice for permanent employees, and they worked under the direction and control of the head waiters. As a dispense barman, Mr. Florent worked under the direction of Mr. Mardel and the permanent dispense barman. As so much of the work in the department was performed by casual staff, the "regulars" were introduced into the consultation process. Towards the end of 1982 the company put forward the draft of a "Handbook for Casual Staff," in order to acquaint casual workers with general arrangements at the hotel and give information about conditions of engagement and procedures. The industrial tribunal were satisfied that the handbook, taken as a whole, referred only to casual workers and its provisions were consistent only with the casual worker status.

Enforcing attendance. This part of the findings of the industrial tribunal is of crucial importance and it is worth setting verbatim paragraphs 10 and 11 of their reasons:

"10. It is an essential feature of casual work that the worker has the right to choose, without penalty, whether or not to come to work. It is, however, necessary to the running of the banqueting business that the employer should be assured that a casual worker who has accepted an engagement does not withdraw at the last minute. As the employer has no obligation to offer future engagements he has the opportunity of exercising extremely effective control over attendance. The balance in the relationship exclusively favours the employer because a casual worker can be denied future engagements without reason given and without any form of inquiry or the right to be heard.

"11. For a banqueting business operated on the scale of Grosvenor House it would clearly be impracticable to recruit casual workers on a daily basis. The publication of weekly rosters was not merely of convenience to the casual workers but it was of importance to Mr. Hourigan to be assured in advance that all necessary staff were available and booked for each function. While the rostering of staff might be considered as an offer of engagement for each of the functions, which a worker could decline by asking that his name be removed from the roster prior to the function, it is only a short step for the employer to exercise his dominant position to require a casual worker to accept an engagement he would prefer to decline. It was the uncontested evidence on behalf of the applicants that difficulty was experienced in securing variations to the published roster, that Mr. Hourigan would raise objection to medical appointments, and that he was unsympathetic towards certified sickness. While [the company] could have declined to offer any future engagements, the penalty imposed upon 'regulars' for non-attendance or other infractions was to 'suspend' the worker from a limited number of future engagements—even if those engagements had been rostered and therefore impliedly accepted by the worker. We did not have the

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Ackner L.J.

A benefit of Mr. Hourigan's evidence, and the fact that he may have exceeded his authority does not in itself alter the contractual nature of the relationship, but we refer to the system as indicative of the fact that the freedom to choose whether or not to come to work, if Mr. Hourigan wanted the individual to work, was more apparent than real if that individual wished to continue working at the hotel. A 'regular' had to conform with the requirements of Mr. Hourigan both in respect of rostered engagements and future engagements or he would risk losing his assured livelihood. In the context of casual work for these or any other employees the expression 'without penalty' had little practical meaning when the consequences of failure to attend can so nearly imply an obligation to attend."

C *Acts exemplifying the understanding of the parties.* The industrial tribunal, though accepting that the understanding of the parties was only one of the relevant factors since they may well be mistaken and the relationship may alter as a result of developments, made the following findings. From the commencement of their engagement the applicants were treated by the company as casual staff upon terms and conditions entirely distinct from those accorded to the wine butlers and dispense barmen who were permanent employees and issued with written contracts of employment. The applicants were aware of the distinction and did not challenge it.

E It was not until October 1982 that Mr. O'Kelly and Mr. Pearman first raised the question of contracts of employment with Mr. Green. He asked that the casual wine butlers should be classified as full-time staff "because of the hours we done." Mr. O'Kelly said that he was seeking recognition as "permanent employees," but Mr. Green said, "No, we were casual." After that Mr. O'Kelly raised the matter with the union, it being his wish to obtain recognition of a change in the status of the employment in order to obtain the benefits accorded to permanent employees. The industrial tribunal referred to the correspondence from Miss P. A. Gudgin, the union's recruitment officer for London hotel and catering establishments, and concluded that Miss Gudgin was seeking an alteration in the prevailing legal status of casual workers involving them being issued with contracts of employment to which they would not otherwise be entitled.

F On March 9, 1983, Ms. Gill, legal officer for the union, wrote to the company's solicitors setting out four grounds upon which the applicants based their claim that they were employees:

G "1. They are regularly called upon to serve at banquets according to rota arrangements which are posted a week in advance. 2. They normally work over 16 hours a week. 3. They are paid weekly and tax and national insurance is deducted by your clients. 4. They receive holiday pay."

H It was thus, said the industrial tribunal, a claim based upon length and continuity of service and the manner of payment. It noted that despite discussing the basis of a claim for some two months it was not the applicants' assertion that there was a mutual obligation to provide and perform work. I observe that no alternative was then raised of employment by successive individual contracts of service.

Before the industrial tribunal the submission was made on behalf of the applicants that the "regulars" were employees because they were provided with regular and frequent work on the basis of weekly engage-

ments, with a build-up of holiday entitlement over the year. The contention was that there was no freedom to refuse work and accordingly there was an implied obligation on the part of the company to provide work. The industrial tribunal did not accept that it was necessary to imply an obligation to provide work in order to give business efficacy to the contract. They stated:

"the rights and obligations of casual workers and employers are well established by the custom and practice of the trade. In return for making their services available, the 'regulars' were assured of preferential treatment in the allocation of work. There was mutual advantage to the parties of which both were well aware, and it is not necessary to imply any terms—even if they could be expressed with precision—to give business sense to the arrangement . . . It would be impossible in an objective sense to draw a line between the time when an individual ceases being a casual worker disentitled to protection and a 'regular' who is to be considered an employee."

It is common ground that the industrial tribunal's approach was not open to criticism. It was in these terms:

"the tribunal should consider all aspects of the relationship, no single feature being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate to determine whether the person was carrying on business on his own account."

In making their assessment (paragraph 23), the industrial tribunal took into account the following factors which they considered consistent with a contract of employment:

"(a) The applicants provided their services in return for remuneration for work actually performed. They did not invest their own capital or stand to gain or lose from the commercial success of the functions organised by the banqueting department. (b) They performed their work under the direction and control of [the company]. (c) When the casual workers attended at functions they were part of [the company's] organisation and for the purpose of ensuring the smooth running of the business they were represented in the staff consultation process. (d) When working they were carrying on the business of [the company]. (e) Clothing and equipment were provided by [the company]. (f) The applicants were paid weekly in arrear and were paid under deduction of income tax and social security contributions. (g) Their work was organised on the basis of a weekly rota and they required permission to take time off from rostered duties. (h) There was a disciplinary and grievance procedure. (i) There was holiday pay or an incentive bonus calculated by reference to past service."

The following additional factors in the relationship the industrial tribunal considered were *not inconsistent* with the contract of employment:

"(j) The applicants were paid for work actually performed and did not receive a regular wage or retainer. The method of calculating entitlement to remuneration is not an essential aspect of the employment relationship. (k) Casual workers were not remunerated on the same basis as permanent employees and did not receive sick pay and were not included in [the company's] staff pension scheme and did not receive the fringe benefits accorded to established employees. There is, however, no objection to employers adopting different terms

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A and conditions of employment for different categories of employee (e.g., different terms for manual and managerial staff). (l) There were no regular or assured working hours. It is not a requirement of employment that there should be 'normal working hours': see Schedule 3 to the Act. (m) Casual workers were not provided with written particulars of employment. If it is established that casual workers are employees there is a statutory obligation to furnish written particulars."

B The following factors were considered by the industrial tribunal to be *inconsistent* with a contract of employment:

"(n) The engagement was terminable without notice on either side.

(o) The applicants had the right to decide whether or not to accept work, although whether or not it would be in their interest to exercise the right to refuse work is another matter. (p) [The company] had no obligation to provide any work. (q) During the subsistence of the relationship it was the parties' view that casual workers were independent contractors engaged under successive contracts for services. (r) It is the recognised custom and practice of the industry that casual workers are engaged under a contract for services."

D I shall return later to deal in some little detail with the third category, because this has given rise to a substantial degree of controversy.

The majority decision of the industrial tribunal (making the appropriate alterations for the description of the parties) was in these terms:

E "It is freely recognised that the relationship of the applicants to the company had many of the characteristics of a contract of service. In our view the one important ingredient which was missing was mutuality of obligation. The applicants entered into their relationship with the company in the expectation that they would be provided with any work which was currently available. It was a purely commercial transaction for the supply and purchase of services for specific events, because there was no obligation for the company to provide further work and no obligation for the applicants to offer their further services. By making themselves available on a regular basis the applicants had the prospect of enhanced profit for themselves. If they could obtain more regular and profitable work elsewhere they were free to take it. The applicants were in no different position than any independent contractor who offers his services for a particular purpose or event (e.g., a jobbing gardener or a day labourer) and it was by their choice that they made their services available to a single customer. Where the commodity offered is the simple supply of semi-skilled labour for a specific occasion, or series of occasions, it is not to be expected that there would be financial investment or participation in the profits or losses of the business.

G "We are, of course, aware that lack of mutuality of obligation is not, in itself, a decisive factor and that outworkers can, in appropriate circumstances, be employees working under a contract of employment, even though there is no obligation to provide work or perform it (*Airfix Footwear Ltd. v. Cope* [1978] I.C.R. 1210 and *Nethermere (St. Neots) Ltd. v. Gardiner* [1983] I.C.R. 319). Nevertheless, this was a factor on which we placed very considerable weight in making our assessment.

H "What is required of us in these proceedings is to determine the nature of the contractual relationship between the parties. This is not

the description which the parties give to their relationship but the nature of the engagement resulting from the terms (whether express or implied) of their mutual agreement. No detailed terms were discussed at the time of engagement because there was no need to discuss them. All parties were fully aware of the custom and practice of the industry that casual workers were not considered to be employees working under a contract of employment. They entered into and continued the relationship on that understanding until Mr. O'Kelly and the union attempted to negotiate an alteration in the fundamental basis of the relationship. As Lord Denning M.R. said in *Massey v. Crown Life Insurance Co.* [1978] I.C.R. 590, 595: 'It seems to me on the authorities that, when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation shall be. That was said by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, 513. He said that "If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention." So the way in which they draw up their agreement and express it may be a very important factor in defining what the true relation was between them. If they declare that he is self-employed, that may be decisive.'

"We conclude that when the parties embarked upon their engagement pursuant to the known custom and practice of the industry, it was indicative of their intention not to create an employment relationship."

The majority decision concluded by stating that custom and practice is not, in itself, decisive because each case must be determined on its individual facts and the evidence may indicate that other developments occurred to alter the status of the relationship. However, they considered that it would be irresponsible lightly to disregard the clear evidence of the intentions of the parties derived from an engagement under custom and practice, because this could have widespread and damaging repercussions throughout the whole industry. In the industrial tribunal's judgment the applicants were in business on their own account as independent contractors supplying services and were not qualified for interim relief because they were not employees who worked under a contract of employment.

Jurisdiction

Under the provisions of section 136 (1) of the Act an appeal lies to the appeal tribunal only on a "question of law." The proceedings before the appeal tribunal are thus by way of appeal and not by way of re-hearing. If the appeal tribunal is to allow the appeal it can only do so on the basis that the industrial tribunal were wrong in law.

The company contend that the appeal tribunal can only interfere with the decision of the industrial tribunal if it is shown that they have applied the wrong legal principles or that they have reached a conclusion on the facts which no reasonable tribunal applying the law could have reached. In Mr. Irvine's submission the limited question which the appeal tribunal was entitled to ask itself was: on the facts found by the industrial tribunal have they arrived at a conclusion which could be reasonably entertained?

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A In his submission the appeal tribunal is not entitled to ask itself whether, on the facts found, the industrial tribunal have reached the correct conclusion.

The issue before the industrial tribunal was whether the applicants worked for the company pursuant to a contract or contracts of service or a contract or contracts for services. Before dealing with the substance of the appeal the appeal tribunal dealt with the extent of its jurisdiction in the following terms:

B "As is well known, an appeal lies here on a question of law only. There is a pronounced difference of judicial view as to whether the question 'Is a contract a contract of employment or a contract for services?' is a mixed question of fact and law or a question of law. The older view was that it was at best a mixed question of fact and law. As a result, an appellate court with jurisdiction to correct errors of law only could not intervene in the decision of the lower court unless it was shown that the lower court, in deciding whether or not there was a contract of employment, had on the face of its reasons for its decision indicated that it had misdirected itself in law, or had reached a conclusion that was in a legal sense 'perverse.' This was the approach of the Court of Appeal in *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543, and of the Queen's Bench Division in *Construction Industry Training Board v. Labour Force Ltd.* [1973] 3 All E.R. 220 and *Global Plant Ltd. v. Secretary of State for Social Services* [1972] 1 Q.B. 139. It was also the approach of Browne L.J. in the Court of Appeal in *Ferguson v. John Dawson & Partners (Contractors) Ltd.* [1976] 1 W.L.R. 1213, 1230B, a case in which the appeal to the Court of Appeal lay on questions of fact as well as law. On the other side, in *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201, paragraph 15 Stephenson L.J., following the view which he understood Megaw L.J. to have expressed in *Ferguson's* case [1976] W.L.R. 1213, held that the question was one of pure law so that the appellate court can, and indeed must, reach its own view whether or not, on the findings of fact made by the lower court, the true legal analysis is that there was a contract of employment. Ackner L.J., whilst agreeing with the conclusion reached by Stephenson L.J., did not specifically deal with this point. Since the *Young & Woods* case [1980] I.R.L.R. 201 this appeal tribunal has often been confronted with a choice between these two conflicting views but in general has felt bound to follow the views of Stephenson L.J. in *Young & Woods*: see, e.g., *Addison v. London Philharmonic Orchestra Ltd.* [1981] I.C.R. 261, 270D; *Ahmet v. Trusthouse Forte Catering Ltd.* (unreported), January 13, 1983, and *Nethermere (St. Neots) Ltd. v. Gardiner* [1983] I.C.R. 319.

H "We do not propose to increase the learning on this matter. Very many cases come before this appeal tribunal on the point and it is in the highest degree desirable that the matter should be settled by the Court of Appeal one way or another at an early date. In the meantime it seems to us important to maintain a consistency of approach by this appeal tribunal. For that reason we, too, will approach the case on the basis laid down by Stephenson L.J., i.e., that the question is a question of law on which we must make up our own minds on the basis of the facts found by the industrial tribunal whether the

relationship between the parties is or is not a contract of A
employment."

I think it may be helpful to go straight to *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201. Mr. West was a skilled sheet metal worker and when he joined Young & Woods Ltd. he was offered alternative methods of payment: either he could become an employee in the ordinary way or he could be treated as a self-employed person. Mr. West chose to be B
treated as self-employed. No deductions were made from his pay for tax, he was responsible for his own national insurance contributions, he did not receive any holiday pay or sickness benefit from the company. This agreement was entered into with the knowledge of the Inland Revenue, who treated Mr. West for tax purposes as self-employed. When Mr. West's work was terminated he complained that he had been unfairly C
dismissed. Young & Woods Ltd. contended that he was not an employee under a contract of service, but he was self-employed under a contract for services. The industrial tribunal held that Mr. West was an employee as defined by the statute and not self-employed as he and the company had agreed that he was. The appeal tribunal, by a majority, dismissed the company's appeal. They held that the parties cannot, by a mere label, D
alter realities and that the realities were that Mr. West was no more than a skilled sheet metal worker working under a contract of service, just as other employees who were admittedly working under a contract of service. The minority view was that a deliberate choice had been made by Mr. West to be treated as self-employed in order that he might reap fiscal advantages. The reality was that he deliberately chose to be in the position of a self-employed person. On behalf of Young & Woods Ltd. it was E
argued in the Court of Appeal, *inter alia*, that the presumption created by Mr. West deliberately and openly choosing the relationship of self-employed, although rebuttable, was not easily rebutted and had not been rebutted by him. The complaint was made that the appeal tribunal did not pay any, or any adequate, regard to those facts which pointed away from a contract of service to a contract for services.

In the course of his judgment Stephenson L.J. commented on the F
observation made by Browne L.J. at the conclusion of his judgment in *Ferguson v. John Dawson & Partners (Contractors) Ltd.* [1976] 1 W.L.R. 1213, 1230, which was in these terms:

"When the right tests have been applied, the conclusion to be drawn is in my view a question of fact: see *Global Plant Ltd. v. Secretary of State for Social Services* [1972] 1 Q.B. 139, 152-155," a decision of G
the Divisional Court.

The *Ferguson* case [1976] 1 W.L.R. 1213 was one in which the majority of the Court of Appeal held that notwithstanding the label which the parties had put on their relationship to the effect that the plaintiff was to be, or was deemed to be "a self-employed labour only subcontractor," in H
reality the relationship was that of employer and employee.

Stephenson L.J. cited, at p. 205, the following excerpt from the judgment of MacKenna J. in the well-known case of *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, 512-513, which Megaw L.J., had clearly cited with approval in the *Ferguson* case [1976] 1 W.L.R. 1213, 1223:

"It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a

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A conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."

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That part of Stephenson L.J.'s judgment which the appeal tribunal rely upon in *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201, 205, says:

C "but I must respectfully express my dissent from what Browne L.J. said at the very conclusion of his judgment that the conclusion to be drawn from the facts as to the true legal relationship between the parties after the right tests have been applied is a question of fact. If by that he meant that it was a question on which this court cannot interfere, I prefer the view of Megaw L.J. that it is a question of law, in these cases of service or services as in the case of lease or licence, whether the true inference from the facts, the true construction or interpretation of a written agreement or of an agreement partly oral and partly written or of a wholly oral agreement, is a matter of law on which there is a right and wrong view, and if an industrial tribunal comes to what in the view of this court is a wrong view of the true nature of the agreement, it can and should find an error in law on the part of the industrial tribunal and reverse its decision. It cannot say that two views are possible of the true construction of this particular agreement on the facts which the industrial tribunal has found, and we cannot say that no reasonable tribunal could have come to the interpretation which the industrial tribunal has put upon the facts. It must make up its mind what the true interpretation of the facts and the true legal relationship created by the contract between the parties is."

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F Stephenson L.J. rejected the submission that the appeal tribunal had ignored or undervalued those facts which pointed away from a contract of service to a contract for services. He took the view that the pointers in the other direction were strong enough to satisfy the burden which no doubt rested on Mr. West to show that the label was a false label and that, though the mutual intention of the parties was undoubtedly to call the work which Mr. West was going to do for them services under a contract for services, nevertheless it was in reality service rendered under a contract of service. There was no such ambiguity in the relationship between Mr. West and the company as could make their declared intention as to what it should be decisive of it.

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H The extent of the appeal tribunal's jurisdiction was not called into question, as I recall the appeal, and in my judgment I did not deal with that subject in express terms. I did, however, at the outset of my judgment, express my agreement with the judgment of Stephenson L.J., and this was certainly intended to cover all that he said. Sir David Cairns began his judgment in these terms, at p. 208:

"I found this a difficult case. I was much impressed by Mr. Clifford's contention that the right conclusion from the facts found in paragraph 3 of the decision of the industrial tribunal was that there was in reality, and not merely as a matter of label, a contract for services

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rather than a contract of service. An alternative argument of Mr. Clifford which also seemed to me to have much force was that, taking account of the facts in paragraph 3 together with those in paragraph 5 of the decision indicating that Mr. West's working conditions were indistinguishable from those of the company's employees, the case was one of ambiguity where the label might be decisive."

It seems to me clear that Sir David Cairns was approaching the case not on the basis that the appeal court had merely to be satisfied that the industrial tribunal reached a decision which was reasonably open to them when properly applying the law to the facts. The appellate tribunal, be it the appeal tribunal or the Court of Appeal, had to be satisfied that the industrial tribunal had reached the correct decision. Towards the end of his judgment Sir David Cairns said, at p. 209: "on balance, the matters pointing to its being a contract of service do outweigh the matters pointing in the other direction; . . ."

It is clear that the approach of the Court of Appeal in *Young & Woods Ltd v. West* [1980] 1 R.L.R. 201 was that an error of law could be established if (a) the industrial tribunal took into account the wrong criteria in concluding that a contract was a contract of service or a contract for services and/or (b) if the tribunal, although applying the proper criteria, gave the wrong weight to one or more of the relevant factors.

Mr. Irvine, for the company, while accepting that it is a question of law whether or not the right criteria had been applied in answering the question "Contract of service or contract for services?" contends that it is entirely a matter of fact as to the weight given to the relevant criteria. I am bound to say that I find this submission difficult to accept. For example, it is well established that the power to direct and control the work of the employee is an important one, but only one of the factors to be considered. If an industrial tribunal decided that so much weight should be given to the control exercised or exercisable by the employer that it concluded the issue, I would have thought that the appeal tribunal would clearly be entitled itself to make the proper evaluation of that particular factor and reverse the decision.

The one case in the Court of Appeal upon which Mr. Irvine relies is that of *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543. The facts are quite simple. The appellant, a laundry girl, had her hand injured by an accident arising out of and in the course of her employment. She earned seven shillings a week at the laundry, but she also gave piano lessons to a man's children at his house at three shillings a week. She applied under the Workmen's Compensation Act 1906 that the latter sum might be taken into account under paragraph 2 (b) of Schedule 1 to the Act of 1906 in assessing her compensation. This paragraph provided that where a workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer his average weekly earnings should be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. "Workman" in section 13 of the Act meant

"any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing; . . ."

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A Liability was admitted on the footing of the wages of seven shillings per week paid by the respondent employers, but they denied that the case fell within paragraph 2 (b) of Schedule 1, contending successfully before the county court judge that the appellant had not entered into concurrent contracts of service.

B The issue which had to be decided was whether the appellant, as a teacher of music, came within the definition of "workmen" in the Act. In the judgment of Cozens-Hardy M.R., at p. 548:

"In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a 'workman.' This is not a question of law, but a question of fact, and, unless the arbitrator has misdirected himself, this court ought not to interfere."

C Fletcher Moulton L.J. said, at p. 549:

"These facts, although very simple, raise a question of law of considerable importance and difficulty. It turns substantially on the scope which is to be given to the phrase 'contract of service' in the Act."

D Towards the end of his judgment he said, at p. 550:

"The county court judge has decided that it was not a contract of service, and that therefore the earnings under it cannot be counted in assessing the compensation to be paid to the injured girl. This is a question of fact as to which we cannot interfere with his decision."

E Buckley L.J. began his judgment in these words, at p. 550:

"This appeal involves a decision trifling in pecuniary amount, but of the largest consequence in its possible application to other cases. The question in substance is as to the true meaning of the words 'contract of service' in the definition of a workman contained in section 13 of the Act."

F Buckley L.J. dealt in some little detail with examples of contracts under which services are rendered but which could not be described as contracts of service. He then said, at p. 553:

G "The question to be answered is, Was he employed as a workman or was he employed as a skilled adviser? I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is what was the man employed to do; was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such a manner as in his judgment was most likely to ensure success? Was his contract a contract of service within the meaning which an ordinary person would give to the words? Was it a contract under which he would be appropriately described as the servant of the employer? If the question which the county court judge puts to himself is that question, and his answer is given in view of those principles, then I think his finding is a finding of fact."

H I must confess that I was surprised at the terms of this decision, emanating, as it does, from so strong a Court of Appeal. I am relieved to

find that my diffident conclusion that the decision was wrong seems to me to be amply borne out by the two main speeches in the well-known case of *Edwards v. Bairstow* [1956] A.C. 14. The facts of the case are simple enough. In 1946 Mr. Bairstow and Mr. Harrison embarked on a joint venture involving the purchase of a complete spinning plant, agreeing between themselves not to hold it but to make a quick resale. After much negotiation and not until 1948 the plant was sold in several lots at a substantial profit. Expenses had been incurred, inter alia, for commission for help in effecting the sales, for insurance, renovation of the plant, etc. The general commissioners found that there was not an adventure in the nature of trade to justify an assessment to income tax under Case 1 of Schedule D to the Income Tax Act 1918. Viscount Simonds said, at pp. 30–31:

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“To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.”

Lord Radcliffe said, at p. 33:

“My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act ‘trade, manufacture, adventure or concern in the nature of trade’ and for that matter what constitute ‘profits or gains’ arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income.”

He then went on to observe that the law did not supply a precise definition of the word “trade,” much less did it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. He said:

“In effect it lays down the limits within which it would be permissible to say that a ‘trade’ as interpreted by section 237 of the Act does or does not exist.” He then continued: “But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the commissioners, special or general, to the effect that a trade does or does not exist is not ‘erroneous in point of law’; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some

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A relevant particular. All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact."

B It seems to me clear that in the *Heath Laundry* case [1910] 1 K.B. 543 it was a question of law what meaning had to be given to paragraph 2 (b) of Schedule 1 to the Workmen's Compensation Act 1906. Further, it must be axiomatic that whether or not A has entered into a contract with B, whether such contract be in writing or partly in writing and partly oral, or wholly oral, is a question of law involving the true interpretation of a document and/or the conduct of the parties. The facts cannot warrant a determination either way. It is not a question of degree, as in the case of the meaning of reasonableness (*Union of Construction, Allied Trades and Technicians v. Brain* [1981] I.C.R. 542) or whether a breach amounted to a repudiatory breach: see *Woods v. W.M. Car Services (Peterborough) Ltd.* [1982] I.C.R. 693. If then it is a question of law, whether on the correct interpretation of a document or whether on the true inference from the facts, parties have entered into a contract, then in my judgment it must be equally a question of law what on the facts found is the true nature or quality of that legal relationship. Given that A has entered into a contract with B to allow him to use his, A's, premises, I would have thought it axiomatic that whether such an agreement amounts to a lease or a licence is a question of law depending upon either a proper construction of the relevant document(s) and/or upon the true interpretation of the facts. If this be correct, then having established as a matter of law that there was a contract of employment between A and B, the quality or nature of that contract must equally be a question of law: Was it a contract of service or a contract for services, did B enter A's employment as an ordinary employee or was he employed by A as an independent contractor?

F I do not think that it is profitable to consider all the other cases of a lesser status than that of the *Heath Laundry* case [1910] 1 K.B. 543. I should perhaps refer to *Morren v. Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576, which involved a case stated by the Minister of Housing and Local Government under section 35 of the Local Government Superannuation Act 1937 for the opinion of the High Court on "any question of law." The dispute was between a local authority and a resident engineer whom they had appointed, and the issue was whether or not he came within the definition of "employee" in section 40 (1) of the Local Government Superannuation Act 1937. Lord Parker C.J., with whose judgment Marshall and Widgery JJ. agreed, said, at p. 583:

H "Mr. Threlfall has pressed upon the court that the question of what is the legal quality of the contract is a question of fact, and being a question of fact it is for the Minister and not for this court to determine, provided that there is any evidence which would justify the Minister in arriving at this conclusion. I am quite unable to accept that. The terms of the contract of course are fact, and to that extent the determination depends upon fact, but it seems to me perfectly clear that once the primary facts are found, then it is a pure question of law as to what is the reasonable inference based on the legal interpretation of the contract."

In *Global Plant Ltd. v. Secretary of Social Services* [1972] 1 Q.B. 139, 154, Lord Widgery C.J. declined to follow the view expressed by Lord

Parker C.J. distinguishing it on the ground that in that case the issue of contract of service or no had to be determined substantially from a written contract. I cannot accept the validity of this distinction.

It was objected by Mr. Irvine that if the appeal tribunal and the Court of Appeal were entitled to intervene where in their opinion the industrial tribunal had reached the wrong, although an arguable decision, this would lead to a multiplicity of litigation. In my judgment the contrary would be the case. Without the appeal tribunal being entitled to intervene where in its view the industrial tribunal has wrongly evaluated the weight of a relevant consideration(s) then it will be open to industrial tribunals to reach differing conclusions, so long as they are reasonably maintainable, on essentially the same facts. This is clearly highly undesirable, particularly where a substantial number of statutory provisions impose duties on an employer in relation to his employees, or confer benefits on employees, where they work under a contract of service, but not under a contract for services. Quite apart from the Act of 1978, there are the Transfer of Undertakings (Protection of Employment) Regulations 1981 dealing with rights and obligations relating to employers and employees on certain transfers or mergers of undertakings, business or parts of business, the Social Security Act 1975, which makes the employer responsible for contributions in respect of an employed "earner" and the Factories Acts. To permit conflicting decisions on the basis that a broad band exists where a tribunal or a court might be said reasonably entitled to decide the issue either way would seem most unsatisfactory.

At the appeal tribunal two attacks were mounted upon the decision of the industrial tribunal and I will seek to deal with these separately.

1. *The finding that there is no contractual obligation either on the company to offer work or on the applicants to do work once rostered*

It was submitted that the industrial tribunal, having found that in practice "regular" casuals on the list had priority in the offer of available work and a reciprocal practical requirement to do the work once rostered (because failure to do the work could lead to possible suspension and subsequent removal from the list) the right conclusion to draw was that there was a contractual obligation on the company to offer work to "regulars" in priority and on "regulars" to do the work when offered. It was therefore contended that factors (o) and (p) (ante, p. 615B-C) in paragraph 23 of the industrial tribunal's reasons should not have been placed in the balance against there being a contract of employment. On the contrary, "the one important ingredient" (namely, mutuality of obligation) which the industrial tribunal found to be missing was indeed present.

The appeal tribunal rejected this submission. It was, as found by the industrial tribunal, the commanding economic power of the company and the financial advantages to the applicants of conforming with the company's requirements which enabled the company to be able to rely upon the "regulars" accepting the work when it was rostered, and the "regulars", for their part, being able to rely upon receiving the priority to which I have referred. The same attack has been repeated before us. Mr. Sedley, for the applicants, complained that the industrial tribunal had begged the question in factors (o) and (p). I do not think this is right. The "assurance of preference in the allocation of any available work" which the "regulars" enjoyed was no more than a firm expectation in practice. It was not a contractual promise. The company, of course, expected the applicants to accept engagements rostered, but to suggest that a failure to accept

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A amounted to a breach of contract is going too far. They were entitled to choose whether or not to attend, and however irritating it might have been to the company if faced with a refusal it would have been quite unreal to conclude that either party would have thought it was breach of contract.

2. *The industrial tribunal erred in law in weighing in the balance factors (q) and (r)*

B Those factors: were (q) during the subsistence of the relationship it was the parties' view that the casual workers were independent contractors engaged under successive contracts for services. (r) It is the recognised custom and practice of the industry that casual workers are engaged under a contract for services.

C The appeal tribunal accepted this submission, concluding that the evidence fell far short of showing that the parties had any view of the nature of the existing contractual relationship between them, let alone a shared intentional desire to produce a particular legal relationship. Having accepted the finding by the industrial tribunal that there was no overall contractual obligation to roster any "regular" casuals and accordingly unless and until in each week a "regular" casual was rostered for a job there could be no contractual bond of any kind between the company and the employee, the applicants' success on this subsidiary issue was, however, considered to be irrelevant. Since I agree that the appeal tribunal were right to conclude that the applicants' success on the subsidiary point was of no practical consequence, there is no need to inquire into the correctness or otherwise of their accepting the applicants' submissions with regard to paragraphs (q) and (r). I add, however, these short observations since they may have some relevance to the next main heading. I accept Mr. Irvine's submission that there was ample evidence that the applicants and the company were aware of the factual distinctions between "regular" casuals and the employees of the company, but since there was no ambiguity as to the relationship it seems to me to be irrelevant to consider what was the legal result the parties intended to produce. Clearly the "custom and practice" found in (r) did not amount to a legal custom properly so described. However, the applicants' evidence was initially that the company were out of step with the industry. They said that they were the only employers who did not issue contracts of employment. This was subsequently withdrawn as a result of the company during an adjournment, calling evidence to establish that the practice which they adopted, referred to earlier in this judgment, was indeed the practice adopted generally throughout the trade. This was a factor, although not a particularly important factor, which the industrial tribunal were entitled to take into account as part of the background against which the parties regulated their relationship. The industrial tribunal were entitled to find as they did that from the commencement of their engagement the applicants were treated by the company as casual staff, upon terms and conditions entirely distinct from those accorded to the wine butlers and dispense barmen who were permanent employees and issued with written contracts of employment. The applicants were aware of the distinction and did not challenge it.

Separate contracts

It seems quite clear that at the hearing before the industrial tribunal the essence of the applicants' case was that there was one overall or continuous contract in relation to the "regulars." The chairman's notes

show that it was in his mind that certainly one alleged feature, the casual nature of the contract, might affect "whether we conclude a continuing or successive contract." The tribunal note of Mr. Irvine's closing speech again makes it clear that he was dealing with a case in which it had been maintained throughout that the nature of the relationship was not short-term but a continuous contract of service, which had been terminated by the company's letter of February 26, 1983. The reply by Ms. Gill, on behalf of the applicants, again made it clear that the employment was "continuous." However, it was accepted before the appeal tribunal, before whom Mr. Irvine did not appear, that the point had been made that each hiring was a separate contract and the nature of that contract was a contract of service. The point was not dealt with by the industrial tribunal, but the appeal tribunal felt at liberty to decide it. They took the view that the factors relied upon as indicating the existence of a contract of employment enumerated by the industrial tribunal was as much applicable to each individual contract as to an overall contract. They left out of account factors (j) to (m) which the industrial tribunal, rightly in the view of the appeal tribunal, regarded as neutral. When they came to the factors which in relation to the overall contract were treated as being inconsistent with a contract of employment, the lack of mutuality factor (o) and (p) did not apply to the individual contracts, since once a "regular" had turned up for the function then it was accepted there was a contractual obligation to allow the work to be done. They repeated their views in relation to factors (q) and (r), namely, that there was no evidence justifying a finding of any specific intention by the parties as to the nature of the legal relationship that they were creating. They therefore concluded that all those elements pointing against a contract of employment had disappeared, leaving in existence factors all of which point to there being a contract of employment. The appeal tribunal said:

"We find it difficult to see on what grounds it can be urged that each individual contract is a contract for services, given the degree of control, the nature of payment, the holiday pay, the background of recurrence, the de facto requirement to work for one person only."

However, the nature of payment, the holiday pay, the background of recurrence, and the de facto requirement to work for one person only, are not relevant to status when working pursuant to an individual contract—they are only relevant to the issue: "Was there an overall contract?", as to which the appeal tribunal have agreed with the decision of the industrial tribunal. The appeal tribunal concluded that each individual contract was a contract of employment and not a contract for services. Mr. Irvine, of course, accepts that there were individual contracts with the "regulars," as, indeed, with all casuels. He contends that they were not contracts of employment and that this issue was never properly before the industrial tribunal. He takes the further point that in each single contract the engagement was for a particular task and when that task was performed that engagement was discharged by performance. In such circumstances there was no dismissal and therefore no entitlement to invoke the Act: see *Wiltshire County Council v. National Association of Teachers in Further and Higher Education* [1980] I.C.R. 455, a decision of this court. There is, in fact, indeed a finding in this regard in paragraph 6 of the industrial tribunal's reasons for its decision:

"If an engagement is undertaken the worker is paid at the appropriate hourly or sessional rate for the work performed. During the function

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A the casual worker works under the direction and control of the employer as part of his organisation and the relationship ends automatically at the end of the function without the need of notice on either side."

It appears to have been accepted before the industrial tribunal that it cannot be determined in advance precisely how long each function will last, therefore how long the casual will be employed in relation to that function. He will, of course, stay until he has completed all the work for which he was engaged.

B The point whether the expiry of each such individual contract at the conclusion of each session constitutes a "dismissal" within the meaning of section 55 of the Act was not considered by the appeal tribunal and, indeed, was not investigated by the industrial tribunal. In my judgment the appeal tribunal, having allowed the individual contract point to be raised, should have remitted it to the industrial tribunal in order to consider not only whether such individual contracts were contracts of service or for services, but also whether, since Mr. Sedley wishes to contest the point, each such contract was discharged by performance at the conclusion of the work involved in the session and whether, in such circumstances, there was a "dismissal" within the meaning of section 55 of the Act.

D I would accordingly have allowed this appeal to the limited extent of ordering the remission to the industrial tribunal of what can be called, conveniently, "the single or successive contract issue," and dismissed the cross-appeal.

E Fox L.J. The preliminary issue with which we are concerned is whether the applicants were "employees" under a "contract of employment" within section 153 (1) of the Employment Protection (Consolidation) Act 1978 or whether they were independent contractors working under a contract for service.

F Under section 136 (1) of the Act an appeal lies to the appeal tribunal "on a question of law" arising from a decision of the industrial tribunal. The first question which we have to determine is the extent of the jurisdiction of the appeal tribunal to interfere with the decision of the industrial tribunal. It is said, by the applicants, that the question whether a contract is a contract of service or a contract for services is a question of law; that section 136 (1) permits an appeal on a question of law; and that accordingly the appeal tribunal were free to make up their own minds on that question of law upon the basis of the facts found by the industrial tribunal.

G I accept that the question whether a contract is a contract of service can, in a general sense, be called one of law. But I doubt if that is useful in relation to the present problem. It gives too general an answer to a more complex matter. Thus it is evident from the authorities that a question can, in a general sense, be characterised as one of law without excluding the possibility that, in the end, it resolves itself into a question of fact in individual cases. In *Currie v. Inland Revenue Commissioners* [1921] 2 K.B. 332, the question was whether a person was carrying on a "profession" within the meaning of exception (c) of section 39 of the Finance (No. 2) Act 1915. Lord Sterndale M.R. said, at pp. 335-336:

H "Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question; it must depend upon the

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circumstances with which the court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact; . . .”

In *Edwards v. Bairstow* [1956] A.C. 14 the question was whether a transaction was “an adventure or concern in the nature of trade” and so taxable under Case I of Schedule D of the Income Tax Act 1918. Lord Radcliffe said that was a question of law (at p. 33). But he also said that the law provided no precise definition of the word “trade” and that there were many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. All such cases could be described “as questions of degree and, therefore, as questions of fact.”

Simmons v. Heath Laundry Co. [1910] 1 K.B. 543 is a much earlier example of the principle stated in *Currie v. Inland Revenue Commissioners* [1921] 2 K.B. 332 and *Edwards v. Bairstow* [1956] A.C. 14. The case turned on the meaning of the term “contract of service” in the Workmen’s Compensation Act 1906; the problem related to part-time earnings of the applicant from giving piano lessons and giving accompaniments on the piano. The arbitrator decided that the earnings did not arise under contracts of service. That was held to be a question of fact for the arbitrator, and accordingly the Court of Appeal refused to interfere. Fletcher Moulton L.J. said, at p. 549:

“Some cases present no difficulty. For example, where the proprietor of a private boarding school engages ushers to teach the boys and to maintain discipline, it does not, in my opinion, admit of reasonable doubt that the contracts into which those ushers enter are ‘contracts of service’ within the Act. On the other hand it is in my mind equally clear that where a person goes to a music or singing master to take lessons it would be absurd to hold that the person giving the lessons is the servant of the person taking them in any sense of the word. The contract between them is a contract for services, but it is not a contract of service. Between these two extreme cases lie an infinite number of intermediate cases where the special circumstances point with greater or less force towards the one conclusion or the other, and in my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case.”

Woods v. W.M. Car Services (Peterborough) Ltd. [1982] I.C.R. 693, which was concerned with the question whether the employer had repudiated the contract of service, seems to me to follow the same principles as those stated by Lord Sterndale M.R., Fletcher Moulton L.J. and Lord Radcliffe.

Lord Denning M.R. said in *Woods v. W.M. Car Services (Peterborough) Ltd.* [1982] I.C.R. 693, 698:

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A "In each case, it depends on whether the misconduct amounted to a repudiatory breach . . . The circumstances are so infinitely various there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact—in this case the industrial tribunal."

B Now what is said on behalf of the applicants in the present case is this. It is accepted that in *Woods v. W.M. Car Services (Peterborough) Ltd.*, for example, the nature of the issue before the court was such that there was a grey area, or a band of uncertainty, where one could not say that it would be wrong for the tribunal to decide the case one way or the other. The confines of the law were imprecise and, within the grey area, it was a matter of degree in individual cases whether the case was within the statutory provision or not. That, however, is not, so it is said, the position here. There can only be one correct answer to the question whether a contract of service exists. Reliance is placed upon the decision of this court in *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201 and, in particular, the observations of Stephenson L.J. at p. 205.

C I do not feel able to accept that argument. The issue seems to me to be no more susceptible of the analysis that there is a right and a wrong answer to be determined as a matter of pure law than was the issue in the *Heath Laundry* case [1910] 1 K.B. 543 or *Currie v. Inland Revenue Commissioners* [1921] 2 K.B. 332 or *Woods v. W.M. Car Services (Peterborough) Ltd.* [1982] I.C.R. 693. The precise quality to be attributed to various individual facts is so much a matter of degree that it is unrealistic to regard the issue as attracting a clear "legal" answer.

D I do not think that the *Heath Laundry* case [1910] 1 K.B. 543 was wrongly decided. It seems to me to be consistent with the principles applied by the Court of Appeal in *Currie v. Inland Revenue Commissioners* [1921] 2 K.B. 332 and the House of Lords in *Edwards v. Bairstow* [1956] A.C. 14, and if there be any conflict between it and *Young & Woods v. West* [1980] I.R.L.R. 201 (in which, in fact, the Court of Appeal was of opinion that the decision of the industrial tribunal was right and did not have to interfere with it), I would follow the *Heath Laundry* case [1910] 1 K.B. 543.

E I should add that I do not detect in the more recent authorities any tendency to depart from the *Edwards v. Bairstow* [1956] A.C. 14 principles. In *Melon v. Hector Powe Ltd.* [1981] I.C.R. 43 they were applied by the House of Lords in an appeal from an industrial tribunal under the Redundancy Payments Act 1965: see the speech of Lord Fraser of Tullybelton at p. 48. And in *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd.* [1982] A.C. 724, 752, Lord Roskill said that in *Edwards v. Bairstow* [1956] A.C. 14 the House of Lords made it clear that the court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or had reached a conclusion which no reasonable tribunal, properly instructed, could have reached. And he went on to deprecate the suggestion that since the question whether a contract was frustrated was one of law the court was free to decide the matter itself and contrary to the decision of the arbitrators.

H In the present case the industrial tribunal in their full and careful reasons list nine circumstances which are consistent with the existence of a contract of employment, four which are not inconsistent with it and five which are inconsistent with it. It seems to me that the case was indeed one where the answer, in the end, was a matter of degree and, therefore,

of fact. For example there may, I think, be a narrow line between the conclusion that the company were undertaking to offer work to the regular casuals in return for the regular casuals undertaking to accept the work which was offered (i.e. a contract of employment) and the conclusion that there was no contract to employ and that the arrangement was simply the consequence of market forces (in effect, the dominant economic position of the company). It was essentially a matter of fact for the industrial tribunal to decide which was correct after considering the evidence.

The result, in my view, is that the appeal tribunal was not entitled to interfere with the decision of the industrial tribunal unless that tribunal misdirected itself in law or its decision was one which no tribunal, properly instructed, could have reached on the facts. Neither of those exceptions can be demonstrated here in relation to the overall contract question. I cannot see any misdirection and I find it quite impossible to say that no reasonable tribunal, properly instructed, could have reached the conclusion that the industrial tribunal did. They had evidence on which to do so. I agree, therefore, with the conclusion of the appeal tribunal that the industrial tribunal's decision that there was no overall contract of employment must stand.

There remains the question whether there was a series of individual contracts of employment of the "regular" casuals. The appeal tribunal were of the opinion that the industrial tribunal had not dealt with the point at all. Ms. Gill, who appeared for the applicants before the industrial tribunal, is, we are informed, in no doubt that she put the point. In the light of their careful reasons, I should be surprised if this tribunal overlooked it.

If the point was not dealt with by the industrial tribunal I do not think that the appeal tribunal was justified in dealing with the point themselves. The appeal tribunal should, in the circumstances of this case, have remitted the matter. In fact, however, the industrial tribunal decided:

"The majority decision of the tribunal is that the applicants are not qualified for interim relief because they are not employees who worked under a contract of employment."

That was the question the industrial tribunal were required to decide.

Now the tribunal, no doubt, decided that there was no overall contract of employment. But they decided more than that. In the final paragraph of their reasons they state:

"It is our decision that the applicants were in business on their own account as independent contractors supplying services and are not qualified for interim relief because they were not employees who worked under a contract of employment."

That seems to me to be inconsistent with the "separate contracts" contention. Since it does not appear to me that there was any misdirection by the industrial tribunal and the conclusion was not unreasonable on the facts, I would therefore regard the point as concluded.

I would allow the appeal and dismiss the cross-appeal.

SIR JOHN DONALDSON M.R. The judgment of the appeal tribunal in this case suggests that there is a difference of judicial view as to whether the question "Is a contract a contract of employment or a contract for services?" is a mixed question of fact and law or a question of law, but I do rather doubt whether the triple categorisation of issues as "fact," "law"

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A and "mixed fact and law" is very helpful in the context of the jurisdiction of the appeal tribunal.

B The appeal tribunal is a court with a statutory jurisdiction. So far as is material, that jurisdiction is limited to hearing appeals on questions of law arising from any decision of, or arising in any proceedings before, an industrial tribunal: section 136 (1) of the Employment Protection (Consolidation) Act 1978. If it is to vary or reverse a decision of an industrial tribunal it has to be satisfied that the tribunal has erred on a question of law.

C Whilst it may be convenient for some purposes to refer to questions of "pure" law as contrasted with "mixed" questions of fact and law, the fact is that the appeal tribunal has no jurisdiction to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law.

D The purification methods are well known. In the last analysis all courts have to direct themselves as to the law and then apply those directions in finding the facts (in relation to admissibility and relevance) and to the facts as so found. When reviewing such a decision, the only problem is to divine the direction on law which the lower court gave to itself. Sometimes it will have been expressed in its reasons, but more often it has to be inferred. This is the point of temptation for the appellate court. It may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there *must* have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant. I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards v. Bairstow* [1956] A.C. 14.

F Why, then, is there a problem in relation to an issue as to whether an applicant to an industrial tribunal is or is not employed under a contract of employment? The answer lies in the interpretation which the appeal tribunal has placed upon a passage in a judgment of Stephenson L.J. in *Young & Woods Ltd. v. West* [1980] I.R.L.R. 201, 205, which Browne-Wilkinson J. has interpreted as authority for the proposition:

G "the question was one of pure law, so that the appellate court can, and indeed must, reach its own view on whether or not, on the findings of fact made by the lower court, the true analysis is that there was a contract of employment."

H If this is the true interpretation of Stephenson L.J.'s judgment, it represents a sudden and unexplained departure from what has been understood to be the law for over 70 years, for it was as long ago as that that this court went so far, in *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543, as to describe the issue as one of fact with which an appellate court could not interfere in the absence of reason to believe that the arbitrator had misdirected himself. For my part I do not think that Stephenson L.J. can be taken as having intended to make such a departure.

There is no doubt that there are pure questions of law which throw a court back to questions of fact. The most obvious example is what length of notice is required to terminate a contract which does not expressly make provision for termination. This is a pure question of law and the answer is "Such time as is reasonable in all the circumstances." Applying that direction to facts whose nature, quality and degree are known with complete precision will no doubt always produce the same answer. But this is not real life. In reality every tribunal of fact will find and assess the factual circumstances in ways which differ to a greater or lesser extent and so can give rise to different conclusions, each of which is unassailable on appeal. In this sense, but in this sense alone, their conclusions are conclusions of fact. More accurately they are conclusions of law which are wholly dependent upon conclusions of fact.

The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract, those findings and that assessment will dictate the correct legal answer. In the familiar phrase "it is all a question of fact and degree."

It is only if the weight given to a particular factor shows a self-misdirection in law that an appellate court with a limited jurisdiction can interfere. It is difficult to demonstrate such a misdirection and, to the extent that it is not done, the issue is one of fact. This, I think, is what this court meant in *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543 which, so construed, is consistent with *Edwards v. Bairstow* [1956] A.C. 14.

In the instant appeal the industrial tribunal directed itself to

"consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account."

This is wholly correct as a matter of law and it is not for this court or for the appeal tribunal to re-weigh the facts.

The industrial tribunal then concluded that there was no contract of employment extending over a series of engagements. This conclusion was based upon an evaluation of the large number of factors set out in their reasons, but it is clear that the majority attached great importance to the fact that, as they saw it, there was no mutuality of obligation and that in the industry casual workers were not regarded as working under any overall contract of employment.

The appeal tribunal refused to interfere with this conclusion and in my judgment they were right to do so. So far as mutuality is concerned, the "arrangement," to use a neutral term, could have been that the company promised to offer work to the regular casuals and, in exchange, the regular casuals undertook to accept and perform such work as was offered. This would have constituted a contract. But what happened in fact could equally well be attributed to market forces. Which represented the true view could only be determined by the tribunal which heard the witnesses and evaluated the facts. Again, although how the industry and its casual workers regarded their status is not directly material, any generally accepted view would be part of the contractual matrix and so indirectly

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A material, although in no way decisive. This again was a matter for the industrial tribunal.

B Although I, like the appeal tribunal, am content to accept the industrial tribunal's conclusion that there was no overall or umbrella contract, I think that there is a shorter answer. It is that giving the applicants' evidence its fullest possible weight, all that could emerge was an umbrella or master contract *for*, not *of*, employment. It would be a contract to offer and accept individual contracts of employment and, as such, outside the scope of the unfair dismissal provisions.

C This leaves the question of whether the applicants entered into individual contracts of employment on each occasion when they worked for the company and it is here that the appeal tribunal and the industrial tribunal parted company. The appeal tribunal dealt with this aspect of the matter by saying:

D "For whatever reason, the industrial tribunal have not dealt with the point, nor have they weighed the factors bearing on the question: 'was each contract for services?' in the same careful way in which they weighed those factors when looking at the nature of an overall contract of employment. In our judgment, the mere assertion by the industrial tribunal that it was a succession of contracts for services entered into by independent contractors cannot stand as good in law in the absence of any reason for that conclusion. We must therefore consider the point and reach our own decision on it."

E This, in my judgment, does less than justice to the decision of the industrial tribunal. It had weighed the relevant factors governing the relationship between the parties with great care in the course of determining whether any umbrella contract was one of employment or for the provision of services. It had rejected the umbrella contract on the grounds that there was no contract at all, but it had also concluded:

F "the applicants were in business on their own account as independent contractors supplying services and are not qualified for interim relief because they were not employees who worked under a contract of employment."

G This, unless erroneous in law, was wholly sufficient reason for holding that the individual contracts, which clearly existed, were contracts for the provision of services. If and in so far as the appeal tribunal was criticising the industrial tribunal for failing to say so, it should be pointed out that there was only one question which it had to decide, namely, whether the applicants were employees who worked under a contract of employment. It answered this question in the negative as a matter for decision under the heading "Decision." The purpose of what followed under the heading "Reasons" was to explain this decision. Those reasons, by explaining that there was no umbrella contract and that the applicants were independent contractors, disposed in different ways of the two different forms of contract of employment which had been suggested in argument. The fact that the argument was primarily about the umbrella contract does not persuade me that the status of the individual contracts was not carefully considered, particularly as Ms. Gill, who appeared for the applicants, says that she argued in the alternative for a succession of individual contracts of employment. Furthermore, in the light of the industrial tribunal's finding of lack of mutuality in relation to the umbrella contract the only

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point of considering "service v. services" was in relation to the individual contracts.

Even if the appeal tribunal had been correct in holding that the industrial tribunal's reasons were not sufficiently clear, this would not have entitled it to arrogate to itself the full functions of an industrial tribunal and so reach its own decision. The appeal tribunal can correct errors of law and substitute its own decision in so far as the industrial tribunal must, but for the error of law, have reached such a decision. But if it is an open question how the industrial tribunal would have decided the matter if it had directed itself correctly, the appeal tribunal can only remit the case for further consideration.

In the course of argument it was suggested that the course adopted by the appeal tribunal could be justified by paragraph 21 (1) of Schedule 11 to the Employment Protection (Consolidation) Act 1978, which provides:

"For the purpose of disposing of an appeal the appeal tribunal may exercise any powers of the body or officer from whom the appeal was brought or may remit the case to that body or officer."

However, I do not read that paragraph as doing more than authorising the appeal tribunal to record a decision which, on the facts found, it could have directed the industrial tribunal to record.

In pursuance of this declared intention to reach its own decision, the appeal tribunal reviewed and re-evaluated the various factors, concluding that there was a series of ad hoc contracts of employment. In so doing, in my judgment it quite clearly usurped the function of the industrial tribunal. This was not a case in which no reasonable tribunal could have reached the conclusion reached by the industrial tribunal and no reasonable tribunal could have failed to reach that reached by the appeal tribunal. The industrial tribunal's decision may have been surprising, but it was certainly not "perverse" in the legal or any other sense.

The appeal tribunal justified its own conclusion by saying:

"Standing back and looking at the matter in the round, what we have to ask is whether these applicants can be said to have been carrying on business on their own account. We can well understand that casuals who have their services to sell, and sell them in the market to whoever needs them for the time being, can be said to be in business on their own account in the marketing or selling of their services; but we find it difficult to reach that conclusion in a situation where the services are, in fact, being offered to one person only against a background arrangement (albeit not contractual) which requires the services to be offered to one person only and which involves a repetition of those contracts (albeit under no obligation to do so) as is shown by the weekly pay packet, the holiday pay and other matters of that kind. In our judgment, each of these individual contracts is a contract of employment, not a contract for services."

This must involve a misdirection on a question of law or every independent contractor who is content or able only to attract one client would be held to work under a contract of employment. Indeed, I could as well point out that what distinguishes the applicants' contracts from those of waiters who admittedly work under contracts of employment is that the applicants were employed to wait at a given function and were not available to the company for general deployment as waiters during their hours of work.

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But if I did so, I too should be usurping the functions of the industrial tribunal.

I can detect no error of law on the part of the industrial tribunal and I would therefore allow the appeal and dismiss the cross-appeal, thereby restoring the decision of the industrial tribunal.

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For the reasons which are set out in the judgments, the appeal is allowed, although there is a small difference between Ackner L.J., on the one hand, and Fox L.J. and myself on the other hand, as to the consequential orders which should be made. Ackner L.J. would have remitted the successive individual contracts point to the industrial tribunal for further consideration. The cross-appeal is unanimously dismissed.

C

*Appeal allowed with costs of appeal
and cross-appeal.*

Cross-appeal dismissed.

Leave to appeal refused.

Solicitors: *Linklaters & Paines; Tess Gill, Claygate, Surrey.*

A. H. B.

D

[COURT OF APPEAL]

FURNISS (INSPECTOR OF TAXES) v. DAWSON (G.E.)

SAME v. DAWSON (D.E.R.)

MURDOCH (INSPECTOR OF TAXES) v. DAWSON (R.S.)

E

1983 May 11, 12; 27

Oliver, Kerr and Slade L.JJ.

F

Revenue—Capital gains tax—Tax avoidance—Scheme to defer liability to tax on sale of shares—Company incorporated to transfer shares to ultimate purchaser—Taxpayers acquiring shares in new company in exchange for their shareholdings—Whether “disposal” of shares by taxpayers direct to ultimate purchaser—Whether relieving provisions for reorganization of share capital and company amalgamations applicable to defer liability—Finance Act 1965 (c. 25), Sch. 7, paras. 4 (2), 6 (1)

G

H

In 1971 the taxpayers, a father and his two sons, wished to sell their shareholdings in two small family companies, the operating companies. Before the sale took place they entered into a scheme designed to defer any liability to pay capital gains tax on the sale of their shareholdings. To that end on December 16, 1971, an investment company, G. Ltd., was incorporated in the Isle of Man. On the same day draft agreements were approved whereby G. Ltd. agreed to purchase from the taxpayers their shareholdings in the operating companies at a price to be satisfied by the issue of 151,500 shares of 1p each at a premium of 99p per share and further agreed to sell those shareholdings on to W. Ltd. for £151,500. On December 20, 1971, the share transfer and the sale on to W. Ltd. took place. Thus G. Ltd. acquired the beneficial ownership of the shares in the operating company and had control of them. The taxpayers were assessed to capital gains tax for 1971–72 on the basis that the exchange of their shares in the operating companies for shares in G. Ltd. and the sale of those shares by G. Ltd. to W. Ltd. was for fiscal purposes a disposal by the taxpayers of their shares. Appeals by the taxpayers were allowed by the special commissioners and the assessments

quashed on the ground that paragraphs 4 (2) and 6 (1) of Schedule 7 to the Finance Act 1965¹ applied to the share exchange so that for tax purposes the shares in G. Ltd. were to be identified with the shares in the operating companies and treated as the same asset with the result that no liability to the tax would arise until the taxpayers disposed of their shares in G. Ltd. An appeal by the Crown was dismissed by Vinelott J. He rejected their contention that the taxpayers should be treated for fiscal purposes as having disposed of their shares in the operating companies direct to W. Ltd. He held that even if the share exchange and the subsequent sale on to W. Ltd. by G. Ltd. could be treated as part of a single composite transaction, the exchange transaction was a real step with enduring legal consequence that could not be ignored and thus ensured that the taxpayers could take advantage of the relieving provisions in paragraphs 4 and 6 of Schedule 7.

On appeal by the Crown:—

Held, dismissing the appeals, that both steps in the transaction, the share exchange and the sale on of the shares, were genuine transactions that were not of a circular or self-cancelling nature and had enduring legal consequences, and although those steps were carried out in a prearranged sequence designed to defer liability to tax, they could not be ignored or regarded as ineffective for fiscal purposes; that, accordingly, the only disposal to which the taxpayers were a party was the disposal of their shares in the operating companies to G. Ltd. and that disposal was not to be treated as a disposal for capital gains tax purposes because of the provisions in paragraphs 4 and 6 of Schedule 7 (post, pp. 640D–E, G–H, 644F–G, 653H, 654H–655E, 656F–G, 662D–E, 665H–666C).

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1, H.L.(E.) applied.

Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners; Eilbeck v. Rawling [1982] A.C. 300, H.L.(E.) and *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, H.L.(Sc.) distinguished.

Floor v. Davis [1978] Ch. 295, C.A. considered.

Decision of Vinelott J. [1982] S.T.C. 267 affirmed.

The following cases are referred to in the judgments:

Eilbeck v. Rawling [1980] 2 All E.R. 12, C.A.; [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.).

Floor v. Davis [1978] Ch. 295; [1978] 3 W.L.R. 360; [1978] 2 All E.R. 1079, C.A.; [1980] A.C. 695; [1979] 2 W.L.R. 830; [1979] 2 All E.R. 677, H.L.(E.).

Inland Revenue Commissioners v. Burmah Oil Co. Ltd. [1982] S.T.C. 30, H.L.(Sc.).

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1; 19 T.C. 490, H.L.(E.).

Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners [1979] 1 W.L.R. 974; [1979] 3 All E.R. 213, C.A.; [1982] A.C. 300; [1981] 2 W.L.R. 449; [1981] 1 All E.R. 865, H.L.(E.).

The following additional case was cited in argument:

Chinn v. Hochstrasser [1981] A.C. 533; [1981] 2 W.L.R. 14; 1981 1 All E.R. 189, H.L.(E.).

APPEALS from Vinelott J.

¹ Finance Act 1965, Sch. 7, para. 4(2), 6(1): see post, p. 639E–F, G–H.

3 W.L.R.

Furniss v. Dawson (C.A.)

A The taxpayers, George Edward Dawson and his sons, Douglas Edward
 Rexford Dawson and Rexford Stuart Dawson, appealed against assess-
 ments to capital gains tax for the year 1971-72 in sums of £57,000, £28,000
 and £28,000 respectively made on them in respect of gains accruing on the
 disposals of their shareholdings in Fordham and Burton Ltd. and Kirkby
 B Garments Ltd. Vinelott J. on December 18, 1981, upheld a determination
 of the special commissioners quashing the assessments on the ground that
 the taxpayers had not incurred liability to the tax because of the provisions
 of paragraphs 4 (2) and 6 (1) of Schedule 7 to the Finance Act 1965.

C The Crown appealed on the grounds that having regard (a) to the
 matters contained in the case stated and the documents appended thereto
 and (b) to the approval by the House of Lords in *W. T. Ramsay Ltd. v.*
Inland Revenue Commissioners [1982] A.C. 300 of the dissenting judgment
 of Eveleigh L.J. in *Floor v. Davis* [1978] Ch. 295, Vinelott J. had erred
 in law in holding that the taxpayers were not chargeable to capital gains
 tax in respect of any gain arising on a disposal of the shares in the two
 companies.

Mr George Dawson died subsequent to the hearing before the
 commissioners.

D The facts are set out in the judgment of Oliver L.J.

P. J. Millett Q.C. and *Robert Carnwath* for the Crown.
Stephen Oliver Q.C. and *William Massey* for the taxpayers.

Cur. adv. vult.

E May 27. The following judgments were handed down.

F OLIVER L.J. This is an appeal by the Crown from a judgment of
 Vinelott J. on December 18, 1981, affirming a decision of the special
 commissioners who had discharged an assessment to capital gains tax
 made on three taxpayers, Mr. G. E. Dawson and his two sons Mr. D. E.
 R. Dawson and Mr. R. S. Dawson. Mr. G. E. Dawson died after the
 decision of the commissioners and the appeals have been carried on
 against his personal representatives. The facts are fully set out in the
 careful judgment of Vinelott J., [1982] S.T.C. 267 and it is unnecessary
 for present purposes to do more than summarise the salient features of
 the transactions which gave rise to the claim for tax. The taxpayers and
 the wife of Mr. G. E. Dawson were, between them, the holders of all the
 G ordinary shares in two family companies, Fordham and Burton Ltd. and
 Kirkby Garments Ltd., conveniently referred to as "the operating com-
 panies." They had, in September 1971, been in negotiation for the sale of
 the whole of the issued capital of both companies to an outside purchaser,
 Wood Bastow Holdings Ltd., and had agreed on the main details of a sale
 but without, at that stage, any binding commitment having been entered
 into on either side. The negotiations had been conducted by Mr. G. E.
 H Dawson and at the point at which agreement in principle was reached he
 consulted solicitors with a view to carrying matters through in the most
 advantageous way. As a result of the advice received it was decided to
 reorganise the share capitals of the operating companies with a view to
 saving stamp duty on transfer and to incorporate a new investment
 company in the Isle of Man to acquire the reorganised share capital,
 which company, it was intended, would then sell the shares so acquired
 to Wood Bastow Holdings Ltd. On December 16, 1971, Greenjacket

Investments Ltd. was incorporated in the Isle of Man with a share capital of £1,550 divided into 155,000 shares of 1p each. Local directors were appointed by the subscribers and at the first directors' meeting, on the following day, two agreements were put before the board. The first was a share exchange agreement providing for the purchase of Dawson family shares in the capital of the operating companies in its reorganised state in exchange for the issue of 151,500 shares in Greenjacket at a premium of 99p per share. That agreement was executed. It contained the usual vendors' warranties and indemnities customary in agreements for the sale of a majority interest in a company. At the same time a sale agreement providing for the sale of what would, on completion of the exchange agreement, be Greenjacket's shares in the operating companies to Wood Bastow for £151,500 was approved and it was resolved that Mr. Moroney, one of the directors, be authorised to execute it on behalf of Greenjacket if the negotiations for sale proved effective—as to which, of course, there was then no real doubt.

On December 20 meetings of the operating companies were held at which their share capitals were reorganised by converting the ordinary shares into preference shares and creating new A ordinary shares which were then issued by way of bonus on renounceable letters of allotment. At that stage the exchange agreement was completed, transfers, letters of allotment and share certificates being handed over to Mr. Moroney who attended the meeting. Telephonic communication was maintained with the remaining directors in the Isle of Man and Greenjacket thereupon allotted shares to the taxpayers in accordance with the agreement, the appropriate share certificates then being sealed. Mr. Moroney then executed the sale agreement which was immediately thereafter exchanged. It provided for the sale of all the shares in the operating companies to Wood Bastow at a total price of £155,000 of which £3,500 was payable to outside holders of preference shares who were also parties to the agreement. The sale agreement contained the same warranties and indemnities by the directors of the operating companies as had been given by the vendors to Greenjacket in the exchange agreement, the only difference being that Mr. R. S. Dawson, who was not a director, was not party to the sale agreement. That agreement was duly completed by Greenjacket's transferring its preference shares and renouncing its allotments of A ordinary shares in favour of the purchaser and the purchase price of £151,500 was duly paid to Greenjacket. Accounts of Greenjacket for the year ended November 30, 1972, show that that money was dealt with as an investment by Greenjacket in accordance with its constitution.

This appeal therefore concerns the fiscal effect of what must, I think, be a series of transactions familiar to company lawyers and taxation advisers alike. It is, on the face of it, a perfectly straightforward and sensible series of transactions, the fiscal consequences of which are clearly laid out in the Finance Act 1965. The controlling shareholder of a family company wishes to retire from business and to dispose of his shares. He has an understandable desire that the fruits of his endeavours shall not be taxed more highly than the law compels and he accordingly consults professional advisers in order to ascertain from them the most advantageous way of effecting what he requires. He is advised that if he is content not to receive the proceeds of the shares himself but to have them represented by shares in another company in which he holds the shares, the payment of capital gains tax can be postponed until such time as he finds it necessary or convenient to dispose of those last-mentioned shares.

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A He acts upon that advice. He causes to be formed an investment company—in the instant case it was an off-shore company, but that can be disregarded for present purposes as an irrelevant refinement—and he exchanges his shares in the family business for shares in that company, which now becomes the parent of the family company. The parent then sells the shares in what is now its subsidiary company to an outside purchaser, it matters not whether for cash or for other consideration—for instance, shares or debentures in the purchasing company.

B Applying the statutory provisions to this series of transactions produces clearly defined and easily intelligible consequences. Section 19 (1) of the Finance Act 1965 provides:

C “Tax shall be charged in accordance with this Act in respect of capital gains, that is to say, chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.”

D So the tax is chargeable only “in accordance with” the Act, the gains are to be computed “in accordance with” the Act and, to be chargeable, those gains must be gains accruing “on the disposal of assets.” Thus, when the shareholder exchanges his shares for shares in his newly formed investment company, on the face of it, he disposes of his shares and one looks to see whether, on that disposal, any gain accrues to him computed in accordance with the Act. Guidance as to that is found in section 22 (9) which, for relevant purposes, provides that “the amount of the gains accruing on the disposal of assets shall be . . . subject to the further provisions in Schedules 7 and 8 to this Act”; and reference to paragraphs 4 and 6 of Schedule 7 shows that this particular type of transaction is the subject matter of an exemption. Paragraph 4 contains special provisions relating to reorganisations of share capital and sub-paragraph (2) provides:

E “a reorganisation or reduction of a company’s share capital shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired.”

F So if, on a reorganisation, you acquire new shares in place of your original shareholding and you subsequently dispose of those new shares, you have to go back to the acquisition of the original shareholding in order to ascertain the amount of any loss or gain on that disposal. Paragraph 6 (1)—subject to the qualification in sub-paragraph (2) that the issuing company has control of the company whose shares are acquired in exchange for the issue—provides:

G “where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 above shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganisation of its share capital.”

H Thus in the transaction described above the shares in the investment company in the hands of the shareholder are statutorily to be treated as the same asset as his original shares in the family company acquired in the same way and at the same time as those original shares were acquired. If he subsequently disposes of his new shares any gain accruing on that disposal is to be computed in the same way as if they were his original

shares and the acquisition cost is treated as the acquisition cost of the original shares. On the other hand, the cost to the investment company of the acquisition of the family company shares is, on the postulate of a straight share exchange, the value of the shares acquired, so that when it comes—if it does—to dispose of those shares, the gain or loss on such disposal falls to be computed on the basis of that acquisition cost and not on the acquisition cost to the original shareholder. Thus any controlling shareholder of a family company who is contemplating retiring and disposing of the business and who is content to leave the proceeds of sale of his shares in a company controlled by him would be well advised to take the step of carrying out the sort of share exchange with which this appeal is concerned and then to look for a purchaser for the shares of what will then be the subsidiary of a holding company controlled by him. So long as a purchaser can be found within a reasonably short space of time, it is unlikely that there will have been much material increase in the value of the shares in the subsidiary, so that little, if any, tax will be payable as a result of the sale. He remains, of course, liable to pay capital gains tax if he disposes of his new shares or if the assets of the investment company are distributed to him in its liquidation but that liability is postponed until the event occurs.

In the instant case, the taxpayers followed the course just outlined but with these refinements or qualifications; that is to say, (a) that the ultimate purchaser was found and the purchase agreed in principle before any share exchange took place and (b) that the share exchange and the sale by the new investment company to the ultimate purchaser were substantially contemporaneous and were intended to be so. Nonetheless it was found by the special commissioners and is not in dispute that the transactions were perfectly genuine transactions. There was nothing sham about them in the sense that they purported to be something that they were not in fact. The commissioners found as a fact that Greenjacket, the Manx investment company, existed, that it issued its own shares in exchange for the shares in the operating companies and that in consequence of that exchange it became the holder of those shares. But they also found that what happened was what had all along been intended to happen, that as soon as the solicitors for the ultimate purchaser were satisfied that the Manx company was in a position to sell the shares in the operating companies, the director of the Manx company, who had previously been authorised by the board to act in that event, signed the sale agreement. There was an express finding that the Manx company acquired the beneficial ownership of the shares in the operating companies and thus had control of the operating companies. It was never contractually bound to sell the shares—prior to the sale agreement—although, of course, it intended to do so and there was little or no likelihood that it would do otherwise.

The Crown do not, as I understand the argument, seek to contend that the share exchange is to be treated as otherwise than genuine and therefore to be ignored. It was, it is conceded, a valid and effective transaction which transferred title to the shares in the operating companies to Greenjacket. Nor do they contend that the sale by Greenjacket of those shares to Wood Bastow was other than a genuine sale of shares which were, at the material time, owned by Greenjacket. What they say to the taxpayers, in effect, is: "Because the share exchange and the subsequent sale were carried out in a prearranged sequence and with the preconceived intention of taking advantage of the statutory provisions

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A which enable a share exchange to take place without tax liability and with a view to postponing the tax which would have been payable if you had elected to dispose of your original shares direct to the purchaser, you are to be treated as having done something other than that which you have in fact done, that is to say, as having—but for fiscal purposes only—disposed of your original shares direct to the purchaser.”

B Now the consequences of that, if correct, are sufficiently startling to make one examine with some care the basis for such a claim. Mr. Millett has been at pains to stress that he is not seeking to say that the share exchange never happened. He accepted that it was a genuine transaction, which genuinely transferred the shares to Greenjacket and which has the legal and fiscal consequences which ensue from a share exchange where the issuing company has control of the company whose shares are acquired. He accepted, too, as I understand his argument, that the sale
C by Greenjacket was a genuine sale beneficially and not as a nominee for anyone else. Nor did he suggest that, although there was a share exchange followed by a sale of the shares acquired, the substance of each of the two transactions was something other than what it purported to be. What he claims to do is not, to use the word used by Vinelott J., to remould the two transactions but to re-analyse them—a metaphysical process which,
D he argued, leads to a conclusion that the two transactions were, not in substance but in fact, a single transaction of disposal by the taxpayers on which a gain accrued to them, the gain being computed by reference to the difference between the purchase price of the shares paid to Greenjacket and the original acquisition cost of those shares by the taxpayers. Thus it follows that, unless one totally ignores the share exchange, which
E Mr. Millett conceded—and indeed averred—that we are not to do, the taxpayers are inevitably, in the fullness of time, to be taxed twice on the same gain. They are to be taxed here and now on a gain which they have not made, but which, on Mr. Millett’s argument, accrued when the proceeds were paid to Greenjacket, a gain computed by reference to the difference between the proceeds and the acquisition cost to the taxpayers of the operating companies’ shares. One asks, in parentheses, to whom
F did that gain “accrue”? Greenjacket made no gain and no loss. The taxpayers’ shares in Greenjacket were worth exactly the same before the sale as they were after the sale. So the only gain that one can see in the hands of the taxpayers is that, on their acquisition of the shares in Greenjacket, those shares were worth more than the original acquisition cost of the shares given in exchange—but that is a gain which paragraph 4 of Schedule 7 tells us that we must ignore. The taxpayers are then to be
G taxed again when they come to dispose of the shares in Greenjacket. Paragraph 4 of Schedule 7 ordains that those shares are to be treated as the same asset acquired as the original shares were acquired and it was no part of Mr. Millett’s case that the disposal by the taxpayers to the purchaser of the original shares which, he claimed, has taken place, constituted also a disposal of the Greenjacket shares. The Greenjacket share exchange stands and the fiscal consequences of that exchange follow.
H It follows, therefore, that when the Greenjacket shares are sold their value on the sale will fall to be measured by the asset content of Greenjacket which will include the proceeds of sale of the original shares or the investments representing them. The gain on that transaction is then to be computed under Schedule 6 and paragraph 4 of Schedule 7 on the difference between that value and the acquisition cost of the original shares—a gain which, on Mr. Millett’s contention, will already have been

taxed when the operating companies' shares were sold to Wood Bastow Holdings Ltd. A

Again, suppose a case of a similar series of transactions with a slightly extended timetable. Assume that the arrangements are such that a week is to elapse between the completion of the share exchange and the sale on to the purchaser of the operating companies' shares. Suppose that during that week some dramatic up-turn in the fortunes of the operating companies prompts a renegotiation upwards of the price. In those circumstances, clearly the intermediate company has made a gain, for the shares are now worth more than they were when it acquired them. On the sale, therefore, that company becomes liable for tax on that gain. Equally on Mr. Millett's re-analysis of the transactions they remain nonetheless a disposal by the original shareholders, for the transactions remain part of a preconceived plan and the renegotiation of the price is carried out by those same people. There are thus two disposals, on each of which a gain accrues, unless one is to treat the real gain made by the company as in some way cancelled out by the notional gain made by the original shareholder for which there is no statutory warrant. If I understand him aright, Mr. Millett's answer in these circumstances was not that the revenue have an option to tax either—for that would make tax depend upon revenue discretion—but that the revenue could tax both. And indeed that must be the inevitable consequence if one is compelled, as Mr. Millett accepted that one is, to treat the sale by the company as a genuine sale, and hence a disposal to the purchaser. B C D

I turn then to the basis for the Crown's contentions. Vinelott J. clearly felt—as do I—oppressed by the logical difficulty inherent in accepting, on the one hand, the reality and genuineness of the transactions with which he was confronted and the legal consequences which flowed from those transactions, and on the other the re-analysis of those transactions in such a way as to attribute to them, for fiscal purposes, a legal result which they did not have and which, indeed, they were specifically designed to avoid having. It was forcefully submitted to him that he was bound by the authority of the House of Lords in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300—and in particular, by the approval in that case of the dissenting judgment of Eveleigh L.J. in *Floor v. Davis* [1978] Ch. 295—to reach the result for which the Crown contended, but he felt himself able to distinguish *Floor's* case [1980] A.C. 695. And the question on this appeal is whether he was right in doing so. That is, I think, the only question, for, speaking at any rate for myself, I would, if the matter were *res integra* and applying the *Ramsay* principle, have no hesitation in rejecting the Crown's argument in the circumstances of this case as found by the special commissioners. E F G

The starting point of the inquiry is, I think, *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 which, if it stood unaffected by later authority, would, in my judgment, conclude the instant case against the Crown. Now it has been said by the House of Lords that the principle of that case remains a cardinal principle, at any rate when applied to a single document, but there can, I think, be no doubt that *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* and, perhaps even more, the subsequent case of *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, have made very severe inroads on it or, perhaps it would be more accurate to say, on the ambit within which it is to be applied. Nevertheless it has not, as I think, been reduced to the status of a sacred cow to which a ritual obeisance must first be made and H

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A which can then be ignored. It remains a live principle. In that case it will
 be remembered that the then Duke of Westminster, for the purpose of
 reducing his liability to surtax, gave to some 100 of his employees deeds
 of covenant for varying amounts. This apparently open-handed generosity
 was somewhat qualified by letters addressed to the employees concerned
 explaining that, without actually binding them, they were expected to
 B forgo out of their current wages sums equal to the sums covenanted to be
 paid to them, an arrangement apparently accepted with a docility which
 may seem surprising to those accustomed to a less temperate climate of
 industrial relations. The question was whether these were in fact payments
 for services to be rendered and so not deductible for the purposes of
 surtax, the Crown's contention being that the court should ignore the
 strict legal rights of the parties and have regard to what was described as
 C "the substance of the matter." That contention was decisively rejected in
 Lord Tomlin's classic statement, at p. 19:

D "Every man is entitled if he can to order his affairs so as that the tax
 attaching under the appropriate Acts is less than it otherwise would
 be. If he succeeds in ordering them so as to secure this result, then,
 however unappreciative the Commissioners of Inland Revenue or his
 fellow taxpayers may be of his ingenuity, he cannot be compelled to
 pay an increased tax."

Lord Tomlin states the principle, at p.21:

E "There may, of course, be cases where documents are not bona fide
 nor intended to be acted upon, but are only used as a cloak to
 conceal a different transaction. No such case is made or even
 suggested here. The deeds of covenant are admittedly bona fide and
 have been given their proper legal operation. They cannot be ignored
 or treated as operating in some different way because as a result less
 duty is payable than would have been the case if some other
 arrangement (called for the purpose of the appellant's argument 'the
 substance') had been made."

F Now there could be no doubt that the arrangements made in that case
 were entirely artificial. No valid commercial reason was, or could be,
 suggested for the execution of the deeds save that they would create
 deductible expenses in the Duke's income tax return. And if one applies
 without qualification the principle of that case to the circumstances of the
 instant case there does not appear to me to be any ground at all for saying
 G that the transactions here in question did not effect exactly that which
 they purported to effect and no more. Indeed to go behind the documents
 and to argue that because the taxpayers wanted to sell their shares and
 because the shares were, in fact, sold by Greenjacket to the ultimate
 purchaser, therefore the taxpayers must be treated for fiscal purposes as
 having disposed of the shares directly to the ultimate purchaser, seems on
 the face of it to be reviving that very appeal to "the substance of the
 H matter" which Lord Tomlin so vehemently rejected. The *Westminster* case
 was, however, a very simple transaction involving one deed and a
 collateral non-contractual arrangement designed to protect the Duke from
 a duplicity of payments. Since then the courts have been presented with
 more and more sophisticated and increasingly artificial arrangements
 contrived to meet increasingly involved taxing legislation. It is, therefore,
 perhaps not altogether surprising that the House of Lords has sought to
 set bounds to the extent to which the *Westminster* principle should be

applied so as to compel the court to accept at their face value and to attribute full legal effect to elaborate series of transactions artificially contrived for the sole purpose of achieving fiscal advantages. The opportunity to do so presented itself in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 and it is that case and, in particular, the observations in it of Lord Wilberforce, at p. 324, and Lord Fraser of Tullybelton, at p. 339, with regard to the earlier case of *Floor v. Davis*, which really formed the bedrock of Mr. Millett's submissions. He pointed out that although in the *Ramsay* case the Crown's argument did not go beyond suggesting the approach to tax avoidance schemes of the self-cancelling nature of the schemes with which that case was involved, the House in fact deliberately went further in its statement of general principle. Lord Wilberforce, in his speech, pointed to the common features of the particular schemes there under consideration, but he then went on, albeit in the context of schemes of the type which he had previously described, to state what he called "some familiar principles"; and it is in this context that there is to be found his reference to the *Westminster* case. He said, at pp. 323-324:

"This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

Pausing here for a moment, Mr. Millett submitted that it is implicit in Lord Wilberforce's reasoning not merely that the series or combination may be regarded, but that the series or combination must be regarded and that that is all that can be regarded. I find myself unable to accept that this can be extracted from Lord Wilberforce's speech. A series or combination of transactions may well have two objects in mind which can only be achieved in separate steps. No doubt each step must be viewed as what it is in the light of the overall combination, but I can see nothing in Lord Wilberforce's reasoning in this part of his speech to indicate that he was suggesting that the court should not consider the legal results of the steps taken if those legal results have a necessary bearing on the combination of transactions taken as a whole.

He goes on to consider the duty of the commissioners reviewing the facts and it may be convenient to set out the passage, at p. 324:

"For the commissioners considering a particular case it is wrong, and an unnecessary self-limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams,' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a

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- A composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd. v. Nicol* (1975) 50 T.C. 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis)
- B the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

- C Mr. Millett submitted that this passage from the speech compulsively leads to the conclusion for which he contends in the instant case. The court is directed, he suggested, to discard the step-by-step approach, to treat the connected transactions as a whole and, as I understand his argument, to assess the legal effect of the combined transactions by reference to the result achieved and entirely without reference to any legal results—even unalterable and enduring legal results—which may have arisen from individual steps forming part of the whole combination.
- D Thus viewed, he said, the taxpayers disposed of their shares even though the statute leads to the contrary conclusion and a gain accrued, that is to say, there was paid by the purchaser a sum which exceeded the taxpayers' acquisition costs. The disposal was not, he said, the disposal to Green-jacket but the ultimate vesting of the shares in Wood Bastow Holdings effected by the transaction as a whole. To my mind, this argument begs the question. Lord Wilberforce directs the commissioners to look for "the relevant transaction." But the "relevant transaction" may be one which essentially involves the constituent steps. To put shares into a company so that they and any subsequent proceeds of their sale are held by the company necessarily involves in itself a disposal in fact—which, after all, means no more than the divesting of the asset from the original holder. Once he has divested himself he has "disposed," although the statute tells us that he is to be treated as not having done so, and the question is
- F whether, on that disposal, a gain accrues. If the transaction, whatever it is, involves factually two dispositions, I cannot see in this part of Lord Wilberforce's speech anything which compels the commissioners to find that it is one disposition. It remains two dispositions though no doubt connected dispositions and the question is what is the legal effect of those dispositions taken together. For myself, I entirely fail to see why a combination of transactions has necessarily to be labelled as "sale of shares by A to C" rather than "vesting of shares by A in the B Co. and sale of the shares by the B Co. to C." It happens that that combination of transactions does not involve the payment of capital gains tax unless and until A sells his shares in the B Co., but if that is the combination of transactions which the parties intended to carry out, then I am unable to follow why there should be attributed to them, for fiscal purposes and
- G only for fiscal purposes, some quite different transaction which they did not intend merely because the end result is, so far as C is concerned, but not A, the same.
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Thus far, therefore, I find nothing in *Ramsay* which convinces me that Vinelott J. was wrong in the conclusion at which he arrived. It is the next passage which to my mind is the one which gives rise to the difficulty, for it is here that Lord Wilberforce reviews some of the earlier cases and in particular *Floor v. Davis* [1978] Ch. 295; [1980] A.C. 695 which is also

reviewed in the speech of Lord Fraser. It will, I think, be convenient to return to that later and to continue for the moment with a consideration of whether, apart from *Floor v. Davis*, there is anything else in *Ramsay* which compels the conclusion which Mr. Millett urged upon us. As I have said, I do not find it in Lord Wilberforce's speech and I turn therefore to that of Lord Fraser. Here again there are passages directed to a consideration of what is described as the wider question. Lord Fraser said, at p. 337:

"there still remains the question whether it is right to have regard to each step separately when it was so closely associated with other steps with which it formed part of a single scheme. The argument for the revenue in both appeals was that that question should be answered in the negative and that attention should be directed to the scheme as a whole. . . . In my opinion the argument of the Inland Revenue is well founded and should be accepted. Each of the appellants purchased a complete prearranged scheme, designed to produce a loss which would match the gain previously made and which would be allowable as a deduction for corporation tax (capital gains tax) purposes. In these circumstances the court is entitled and bound to consider the scheme as a whole: . . . But it is perfectly clear that neither of these disposals would have taken place except as part of the scheme, and, when they did take place, the taxpayer and all others concerned in the scheme knew and intended that they would be followed by other prearranged steps which cancelled out their effect."

I have emphasised these last words because they are, as I read Lord Fraser's speech, essential to the context in which he was expressing his opinion. He was considering the Crown's argument and if reference is made to pp. 313, 314 and 316 it will be seen what that argument was. It emphasised at the outset that what the House was concerned with was the problem of schemes which were self-cancelling. "It cannot," Mr. Millett argued, at p. 313, "have been in Parliament's contemplation that *such disposals as are in question here* were to give rise to allowable losses." (Emphasis supplied.) These schemes were, it was said, paper transactions without any objective economic reality and therefore incapable of having fiscal consequences. Then having described the self-cancelling and artificial nature of the two schemes, at pp. 315–316, counsel postulated the following questions: (i) is the court "bound to treat the individual stages in such a composite transaction each in isolation with its own fiscal consequences?" and (ii) is it "possible to create a deduction from tax by entering into a transaction which has no purpose or effect beyond the generation of the deduction itself?" Up to this point, therefore, it does not seem to me that Lord Fraser was looking wider than the self-cancelling type of schemes with which, and with which alone, the Crown's argument was concerned. If the matter ended there I would feel no difficulty in saying that there is nothing in *Ramsay* which compels me to a result which, at the moment, I find difficult to accept as a matter of logic, for I do not see how for fiscal purposes a man can be treated as having disposed of shares when, again for fiscal purposes, the law requires him to be treated as still having them. That, as it seems to me, can only be done if one ignores entirely the perfectly real transaction as a result of which he is still deemed to have them; and it is common ground that that transaction cannot simply be ignored and treated as if it had never happened. To do so would, in my

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A judgment, be to attribute a quite different substance to the combination of transactions from that which they in fact have and to fly in the face of the facts.

B Mr. Millett's most powerful—and, as he submitted, unanswerable point—arises from the later passage in Lord Fraser's speech where he approves in even stronger terms than those adopted by Lord Wilberforce, the dissenting judgment of Eveleigh L.J. in *Floor v. Davis* [1978] Ch. 295, 312. It was Mr. Millett's submission that these two opinions taken together and in combination with the approval of the three other members of the House overrules the judgment of the majority of the court in *Floor v. Davis* and compels this court, as a matter of binding authority, to hold that the taxpayer in the instant case disposed of his shares to Wood Bastow Holdings and that a taxable gain accrued on that disposal. Vinelott C J. took the view that *Floor v. Davis* was distinguishable, but Mr. Millett contended that that is unsustainable.

D Before, therefore, referring to the two passages relating to the case in the speeches of Lord Wilberforce and Lord Fraser it is necessary to look at *Floor v. Davis* itself for the purpose of determining what the relevant problem was in that case, what the case actually decided, and the context in which Eveleigh L.J. came to record his dissent. The essential facts in that case were, up to a point, indistinguishable from those in the instant case. The majority shareholders of a private company, IDM, wished to sell their shares. They found a purchaser in the form of an American company, KDI, and a sale in principle was agreed, but without any binding contract being entered into. They then formed a new company, FNW, which issued shares to them in exchange for their shares in IDM. E FNW then sold and transferred the shares in IDM to KDI at the price previously negotiated. That was stage 1 and it was for practical purposes a precisely similar series of transactions to those which took place in the instant case. It is perhaps worth remarking that FNW was a somewhat curiously constituted company for its articles provided for both ordinary and preference shares, the ordinary carrying a right to 6/7ths and the preference a right to 1/7th of the assets on a winding up. The transfer to F it of the shares in IDM was in exchange for preference shares only, so that if a winding up had taken place then, the major part of the equity would have been, as it were, in limbo. I mention this only because this capital structure formed an integral and obviously prearranged part of the second stage of the scheme which was designed to channel the major part of the proceeds of sale of the IDM shares into an off-shore company in G the Cayman Islands the ownership of whose shares never appears to have been disclosed in the evidence. That was done by a series of manoeuvres which took place a month later and the details of which do not matter for present purposes but which involved the issue of ordinary shares of FNW to a nominee of the Cayman Islands company and the liquidation of FNW. The Crown claimed tax on two quite separate footings. First, it H was contended that tax was chargeable in respect of stage 1. Originally this was put on the basis that FNW did not, on the share exchange, have control of IDM so that the transaction did not fall within paragraph 4 (2) of Schedule 7. But by the time the matter reached the High Court the contention was that stage 1 constituted a disposal by the shareholders of their IDM shares to KDI—that is to say, the same contention as that raised by Mr. Millett in the instant case. Secondly, it was contended that stage 2 constituted, for reasons which it is unnecessary to pursue here, a

deemed disposition not of the shares in IDM but of the shares in FNW. It was on this latter ground that the Crown succeeded in this court.

As regards the first ground, the majority of the court, consisting of Sir John Pennycuik and Buckley L.J., decisively rejected the Crown's contention and if matters had rested there that decision would undoubtedly be binding on us. The reasoning is very clearly and to me, at any rate, persuasively set out in the judgment of Buckley L.J.: [1978] Ch. 295, 314–315. He began by pointing out that the meaning of paragraphs 4 (2) and 6 (1) of Schedule 7 is not that such a disposal is not a disposal within the meaning of that term in the Act, but that, notwithstanding that it is a disposal, it shall not be taxed as such. He continues, at p. 315:

“Using the word ‘disposal’ in its primary and natural sense, the three shareholders did, in my opinion, dispose of their shares to FNW. In these circumstances, can the fact that they mutually intended to procure the sale of the shares by FNW to KDI deprive the sale to FNW of its character as a disposal and reduce it to the status of a merely mechanical step in a disposal of the shares by the three shareholders to KDI? It is conceded that the sale by FNW to KDI was a genuine sale. . . . Again using the word ‘disposal’ in its primary and natural sense, it is, in my opinion, clear that by that contract FNW disposed of the shares to KDI.”

The argument of counsel is not, in fact, reproduced in the report but is said to be set out in the judgment of Sir John Pennycuik at pp. 307, 308, 309 and 310 and from this judgment it appears that the Crown's case was based on the premise either that there was, at the time of the share exchange, a contractual obligation to sell the shares to FDI or that there was some equitable right to have the shares transferred to KDI which bound FNW. Both these contentions were rejected as being contrary to the commissioners' findings of fact.

Eveleigh L.J., although he agreed with the majority on the effects of stage 2, took a different view as to the effect of stage 1. It is not entirely clear from his judgment whether he accepted the Crown's submission of a subsisting equitable obligation, for he said, at p. 312:

“By virtue of the arrangement initially made between them each was under an obligation to the other to do nothing to stop the shares arriving in the hands of KDI.”

I infer, however, that the critical point in his reasoning is that FNW was a company which was in fact controlled by the taxpayers. He said, at p. 313:

“I see this case as one in which the court is not required to consider each step taken in isolation. It is a question of whether or not the shares were disposed of to KDI by the taxpayer. I believe that they were. Furthermore, they were in reality at the disposal of the original shareholders until the moment they reached the hand of KDI, although the legal ownership was in FNW.”

Accordingly he held that there was a disposal by the shareholders of their shares in IDM to KDI. What is not entirely clear is whether Eveleigh L.J. reached his conclusion on the footing that FNW acquired both the legal and beneficial ownership of the IDM shares. At p. 313 he said “In deciding that there was a disposal within the plain words of the statute to KDI, I in no way deny the legal effect of the transfer to FNW.” If by this

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A he meant that the transfer passed only the legal and not the equitable title, as might seem to be suggested in other passages from the judgment, then the decision is intelligible on the footing that he was looking at stage 1 in isolation and without reference to stage 2, for on that hypothesis FNW was a mere nominee. If, however, he meant by this—as I rather think that he must have done—that he accepted the full legal consequences which would ensue from a transfer of the full beneficial as well as the legal interest, then the conclusion appears to me to be intelligible only on the hypothesis that he was having regard to stage 2. Once the full legal consequences had taken effect—consequences which, as I see it, were incompatible with his conclusion if stage 1 stood alone—they remained in being unless and until something occurred to undo them. That something cannot, I think, be found merely in the fact that the original shareholders had control of FNW, for that entails the proposition that paragraph 4 (2) of Schedule 7 applies only where the shares of the issuing company do not confer control, for which there is no warrant whatever in the statute. One has therefore to look elsewhere for something that undid the legal effect and that can be found only in stage 2 from which it is clear that the intention was throughout to do away with FNW—in other words, a self-cancelling transaction of the *Ramsay* type. This may, I think, be the explanation of Eveleigh L.J.’s statement, at p. 314, that he was not called on to decide whether or not the transfer to FNW was a disposal, for, as a self-cancelling transaction, it could be ignored. On the alternative hypothesis that Eveleigh L.J. was considering both that the beneficial interest passed and that his observations were to be limited to stage 1 taken as a separate transaction wholly independent of stage 2 the conclusion appears to me, with respect, to ignore both the independent legal personality of a corporation and the effect which paragraph 4 of Schedule 7 has upon what, for fiscal purposes, is “the asset.” The statutory question which had to be answered was whether the taxpayer had disposed of an asset and whether a gain had accrued on that disposal and paragraph 4 (2) prescribes that the shares transferred and the shares acquired are to be treated as the same asset. No doubt it is true that the persons holding all or the majority of the shares in a company can, by pressure on the directors (if, indeed, they are not themselves directors) procure that the company deals with its property in accordance with their wishes, so that in that sense the company’s property may be said to be at their disposition. But it is the company’s property and it is the company which disposes, and the logic of disregarding altogether the corporate structure would be, I suppose, that every disposition by a controlled company of its property would be a disposal by its controlling shareholders. That might be a very beneficial result from the fiscal point of view, but it is not what the statute provides. Speaking for myself, therefore, I very much prefer and would, if I am free to do so, follow the reasoning of the majority of the court in a case where the question is simply and solely as to the effect of stage 1 standing by itself. Moreover, I find it difficult to believe that Eveleigh L.J. intended his opinion to be read apart from the facts of the case before the court, taken as a whole, for I cannot think that the inevitability of a double taxation on the same gain, if the transaction was taken as terminating at the end of stage 1, can have escaped him. As Mr. Millet has very fairly pointed out, the Crown there were claiming tax on one amount of gain only, whether it accrued on the sale of the IDM shares or on the subsequent dealings of the taxpayers with their shares in FNW.

The question was whether, taking the transactions as a whole, at what, if any, stage was there a disposal of assets on which a gain accrued.

Eveleigh L.J.'s judgment cannot, as I think, properly be read as divorced from the background that stage 1 was, and was all along intended to be, followed by stage 2 as a result of which the proceeds of sale became the absolute property of the taxpayers—the fact that they brought into being a Cayman Islands company as the actual recipient does not affect the matter. This must, I think, have had a material bearing on his conclusion and that this is so appears, in my judgment, from two passages in the judgment. At p. 313 he draws the analogy of a man wishing to sell his house at an undervalue to his mistress. He sells it to a company controlled by a friend having arranged with the friend to sub-sell it to the mistress at the same price. Thus he is in exactly the same position as if he had sold the house directly to his mistress, the intermediate company being merely a channel. He has the proceeds of sale. She has the house. Now this is a perfectly accurate and fair analogy if one regards the series of transactions in *Floor's* case as a single composite transaction which started with the taxpayers holding the IDM shares and ended with their holding the proceeds of sale received from KDI or if one regards the transfer to FNW as passing no more than the legal title. There is nothing, then, particularly startling about saying, “let us regard the transaction as a whole. The profit has accrued to the shareholders as a result of the total transaction. The intermediate steps were never intended to be anything but ephemeral and self-cancelling or to convey any beneficial interest so we can ignore them and treat the shares as having been disposed of to KDI.” But it is not an accurate analogy if one treats the beneficial title as having passed to FNW and the entire transaction as having terminated at the end of stage 1, for on this hypothesis the intermediate company is not a mere channel. It provides a quite different consideration from that provided by the ultimate transferee and one which is not, in any sense, self-cancelling. The cash consideration paid to the company never comes to the hands of the original shareholders. The other passage which appears to me to support the view that Eveleigh L.J. was considering the effects of stage 1 as part of a total scheme containing both stages is right at the end of his judgment at p. 314 where he describes the transfer to FNW as “conveyancing machinery.” Again, if one treats the transaction as consisting only of stage 1 and nothing but stage 1, it could not, in my judgment, properly be described as mere conveyancing machinery—which I take to mean machinery for giving effect to a conveyance of the property—except, again, upon the footing that FNW never obtained more than a legal, as opposed to a beneficial, interest. It had the quite distinct effect of creating a new and permanent asset quite separate from the proceeds of sale in the form of paid up shares which could be dealt with by the holders only in accordance with the company's constitution and the provisions of the Companies Act. On the other hand, if one looks ahead to stage 2, one finds that that asset was and was intended to be purely ephemeral and that it was indeed self-cancelling. It was brought into being and was then almost immediately made to disappear leaving, as the taxpayers claimed, only some fiscal consequences which lingered like the grin of the Cheshire cat in Alice in Wonderland but had no connection with a living body.

I turn back, therefore, to a consideration of the two passages from the speeches of Lord Wilberforce and Lord Fraser on which Mr. Millett particularly relied, but with the caveat that both of them must be

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A considered in the context of the decision in which they occurred. I ask, therefore, initially what was it in fact that *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 decided? As I see it, it decided three things. First, it established that there is nothing in the *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 principle which compels a consideration of individual transactions separately from

B a preconceived chain or series of transactions of which they form merely a part. Secondly, it established that where one finds a series of preconceived transactions which are entered on solely for fiscal purposes and are clearly interconnected and mutually dependent on one another one should look at the overall transaction to ascertain what has been and what was intended to be achieved. Thirdly, it established that if what you find on

C such a consideration is that nothing whatever has been achieved because the individual steps taken cancel one another out, you are entitled then to ignore the fiscal consequences which might otherwise have resulted from each of those individual steps considered in isolation. That as I see it represents the substance of the general principle deducible from the decision, although I would not wish what I have said to be treated as an exhaustive analysis.

D The matter was carried one stage further, as Vinelott J. pointed out in the court below [1982] S.T.C. 267, 287, by *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, where Lord Diplock made it clear that the approach is not necessarily confined to the completely self-cancelling type of operation, but is to be applied to any preordained series of transactions into which are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence

E of those particular steps would have been payable. As Vinelott J. pointed out in his long and careful judgment, the transaction in that case was not totally self-cancelling in the sense that the position was exactly the same before as it was after, since *Burmah* shed itself of an insolvent subsidiary; but in practical terms its position was unchanged. All that had happened was that an irrecoverable bad debt was transmuted into a realised loss of money subscribed for share capital. What the House regarded was the

F true final result of the circular transactions taken as a whole.

In each of the appeals in *Ramsay* and in *Burmah* the question was whether the taxpayer had suffered a deductible loss and in each case the taxpayer had sought to manufacture or, in the *Burmah* case, to transmute the loss by an elaborate series of transactions each of which was reflected by a matching transaction, either contemporaneous or subsequent, with

G the object of creating the fiscal consequence of deductibility without the factual or economic position of the taxpayer being in the least affected. They were thus engaged in the construction of a sort of fiscal phantasmagoria. Looking at the transactions as a whole the real question was whether anything of the image remained when the mirrors were taken away and it was found in each case that there was nothing. That is the background against which the speeches have to be read. In the *Ramsay*

H case Lord Wilberforce was concerned, in his consideration, to see what were the limitations on the *Westminster* principle and it was in this context that he considered *Floor v. Davis* [1978] Ch. 295; [1980] A.C. 695. He said at p. 324:

“The key transaction in this scheme was a sale of shares in a company called IDM to one company (FNW) and a resale by that company to a further company (KDI). The majority of the Court of Appeal

thought it right to look at each of the sales separately and rejected an argument by the Crown that they could be considered as an integrated transaction. But Eveleigh L.J. upheld that argument. He held that the fact that each sale was genuine did not prevent him from regarding each as part of a whole, or oblige him to consider each step in isolation. Nor was he so prevented by *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. Looking at the scheme as a whole, and finding that the taxpayer and his sons-in-law had complete control of the IDM shares until they reached KDI, he was entitled to find that there was a disposal to KDI. When the case reached this House it was decided on a limited argument, and the wider point was not considered. This same approach has commended itself to Templeman L.J. and has been expressed by him in impressive reasoning in the Court of Appeal's judgment in *Rawling* [1980] 2 All E.R. 12, 21-23. It will be seen from what follows that these judgments, and their emerging principle, commend themselves to me."

Some light on whether this was intended to be treated as a blanket approval of the whole of Eveleigh L.J.'s judgment (and, by implication, the overruling of the majority judgment in that case so far as it related to stage 1) is, I think, to be gained from the judgment of Templeman L.J. in *Eilbeck v. Rawling* [1980] 2 All E.R. 12 in the Court of Appeal with which Lord Wilberforce also approved. Templeman L.J. in fact found *Floor's* case of no assistance because, as he put it, there was no circularity there. What he was concerned with was the application of the *Westminster* case to transactions which were self-cancelling and achieved nothing, and he pointed out as a distinguishing feature that the position of the employee in the *Westminster* case was not the same before the transaction in question as it was after. He contrasted that with the case before him where the effect of the transactions, taken as a whole, was that the taxpayer neither gained nor lost, so that his position remained exactly the same before as it did after the various steps had been gone through. Thus, it seems to me that what Lord Wilberforce is commending in this passage is not the correctness of the conclusion at which Eveleigh L.J. arrived but his approach to the problem. I find it difficult to believe that Lord Wilberforce here was intending to hold as a matter of law that the approach adopted by Eveleigh L.J. necessarily led to the conclusion that, as a matter of analysis, stage 1, taken in isolation from stage 2, produced the result that there was a disposal by the taxpayer to KDI—a matter as to which it does not appear that any argument was addressed to the House (see, for instance, p. 319 where the argument is as to the correctness of Sir John Pennycuik's approach to the case rather than his conclusion). For myself, therefore, I find in this passage nothing more than a general approval of the approach of Eveleigh L.J., that being the "emerging principle" which commends itself.

Lord Fraser of Tullybelton, however, expressed his view of *Floor's* case rather more strongly. He said, at p. 339:

"The view that I take of this appeal is entirely consistent with the decision in *Chinn v. Hochstrasser* [1981] A.C. 533, and it could in my opinion have been the ground of decision in *Floor v. Davis* [1980] A.C. 695 in accordance with the dissenting opinion of Eveleigh L.J. in the Court of Appeal [1978] Ch. 295, 312, with which I respectfully agree."

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A Lord Fraser then briefly describes stage 1 of the scheme and, after quoting the passage from the judgment of Eveleigh L.J. referred to ante at p. 648G—H starting with the words “I see this case . . .,” continued the citation:

B “I do not think that this conclusion is any way vitiated by *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. In that case it was sought to say that the payments under covenant were not such but were payments of wages. I do not seek to say that the transfer to FNW was not a transfer. The important feature of the present case is that the destiny of the shares was at all times under the control of the taxpayer who was arranging for them to be transferred to KDI. The transfer to FNW was but a step in that process.”

C Lord Fraser concluded: “In my opinion the reasoning in that passage is equally applicable to the present appeals.”

D Mr. Millett argued first, that this is part of the ratio of the decision and not merely obiter dictum: secondly that it impliedly overrules the majority judgment in *Floor’s* case; and thirdly that, consequent upon the agreement with Lord Fraser’s speech of Lord Russell and Lord Roskill, there is, in any case where the facts are not materially distinguishable from stage 1 in *Floor’s* case standing alone, a decision of the House of Lords binding upon this court that the transactions, taken together, constitute a disposal to the ultimate purchaser with the inevitable double taxation result indicated above.

E Now to begin with, I cannot, for my part, regard these observations of Lord Fraser, valuable and persuasive as they are, as part of the ratio of the decision. Eveleigh L.J.’s judgment is, as it appears to me, referred to merely as an example of reasoning which Lord Fraser approves and as an illustration of the limitations of the *Westminster* case. It is true that he says that the view which he takes of the *Ramsay* appeal could have been the ground of decision in *Floor v. Davis* [1978] Ch. 295 in accordance with the dissenting judgment, but one has, I think, to look at the facts of *Floor’s* case as a whole and I do not read him as expressing the opinion that stage 1 taken alone, and without any element of circularity, would necessarily produce the same result as the transaction which, as in *Floor’s* case, is in fact a circular and self-cancelling transaction. It is, moreover, as mentioned above, not at all clear whether Eveleigh L.J. was treating anything more than the legal title as having passed to FNW because he expressly disclaimed any decision as to whether or not that transfer was a disposal—a disclaimer which, again, might seem to be only consistent with a view that it was a transfer in name only, without affecting the beneficial interest. Nor indeed is it clear how far the concurrence of Lord Russell of Killowen and Lord Roskill goes. Lord Fraser went rather further than Lord Wilberforce. Lord Roskill agreed with both without reservation. Lord Russell agreed with both on the general principles which they enunciated, but again it is open to question whether Lord Fraser’s approval of Eveleigh L.J.’s reasoning was an enunciation of the general principle. It was, as it seems to me, no more than an example of its application.

H In my judgment, therefore, although I accept—indeed I assert—that *Ramsay* [1982] A.C. 300 dictates the approach which the court should adopt to a series of closely connected transactions such as those in question in the instant case, it does not in my judgment also dictate the result of that approach on the facts of this case. I do not, of course, for

one moment presume to question the correctness of Lord Fraser's view with regard to *Floor's* case on all the facts of that case, but it does not appear to me to be determinative of the result of an analysis, in accordance with *Ramsay* principles, of the transaction in the instant case having regard to the facts of this case and the commissioners' specific findings with regard to those facts.

Vinelott J. [1982] S.T.C. 267, 294-295 took the view that the instant case was in any event distinguishable from *Floor's* case and as I read his judgment he did so on the ground that there was this salient difference, namely, that in *Floor's* case the steps which were taken between the parting by the taxpayer with his shares and the receipt by him, or by his direction, of the purchase moneys were steps which did not have and were not intended to have any enduring effect on the rights and obligations of the parties after the completion of the scheme. It was thus possible to excise those steps as if they were writ in water and to treat the transaction simply as a disposal by the taxpayer to KDI. This is a distinction which Vinelott J. drew from his very close and clear analysis of *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30 and Mr. Millett criticised it as a gloss which is both unwarranted by authority and unjustified in principle. I agree that it may, on the face of it, appear to be a gloss, but in my judgment it is a necessary one, for I do not see how otherwise there is to be avoided an insuperable logical contradiction between the mandatory statutory consequences of a transaction which cannot, it is conceded, be excised or ignored and the legal consequences sought to be attributed to a different composite transaction which, it is asserted, are not to supersede but to live alongside those statutory consequences. It appears first in Vinelott J.'s analysis of the *Burmah* case, in the course of which he observed, at p. 287:

"Further, the court may disregard a transaction and treat it as fiscally a nullity even though there is a change in the legal position of the parties before and after the scheme is carried through if that change can be regarded as a mere change of form with no enduring legal consequences."

This, Mr. Millett suggested, is not in any event a valid ground for distinguishing *Floor v. Davis* because the word "enduring" is itself a word of flexible import. A consequence may endure for one month or for six or for a year or more and in the *Floor* case the existence of FNW did endure for about a month. This as it seems to me is attributing to Vinelott J. a literality of expression which I do not think he can have intended. By an "enduring" consequence I take him to mean merely that the consequence is one which is intended to continue to regulate the position of the parties without any preordained intention or arrangement for its termination or cancellation. It is, I think, merely an echo of Lord Diplock's requirement in *Burmah* [1982] S.T.C. 30, 32 that the inserted steps should have a "commercial" purpose—using the word "commercial" in, as, I apprehend, Lord Diplock must have intended, its widest sense, for taxpayers are not all engaged in commerce. All that I read Vinelott J. as saying is that where you find that a transaction forming part of a larger transaction or a series of transactions is such that it has and is intended to have a lasting effect on the legal position of the parties with no immediate or preordained intention that it shall terminate, you cannot, when analysing the totality of the legal and practical effect of the combination as a whole, disregard that lasting effect. It is there and it is not merely ephemeral, and its legal

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A effects remain however the transaction is analysed. It must therefore figure in the analysis as an integral and inseparable part of the whole. I find myself wholly in agreement with this. There is no suggestion in this case, as there inevitably was in *Floor's* case, that Greenjacket is or was intended to be merely a conduit pipe for syphoning off the purchase money elsewhere or into the hands of the taxpayer or that it was intended to be a mere temporary receptacle whose only function was the brief holding of a legal interest. There is, indeed, an express finding in this case which is not found in *Floor's* case—presumably because, as the matter was presented to the commissioners there, it was not in issue—that the transfer to Greenjacket passed both the legal and the beneficial title to the shares. There was no finding and no evidence of any arrangement for the dissolution of Greenjacket nor any suggestion that it was otherwise than a permanently established investment company intended to operate as such, and indeed the commissioners had before them its accounts for the year ended October 30, 1972, showing its dealings with the proceeds of sale and the income received from their investment. In these circumstances, the case appears to me to be quite a different case from *Floor's* case. I respectfully agree with the analysis of Vinelott J. in his judgment. Approached in the light of the *Ramsay* principles, the composite transaction was in my judgment one which included as an integral feature the disposal of the shares to Greenjacket beneficially and I find it impossible, simply because that company was ultimately under the control of the disposing shareholders, to regard the moneys accruing to Greenjacket on the sale by it to Wood Bastow as a gain accruing to the taxpayers on the disposal of their shares to Wood Bastow. I would dismiss the appeals.

E KERR L.J. I agree that these appeals should be dismissed for the reasons stated by Oliver L.J. It may seem naive nowadays to rely on passages from *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 decided in simpler times, nearly 50 years ago. But the classic statement of Lord Tomlin, as cited by Oliver L.J., ante p. 643c-d, appears to me to remain fully authoritative for the purpose of the present case, notwithstanding that it was made in relation to a “one step” transaction and the welcome new approach to composite transactions which has been initiated by the House of Lords in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300. While it is well settled that the taxpayer’s motive in entering into a transaction is irrelevant, the intended nature and effect of the transaction, viewed as a whole, cannot in my view be ignored in considering the applicability of the principles laid down in *Ramsay* and carried somewhat further in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* The nature of the transaction in the present case was the proposed out-and-out sale of the shares in the family manufacturing companies to a third party. In ordering their affairs—to use the words of Lord Tomlin—in relation to this sale, the members of the family were entitled to do so by any legitimate methods designed to avoid or minimise capital gains tax. The method which they adopted to achieve this result was by restructuring the family finances on the basis of an investment company in the definitive way which has been described. At the end of the transaction the family held the shares in the investment company, whose value included the price paid by the third party to the investment company for the original shares. There was no more to it than that. In particular, there was no further transaction, as in *Floor v. Davis* [1980] A.C. 695, which effectively cancelled out the

intervening steps and indirectly channelled the proceeds of the sale back to the original source. And, if and when there is a disposal of the shares in the investment company, or it is dissolved, capital gains tax will be payable, which will take account of the price received for the original shares.

In my view the various steps in this composite transaction, although intended to be carried through from beginning to end—but no further—do not fall to be ignored or to be regarded as ineffective for fiscal purposes under the principles laid down in *Ramsay*. In saying this, I obviously do not overlook what was said by Lord Wilberforce and, in particular, by Lord Fraser of Tullybelton in their speeches in *Ramsay* and *Eilbeck v. Rawling* (heard together in the House of Lords) about the remarks of Eveleigh L.J. in *Floor v. Davis* [1978] Ch. 295 in this court. However, I do not think that either of their Lordships thereby intended to state that if the facts of *Floor v. Davis* had been limited to stage 1 of that case, then the analyses of Sir John Pennycuik and Buckley L.J. would have been wrong, and the analysis of Eveleigh L.J. would have been right, even in the light of the new approach to composite—but self-cancelling—transactions which they were laying down in situations such as those in *Ramsay* and *Rawling*. So to interpret their remarks would involve the conclusion that they were intending to deal with an issue which did not arise on those appeals and which had not been argued before them. Thus, they did not say that they regarded the majority view in this court to have been wrong. By expressly approving the approach of Eveleigh L.J. in their speeches in those appeals, I think that they intended to do so merely in relation to situations such as those which fell to be considered in those appeals. They were saying, as I see it, that in such situations the approach of Eveleigh L.J. is a permissible and correct basis for rejecting the “step by step” analysis in favour of an overall assessment of what the taxpayer intended to achieve, and did achieve, by a series of steps which, broadly speaking, ultimately became self-cancelling.

In the upshot, my conclusion in the present case is largely in line with the analysis of Sir John Pennycuik and Buckley L.J. of stage 1 in *Floor v. Davis* [1978] Ch. 295. However, their views were expressed in the context of the facts of *Floor v. Davis* as a whole, and before the decision of the House of Lords in *Ramsay* and *Rawling* [1982] A.C. 300. Accordingly, although my conclusion arrives at the same result, I do not regard their analysis as binding upon this court strictly as a matter of stare decisis. As it seems to me, the present case is clearly different from *Floor v. Davis* for the reasons which I have briefly sought to indicate, and in the ultimate analysis it falls to be decided in favour of the taxpayers independently of what was said in relation to *Floor v. Davis* both in this court and in the House of Lords. Accordingly I would dismiss these appeals.

I should add that, since I wrote this judgment, I have also read the judgment of Slade L.J. with which I also agree.

SLADE L.J. I agree that these appeals should be dismissed. The three taxpayers, who in 1971 held ordinary shares in Fordham and Burton Ltd. and Kirkby Garments Ltd. (the operating companies), had two principal objects in effecting the transactions of December of that year, namely: (1) to give effect to the contemplated purchase of those shares by Wood Bastow Holdings Ltd.; and (2) at the same time to avoid or defer the liability to capital gains tax on the gain which would undoubtedly have accrued to them if they had themselves sold the shares to Wood Bastow

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A and received the purchase price. The broad plan was that liability for
capital gains tax could be deferred if an investment company, Greenjacket
Investments Ltd., having been incorporated in the Isle of Man and wholly
owned by the Dawson family shareholders, were to acquire the shares of
the operating companies at full value, issuing its own shares in satisfaction
of the purchase price, and were itself then to sell the shares in the
operating companies to Wood Bastow. The thinking behind the scheme
was that paragraph 6 of Schedule 7 to the Finance Act 1965 would apply
so as to prevent the transfers by the taxpayers of their shares in exchange
for shares in the investment company from being chargeable disposals of
the shares in the operating companies, while the investment company
itself would not make a taxable gain, since the sale would be at a price
equal to the cost of the shares in the operating companies. The hope was
that the Dawson family shareholders would postpone liability for capital
gains tax consequent on the disposal of their shares in the operating
companies until such time as they disposed of, or were to be treated as
disposing of, their shares in Greenjacket.

The scheme employed thus was in all material respects the same as
that which constituted stage 1 of the scheme in *Floor v. Davis* [1978] Ch.
295, C.A.; [1980] A.C. 695, H.L.(E.) The facts of that case have already
been summarised in the judgment of Oliver L.J. In *Floor* the scheme
included a stage 2, not present in the instant case, which involved the
winding up of the company which had been formed to purchase the shares
and the distribution of most of its surplus assets to a foreign company,
Donmarco. Though the case stated in *Floor* gives little information as to
Donmarco, I think the inevitable inference is that it was, as Vinelott J.
described it in his judgment in the present case, “the chosen recipient of
the proceeds of the sale”: [1982] S.T.C. 267, 294. The Court of Appeal,
and subsequently the House of Lords, held that the scheme in *Floor* failed
to achieve its tax-saving purpose, because stage 2 caused paragraph 15 (2)
of Schedule 7 to the Finance Act 1965 to apply, so as to give rise to a
deemed disposal by the taxpayer of the shares in question. The House of
Lords in *Floor* decided the case in favour of the Crown solely on the basis
that paragraph 15 (2) of Schedule 7 applied and did not find it necessary
to deal with the alternative submissions which had been addressed on
behalf of the Crown to the Court of Appeal. This point relating to
paragraph 15 (2) has no relevance in the present case, since here the
taxpayers were content to receive shares in Greenjacket rather than
introduce into the scheme a stage 2. The decision of the House of Lords
in *Floor* is therefore of little assistance in the present case. The judgments
of the Court of Appeal, however, are very relevant because they dealt
not only with the Crown’s argument based on paragraph 15 (2), but also
with an alternative, indeed primary, submission made by the Crown—
namely, that the transactions which made up stage 1, looked at together,
should be regarded as a disposal direct by the taxpayer to the ultimate
purchaser.

H Eveleigh L.J., dissenting on this point, accepted this submission. At
[1978] 1 Ch. 295, 313, he regarded the case as one in which the court was
“not required to consider each step taken in isolation,” and considered
that, when the scheme was regarded as a whole, it involved a disposal by
the taxpayer to the ultimate purchaser. However, the majority of the
court, Buckley L.J. and Sir John Pennycuick, rejected the Crown’s
contention. Sir John Pennycuick, who gave the leading judgment, con-
sidered, at p. 307, that the contention “disregards the legal effect of what

were admittedly genuine transactions and really seeks to resurrect the conception of substance which was buried by the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1." He said, at p. 308, that it was impossible upon "the plain legal effect" of the transactions involved in stage 1 to maintain that the taxpayer and his sons-in-law had sold their shares to anyone other than FNW (the interposed company) or that KDI (the ultimate purchaser) purchased those shares from anyone other than FNW. (I pause to mention that the principle of the *Duke of Westminster* case, as described by Lord Wilberforce in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, 323, is that "given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance.")

In the absence of any relevant authority subsequent to *Floor*, this court would, I think, have been both entitled and bound to follow the decision of the majority in that case, by rejecting the Crown's contention that the scheme in the instant case involved a disposal of the shares in the operating companies by the three taxpayers in favour of Wood Bastow. If the passages from the judgments of Sir John Pennycuik and Buckley L.J. directed to the equivalent point in *Floor's* case [1978] Ch. 295, 307-308 and 314-315 were read with the substitution of references to the members of the Dawson family, the operating companies, Greenjacket and Wood Bastow for the respective references to the taxpayer and his two sons-in-law, IDM, FNW and KDI, these passages would apply almost word for word to the present case. Indeed, the present case could be said by the taxpayers to be a fortiori in their favour, since the scheme in the present case did not include stage 2 and there are specific findings by the commissioners that (a) there was no understanding between the parties that Greenjacket, on receiving a transfer of the shares, should acquire less than the full beneficial ownership of them; (b) Greenjacket did not assume any contractual obligation to sell the shares to Wood Bastow until after it had acquired them. Mr. Millett, however, has submitted on behalf of the Crown not only that the decision of the majority of the Court of Appeal in *Floor*, as to the relevant point, cannot stand with the subsequent decisions in *Ramsay* and *Rawling* and *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, but that these decisions oblige this court to hold that the scheme in the present case involved a disposal by the taxpayers in favour of Wood Bastow, giving rise to a chargeable gain in their favour.

The particular schemes involved in *Ramsay* and *Rawling* were in each case schemes of a somewhat artificial nature designed to create a loss which the taxpayers could set off for capital gains tax purposes against a chargeable gain which had already accrued to them. The two schemes had these common features as described by Lord Wilberforce [1982] A.C. 300, 322:

"The scheme consists, as do others which have come to the notice of the courts, of a number of steps to be carried out, documents to be executed, payments to be made, according to a timetable, in each case rapid: see the attractive description by Buckley L.J. in *Rawling* [1980] 2 All E.R. 12, 16. In each case two assets appear, like 'particles' in a gas chamber with opposite charges, one of which is used to create the loss, the other of which gives rise to an equivalent gain which prevents the taxpayer from supporting any real loss, and which gain is intended not to be taxable. Like the particles, these

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A assets have a very short life. Having served their purpose they cancel each other out and disappear. At the end of the series of operations, the taxpayer's financial position is precisely as it was at the beginning, except that he has paid a fee, and certain expenses, to the promoter of the scheme."

I pause to observe that these are not features of the scheme in the present case. In the courts below, in those two cases, the Crown based its claims on technical grounds which were accepted by the Court of Appeal, though Scarman L.J., who was sitting in this court in *Ramsay* [1979] 1 W.L.R. 974, 986, expressed the hope that the majority decision of this court in *Floor v. Davis* might soon be reviewed by the House of Lords, and the opinion that it was unfortunate that *Floor v. Davis* had been decided in the House of Lords on another point.

C In the House of Lords, for the first time in both *Ramsay* and *Rawling*, the Crown raised a much broader issue than the more technical arguments advanced in the courts below. The submission was in effect that the tax avoidance schemes acquired and used by the taxpayers should simply be disregarded as artificial and fiscally ineffective. As appears from the report of the argument, however (see [1982] A.C. 300, 321), leading counsel appearing for the Crown, Mr. Millett, made it plain that he did not suggest that the House should adopt the widest principle of the "multiple step transaction" adumbrated in the United States of America, but that the doctrine which the Crown invited the House to adopt was much narrower and confined to self-cancelling transactions, in which an allowable loss was manufactured by an artificial transaction with no effect except to generate the claim.

E The taxpayers sought to counter this submission by contending that it was inconsistent with the principle of *Inland Revenue Commissioners v. Duke of Westminster*. Faced with this contention, the House of Lords in *Ramsay* (as Lord Diplock subsequently explained in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, 32) adopted an approach which marked

F "a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transaction (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been taxable."

G The actual ratio of the decision of the House of Lords in *Ramsay* is, as Lord Fraser himself subsequently pointed out in the *Burmah* case [1982] S.T.C. 30, 37, to be found in the following passage from the speech of Lord Wilberforce, where he said [1982] A.C. 300, 326:

H "The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd. v. Inland Revenue Commissioners* [1978] A.C. 885, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

Thus, in regard to *Ramsay*, Lord Wilberforce concluded, at p. 328, that "The true view, regarding the scheme as a whole, is to find that there was neither gain nor loss" and, at p. 332, apart from a sum not exceeding £370, he reached the same conclusion in regard to *Rawling*. The rest of the House of Lords reached the same conclusion.

Accordingly, the ratio decidendi of the decision of the House of Lords in *Ramsay*, as subsequently explained by Lord Fraser, clearly has no direct application to the facts of the present case. Nevertheless, as Mr. Millett emphasised on behalf of the Crown, despite the more restricted nature of the invitation given by him to their Lordships in *Ramsay*, they did not confine their statements of the relevant principles to self-cancelling transactions in which an allowable loss was manufactured by an artificial transaction designed simply to generate the claim. Their observations went wider than this. The speeches of Lord Wilberforce, with whom Lord Russell, Lord Roskill and Lord Bridge agreed, and of Lord Fraser, with whom Lord Russell and Lord Roskill agreed, included not only general statements as to the limitations of the *Westminster* principle but also specific references to the *Floor* case.

Lord Wilberforce in *Ramsay* and *Rawling* [1982] A.C. 300 stated the limitations of the *Westminster* doctrine in general terms, at pp. 323-324:

"This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. For this there is authority in the law relating to income tax and capital gains tax: see *Chinn v. Hochstrasser* [1981] A.C. 533 and *Inland Revenue Commissioners v. Plummer* [1980] A.C. 896.

"For the commissioners considering a particular case it is wrong, and an unnecessary self-limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams,' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd. v. Nicol* (1975) 50 T.C. 229) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter

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A (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions."

By way of an illustration of a recent case which showed the limitations of the *Westminster* doctrine, Lord Wilberforce then proceeded to refer to *Floor* as to which he expressed approval of the general approach of Eveleigh L.J. in that case, in the passage at p. 324, which has already been quoted by Oliver L.J. (see ante pp. 651H-652C).

B Lord Fraser in *Ramsay* and *Rawling* went a little further than Lord Wilberforce. Having clearly demonstrated that, when the schemes in each case were viewed as a whole, there had been no real loss, he continued, at pp. 338-339:

C "Counsel for the taxpayer naturally pressed upon us the view that if we were to refuse to have regard to the disposals which took place in the course of these schemes, we would be departing from a long line of authorities which required the courts to regard the legal form and nature of transactions that have been carried out. My Lords, I do not believe that we would be doing any such thing. I am not suggesting that the legal form of any transaction should be disregarded in favour of its supposed substance. Nothing that I have said is in any way inconsistent with the decision in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 where there was only one transaction—the grant of an annuity—and there was no question of its having formed part of any larger scheme."

E Lord Fraser, at p. 339, then proceeded to make specific reference to the *Floor* case in a passage which has already been quoted by Oliver L.J., ante, p. 652H, and in which he expressly said that he agreed with the dissenting judgment of Eveleigh L.J. in that case.

F The principles established in *Ramsay* and *Rawling* have since been applied again by the House of Lords in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30. But that was another case where it was found on the facts that, when the tax avoidance scheme entered into by the taxpayer company was carried through to completion, "there was here no real loss and no loss in the sense contemplated by the legislature": (see at p. 39 *per* Lord Fraser). The speeches do not refer to the *Floor* decision and I do not think that the case adds much, material for present purposes, to what has already been said in *Ramsay* and *Rawling*.

G I have referred at some length to the earlier authorities because I regard the application of the stare decisis rule as giving rise to by far the most difficult problems in the present case. Vinelott J., when confronted by the same problem, if I have interpreted his judgment correctly, implicitly accepted that the effect of the passages in the speeches of the House of Lords in *Ramsay* and *Rawling*, expressing approval of the judgment of Eveleigh L.J. in *Floor*, was to render obligatory the conclusion that in the present case there had been a disposal by the taxpayers of their shares in the operating companies to Wood Bastow. Nevertheless, he did not think that this compelled him to hold that the taxpayers had realised a gain on a disposal of their shares in the operating companies. This, as I understand it, was essentially for two reasons. First, the scheme in *Floor* included a stage 2, not featuring in the present case, under which the proceeds of the sale of the shares of IDM held by them immediately before the first step in the scheme was taken were paid in part to the taxpayer and his sons-

in-law and as to the larger part to Donmarco, the chosen recipient of the proceeds of the sale to KDI, which proceeds were held until its dissolution by a company which the taxpayer and his sons-in-law controlled. Secondly, in *Floor v. Davis* the question at issue was whether the gain which accrued to the taxpayer or, with his concurrence, to Donmarco accrued on an indirect disposal by him to KDI. However, Vinelott J. said [1982] S.T.C. 267, 295:

"In the instant appeals the question is a different one. It is whether the moneys paid to Greenjacket and received beneficially by it (less the base cost to the Dawson family shareholders of the shares in the operating companies) can be treated as a gain accruing to them as a result of a disposal (indirect) to Wood Bastow."

With great respect to Vinelott J., I do not myself find convincing these two suggested distinctions between the instant case and *Floor*. As to the first, I can find nothing in the judgment of Eveleigh L.J. which suggests that, in concluding that there had been a disposal to FNW, he attached any importance at all to stage 2 of the scheme, which he did not even mention. Likewise, neither Lord Wilberforce nor Lord Fraser made any reference to stage 2 in their subsequent comments on the *Floor* case. As to the second suggested distinction, I am inclined to think that if the correct analysis of the facts of the present case is that a disposal took place by the Dawson family shareholders to Wood Bastow, the conclusion that a gain accrued to them on such disposal is inescapable, though nice questions might arise as to the measurement of such gain.

After anxious consideration, however, I find myself unable to accept the Crown's submission that the decisions in *Ramsay* and *Rawling*, even when read with the observations of Lord Wilberforce and Lord Fraser relating to the *Floor* decision, do constitute an authority obliging this court to hold that, on the facts of the present case, there has been a disposal by the taxpayers in favour of Wood Bastow. Mr. Millett naturally pressed us particularly strongly with the speech of Lord Fraser, particularly having regard to his expressed agreement with the dissenting judgment of Eveleigh L.J. He submitted that, just as Lord Fraser had refused to have regard to the intermediate disposals which took place in the course of the schemes in *Ramsay* and *Rawling*, so should the majority of the court in *Floor* have refused to have regard to them and so should the court dealing with the instant case.

The three recent House of Lords decisions do demonstrate beyond dispute that if, as in the present case, a document or transaction is intended to have effect as merely one part of a series of transactions, the court must not regard it simply in isolation, whether the scheme in question involves a series of interdependent contracts under which the same property revolves in a circle, as in *Ramsay* and *Rawling*, or no circularity is involved, as in *Floor*. However, it would be one thing to say, as Lord Fraser said in regard to the circular schemes in *Ramsay* and *Rawling*, that, when each scheme was looked at as a whole, the relevant loss-making asset had never been disposed of at all, because the alleged disposals had been followed by other prearranged steps which cancelled out their effect. It would be quite another thing to say that the scheme in *Floor*, which involved no circularity at all even when looked at as a whole, involved no disposal by the taxpayer and his sons-in-law in favour of FNW and no disposal by FNW in favour of KDI, but only one disposal by the taxpayer and his sons-in-law in favour of KDI—or alternatively that it

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A involved three disposals. The implications for tax purposes of a conclusion which involved the finding of one or three, as opposed to two, disposals, on the facts of the *Floor* case, were not, I believe, considered by the House of Lords, because it was not necessary to consider them. Mr. Millett told us that in *Ramsay* and *Rawling* he himself addressed no argument to their Lordships on the *Floor* decision on behalf of the Crown, because he did not think it necessary to do so.

B The references to *Floor* by their Lordships were clearly a convenient mode of illustrating the broader approach to tax avoidance schemes which they were concerned to establish. In all the circumstances, however, I do not read these references either as being necessary to their decision in the case before them or as being intended to bind inferior courts in future cases to the conclusion that, on the particular facts of *Floor*, there had been a disposal by the taxpayer and his sons-in-law in favour of the ultimate purchaser. Accordingly, I do not think that they compel a decision in favour of the Crown in the present case. This being my conclusion on this point, I have considered whether this court should regard itself as being still bound by the decision of the majority of the Court of Appeal in *Floor*. I am inclined to think that the answer to this question must be in the negative, since that decision was given before the subsequent guidance as to the broad approach to composite transactions forming part of one tax avoidance scheme, which is to be found in *Ramsay*, *Rawling* and *Burmah*.

E Nevertheless, the status of the majority decision in *Floor*, for the purpose of the stare decisis rule, is in my opinion an academic question because, even apart from that decision, and even after applying the general principles established by those three decisions of the House of Lords, I am satisfied that the Crown's claim in the present case is ill-founded. I can state my reasons fairly shortly. Even when one regards the scheme in the present case as a whole, one is forced to the conclusion that it involved two quite distinct steps, namely, (a) a transfer by the Dawson family shareholders to Greenjacket of the full legal and beneficial ownership of the shares in the operating companies, and (b) a subsequent transfer by Greenjacket to Wood Bastow of the full legal and beneficial ownership of the shares. It is true that these two transfers were separated by only a very short interval of time, perhaps not more than a few hours. Nevertheless, we are bound by the finding of the commissioners that, for the time being, Greenjacket acquired the full beneficial ownership of the shares.

G The claim of the Crown thus involves the radical proposition that, a composite transaction which embodies two steps, namely (i) a transfer by A to B of the full legal and beneficial title to property and, (ii) a subsequent transfer by B to C of the full legal and beneficial title to the same property, may in certain circumstances give rise to a disposal by A to C for capital gains tax purposes. On such facts, whether or not the two transfers form part of one composite scheme, I cannot see how there can have failed to be a disposal by A in favour of B or a disposal by B in favour of C, or how the Crown could possibly be resisted if it sought to make A chargeable for any gain accruing to him on the first disposal and B chargeable for any gain accruing on the second disposal (subject in either case to any special exemption that might be available, for example, under paragraph 6 of Schedule 7 to the Act of 1965). I think that the Crown's claim, by necessary implication, involves the proposition that, at least in some circumstances, the two-step transaction under discussion

could give rise to a third disposal of the very same property, in addition to the two already mentioned, namely, a disposal by A in favour of C. Two observations may be made in regard to this proposition. First, it involves giving to the word "disposal," which is not defined in the capital gains tax legislation, an artificial sense far wider than it can bear according to the ordinary rules of the law of property. (In the present case, for example, according to ordinary legal terminology, unquestionably the only disposal which the taxpayers made was in favour of Greenjacket and the only disposal which Wood Bastow received was from Greenjacket.) Secondly, and perhaps more importantly, the proposition seems to me to be irreconcilable with the general pattern of the capital gains tax legislation. Very broadly, under this legislation the gain accruing to a person on a disposal of an asset by way of sale falls to be measured by taking the consideration received by him and deducting from it the allowable expenditure incurred by him on the acquisition and disposal of the asset. The suggestion that one sale of an asset to C can involve both a disposal of that asset by A, who is to be treated for tax purposes as the sole legal and beneficial owner of the asset at the date of the disposal, and a disposal of the very same asset by B, who is also to be treated for tax purposes as the sole legal and beneficial owner of the asset at the date of the disposal, seems to me something which the legislation does not contemplate and for which it does not provide.

I think that Mr. Millett, when pressed with this point in argument, recognised the formidable difficulties of reconciling such a concept with the capital gains tax legislation. However, as I understood him, he submitted that one possible answer would be for fiscal purposes wholly to disregard the interposition of B in the composite transaction, and that the observations of Lord Fraser in *Ramsay* gave some support for this approach. However, as I have already pointed out, these observations were made in a very different context; in the present context the suggestion seems to me to raise no less great problems of its own. For example, if in the case of such a composite transaction, the Crown is entitled to treat it for fiscal purposes as if the interposition of B had never featured in it at all, is this option one that is open only to the Crown or is it an option open to both Crown and taxpayer? In either case where is the statutory authority for a right of election of this kind? If the undisputed, albeit temporary, beneficial ownership of B is to be wholly disregarded for capital gains tax purposes, is it at the same time to be disregarded for other fiscal purposes? Examples of this kind could, in my opinion, be multiplied for the purpose of illustrating that the treatment for capital gains tax purposes of the two-step transaction referred to above as involving either three disposals on the one hand or only one disposal on the other hand, for capital gains tax purposes, in my opinion gives rise to insuperable difficulties in a case where at common law and in equity there have unquestionably been two disposals, no more and no less.

The point to which Eveleigh L.J. attached particular importance in concluding that the two-step stage 1 in *Floor* involved a disposal by the taxpayer and his sons-in-law in favour of the ultimate purchaser was that they had control of the intermediate company and were in a position to procure that it proceeded with the sale to the ultimate purchaser. This important feature is present in the instant case. Nevertheless, with the greatest respect to Eveleigh L.J., I can find nothing in the capital gains tax legislation which justifies the conclusion that a disposal of an asset by a company is to be equated with a disposal of the same asset by its

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A controlling shareholders for capital gains tax purposes. Nor, in my opinion, can it make any difference in such a case that the company had originally acquired legal and beneficial ownership of the asset in question pursuant to a scheme to which the shareholders were parties, and which contemplated that the company would dispose of it soon after its acquisition.

B In the present case, I have had the advantage of reading in draft the judgments of Oliver L.J. and Kerr L.J. Though, in view of the importance of the matter, I have attempted to express in my own words my reasons for agreeing with their ultimate conclusion, I respectfully agree with, and would wholly endorse, the observations of Kerr L.J. in relation to the "classic statement" of Lord Tomlin in the *Duke of Westminster* case.

C One passage in the judgment of Vinelott J. which, among others, I found of compelling force was the following [1982] S.T.C. 267, 287-288:

D "If the special commissioners' findings of fact are accepted, as I think they must be, then it must follow that even if the two steps are taken as part of a single composite transaction (notwithstanding that there was a possibility, however remote, that Wood Bastow, a wholly independent purchaser, or the outside holder of preference shares, would resile from or seek some modification to the intended sale agreement) the first step in the composite transaction was nonetheless a real step which had enduring legal consequences. At the beginning of the composite transaction the [taxpayers] owned shares of the operating companies; at the end of it they owned shares of Greenjacket and Greenjacket owned beneficially the proceeds of the sale of those shares. Those proceeds have been brought into Greenjacket's accounts, and it is liable to tax on the income derived from them. E Moreover, Wood Bastow's rights under the sale agreement were rights against Greenjacket (which it accepted as being the beneficial owner of the shares formerly held by the [taxpayers]), the directors of the operating companies (who joined in the warranties and indemnities) and the outside shareholders, who joined in a sale of the entire shareholding in the operating companies to Wood Bastow. F On a sale by the shareholders in the operating companies direct to Wood Bastow, Wood Bastow would have had no rights against Greenjacket but would have had rights against all the shareholders, including Mr. R. S. Dawson.

G "The court cannot, as I see it, ignore those enduring consequences and either disregard the exchange agreement or treat the sale agreement as if it had been entered into by Greenjacket as nominee or agent for the [taxpayers]. To do so would be to divorce the facts existing in the real world and to substitute for them facts assumed to exist in an unreal fiscal world. That, it seems to me, is precisely what the court is forbidden by the decision in the *Westminster* case to do."

H Though recent decisions have shown that the *Westminster* principle must not be overstated or overextended, I do not think that Vinelott J. was overstating the position in the passage which I have just cited. Though this was not, in fact, the reasoning which ultimately led him to allow the taxpayers' appeal, I think that, on the findings of the special commissioners, to hold that there had taken place a disposal by the taxpayers to Wood Bastow would be to divorce the facts existing in the real world of law and commerce and to substitute for them facts assumed to exist in an unreal fiscal world. The present case is not one where the scheme was of a circular, self-cancelling nature, having as its sole purpose the saving of

tax. Its object was to vest the shares in Wood Bastow by way of sale in such a way that no immediate liability for capital gains tax was incurred. The price which the taxpayers had to pay for this tax saving or deferment was that they had to be content to receive shares in Greenjacket, as opposed to cash, and that Greenjacket itself should effect the sale to Wood Bastow and receive the consideration for it. In my judgment they were perfectly entitled to arrange their affairs in this way and this court, in applying the capital gains tax legislation, would not be justified in treating them as if the composite transaction had been effected in some other manner. The only relevant disposal to which the taxpayers have been parties was a disposal of their shares in the operating companies in favour of Greenjacket; and that disposal does not fall to be treated as involving a disposal for capital gains tax purposes because of paragraphs 4 (2) and 6 of Schedule 7 to the Finance Act 1965. For these reasons, I would concur in dismissing these appeals.

Appeals dismissed with costs.

*Leave to appeal granted on terms that
Crown do not seek to disturb orders
for costs in Court of Appeal and
below.*

Solicitors: *Solicitor of Inland Revenue; Browne Jacobson & Roose, Nottingham.*

[Reported by MRS. HARRIET DUTTON, Barrister-at-Law]

[COURT OF APPEAL]

MITCHELL (FORMERLY PUHLHOFER) v. MITCHELL (FORMERLY PUHLHOFER)

1983 June 29, 30;
July 15

Cumming-Bruce and May L.JJ.

*Husband and Wife—Divorce—Special procedure—Appeal—Unde-
fended matrimonial causes—Registrar's certificate that petitioner
entitled to decree—Respondent's application to postpone decree
and set aside registrar's certificate—Registrar's refusal to set aside
certificate—Whether court having jurisdiction to entertain appeal
from registrar's refusal—Whether court to exercise discretion to
grant leave to file answer out of time—Matrimonial Causes Rules
1977 (S.I. 1977 No. 344 (L. 6)), rr. 48 (1) (2), 124*

The wife applied to the county court, inter alia, for an order that the husband should vacate the matrimonial home. The order was granted and on August 12, 1982, the husband left. The same day the wife filed her amended petition for dissolution of the marriage alleging that the marriage had irretrievably broken down and the husband had behaved in such a way that she could not reasonably be expected to live with him. The petition was served on the husband on September 16. The husband wanted a reconciliation and he had instructed solicitors to apply to have the order that he should vacate the matrimonial home revoked. By an oversight his solicitors failed to return the acknowledgment of service of the petition and no defence was filed because they did not realise that the husband had not understood the nature of the proceedings and that he wished to defend them. The cause

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was entered for trial in the special procedure list. On November 8 the registrar gave a certificate pursuant to rule 48 (1)(a) of the Matrimonial Causes Rules 1977¹ that the wife had sufficiently proved the contents of her petition, and under rule 48 (2) notice was given to the husband's solicitor that December 17 had been fixed for the pronouncement of the decree by the judge. On December 14 the husband gave notice of his application for the pronouncement of the decree nisi to be postponed, for the registrar's certificate to be set aside, for leave to file an answer out of time, and for the cause to be transferred to the High Court. In his proposed answer the husband denied that the marriage had broken down irretrievably or at all, and the allegations in the petition were denied. On December 17 the judge postponed pronouncement of the decree and the husband's application was adjourned to the registrar, who dismissed the application on January 17, 1983. On February 24 Judge Paynter Reece gave the husband leave to appeal to the judge under rule 124 of the Matrimonial Causes Rules 1977. Judge Barr on March 24 allowed the husband's appeal and gave him leave to file an answer within seven days, whereupon the registrar's certificate would be set aside and the cause transferred to the High Court.

On appeal by the wife:—

Held, dismissing the appeal, (1) that the judge had jurisdiction to hear the husband's appeal from the refusal of the registrar to give leave to file an answer out of time since the application to the registrar was an interlocutory application in matrimonial proceedings in a county court to which rule 124 of the Matrimonial Causes Rules 1977 applied, and accordingly the appeal to the judge under rule 124 was by way of rehearing of the application and the judge had to exercise his own discretion (post, pp. 670H—671B).

G. (formerly P.) v. P. (Ancillary Relief: Appeal) [1977] 1 W.L.R. 1376, C.A. applied.

(2) That, where a respondent wished to defend a petition but failed to do so because of ignorance of the procedural steps that were required to be taken to preserve his position and had no knowledge of the actual hearing until after it had taken place, the court had a discretion to grant a rehearing if it was satisfied that the case the respondent wished to put before the court, if accepted, might have led to a different decision; that the judge, having satisfied himself that the failure to take the necessary procedural steps was a mistake on the part of the husband's solicitor as to the husband's wishes in the matter, had erred in law in failing to consider the nature of the husband's case, but, on the material before the court, the husband's case, if accepted might well lead to the wife's petition for dissolution of the marriage being rejected; and that, accordingly, the registrar's certificate would be set aside and the husband would be given leave to file an answer out of time (post, pp. 672H—673B, E-F, G-H, 674A-B, 676C).

Nash v. Nash [1968] P. 597, D.C. approved.

¹ Matrimonial Causes Rules 1977, r. 48: "(1) As soon as practicable after a cause has been entered in the special procedure list, the registrar shall consider the evidence filed by the petitioner and—(a) if he is satisfied that the petitioner has sufficiently proved the contents of the petition and is entitled to a decree . . . the registrar shall make and file a certificate to that effect . . . (2) On the filing of a certificate under paragraph (1) a day shall be fixed for the pronouncement of a decree by a judge in open court . . . and the registrar shall send to each party notice of the day and place so fixed . . ."

R. 124: "(1) C.C.R., Ord. 13, r. 1 (1) (h) (which enables the judge to vary or rescind an order made by the registrar in the course of proceedings), and C.C.R., Ord. 37, r. 5 (which gives a right of appeal to the judge from a judgment or final decision of the registrar), shall not apply to an order or decision made or given by the registrar in matrimonial proceedings pending in a divorce county court, but any party may appeal from such an order or decision to a judge . . ."

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[1983]

Owen v. Owen [1964] P. 277, D.C.; *Stevens v. Stevens* [1965] P. 147, C.A. and *Day v. Day* [1980] Fam. 29, C.A. considered.

A

The following cases are referred to in the judgment:

Collins v. Collins [1972] 1 W.L.R. 689; [1972] 2 All E.R. 658, C.A.

Day v. Day [1980] Fam. 29; [1979] 2 W.L.R. 681; [1979] 2 All E.R. 187, C.A.

Evans v. Bartlam [1937] A.C. 473; [1937] 2 All E.R. 646, H.L.(E.).

B

G. (formerly P.) v. P. (Ancillary Relief: Appeal) [1977] 1 W.L.R. 1376; [1978] 1 All E.R. 1099, C.A.

Nash v. Nash [1968] P. 597; [1967] 2 W.L.R. 1009; [1967] 1 All E.R. 535, D.C.

Owen v. Owen [1964] P. 277; [1964] 2 W.L.R. 654; [1964] 2 All E.R. 58, D.C.

Rogers v. Rogers [1974] 1 W.L.R. 709; [1974] 2 All E.R. 361, C.A.

C

Stevens v. Stevens [1965] P. 147; [1965] 2 W.L.R. 736; [1965] 1 All E.R. 1003, C.A.

Tucker v. Tucker [1949] P. 105, D.C.

Winter v. Winter [1942] P. 151; [1942] 2 All E.R. 390, D.C.

The following additional cases were cited in argument:

Back v. Back (1980) 10 Fam. Law 183, C.A.

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Huxford v. Huxford [1972] 1 W.L.R. 210; [1972] 1 All E.R. 330.

Kowalski v. Kowalska [1966] C.L.Y. 4133, D.C.

Leebetter v. Leebetter (1974) 5 Fam. Law 49, C.A.

Montague v. Montague [1968] P. 604; [1967] 2 W.L.R. 1102; [1967] 1 All E.R. 802.

Moosa v. Moosa (1982) 12 Fam. Law 181, C.A.

Sandholm v. Sandholm (1980) F.L.R. 359, C.A.

E

Walker v. Walker [1978] 1 W.L.R. 533; [1978] 3 All E.R. 141, C.A.

INTERLOCUTORY APPEALS from Judge Paynter Reece and Judge Barr sitting at Uxbridge County Court.

The wife applied ex parte to the Uxbridge County Court on June 11, 1982, for injunctions ordering the husband to vacate the matrimonial home. Her application was supported by an affidavit to which was exhibited a proposed petition for the dissolution of the marriage of June 1960 and she alleged that, as a result of the husband's behaviour, she feared for the safety of herself, the four children and property. On the wife's undertaking to file the petition, Judge Main Q.C. granted injunctions restraining the husband from molesting the wife and children and interfering with the contents of the home. A petition was filed but it was never served. The application for injunctions was heard inter partes on June 28 but on the husband giving undertakings, the matter was adjourned until July 22. Documents, including a copy of the wife's affidavit with the draft petition attached, were served on the husband on July 2. On July 22, the court, considering the husband's pleas for a reconciliation to be a pipe dream, held that the welfare of the parties and the children required that the parties should separate and ordered that he leave the matrimonial home by August 5, gave interim care and control of one of the children to the husband and made a supervision order in respect of all the children.

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On August 2, the husband instructed solicitors and an application was made for a variation of the order and by an affidavit the husband stated that the true relationship between himself and the wife had been distorted and that his wife was suffering from cancer and, if there was a recurrence, he could look after the children provided he was allowed to live in the

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A matrimonial home. The only variation made to the order was that the husband was to vacate the matrimonial home by August 12 instead of August 5. On the same day the wife filed her amended petition, which set out in paragraph 10 the same ground for the grant of a decree of irretrievable breakdown due to the husband's behaviour and the same particulars, specified in sub-paragraphs (a) to (j) of paragraph 11, as those set out in the proposed petition and that was served on the husband on September 16 together with notice of the wife's application for the committal of the husband for alleged breaches of the injunctions. On September 24, the judge adjourned the application for committal generally.

B No acknowledgment of service or answer was filed to the wife's petition. The wife's solicitors applied for the registrar's certificate under rule 48 (1) of the Matrimonial Causes Rules 1977. On November 8, Mr. Registrar Smee certified that the wife had sufficiently proved the contents of the petition and was entitled to a decree of divorce on the ground that the husband had so behaved to the wife that she could not reasonably be expected to live with him. Notice was given to the husband's solicitors that December 17 had been fixed for the pronouncement of the decree nisi. On December 14, the husband gave notice of applications for the postponement of the pronouncement of the decree, for the registrar's certificate to be set aside and for leave to file the answer out of time. He later gave notice that he would apply for the injunctions of July 22 to be set aside.

D The affidavit evidence of the husband and Mr. Baldwin, clerk in the firm of Messrs. Woodbridge & Son, showed that the husband had consulted that firm after the injunctions had been granted on July 22, when his concern had been to get the injunctions discharged. The husband stated that he had not understood the nature of the papers served on him in those proceedings and had taken them to his former solicitors but because of illness he had not seen those solicitors before the return date of July 22 and had appeared in court unrepresented. He had been under the impression that the divorce and injunction proceedings were one and the same thing. Mr. Baldwin stated that he had personally dealt with the husband's case in September 1982. The solicitors' file revealed that they had regarded themselves as being concerned only with the injunction proceedings and in pressing for a welfare report concerning the children. He had discussed the divorce proceedings with the husband on September 16 and had told him that he saw no point in defending the matter. When the husband had attended to discuss the welfare report on September 26, the divorce proceedings were specifically discussed and the husband had insisted that he wished to defend them. In further interviews it became apparent that the husband had never understood that by taking no action in the proceedings the marriage would be dissolved or that a petition had been filed that would result in anything other than a separation. Mr. Baldwin accepted responsibility for the failure to return the acknowledgment of service (which was not on the file but was later found with other papers in the proceedings) but he was doubtful whether if it had been returned, it would have shown an intention to defend the proceedings. In evidence he stated that there had been difficulty in getting the husband to understand matters and with hindsight he felt that the husband had understood nothing about the divorce.

H On January 17, 1983, Mr. Registrar Smee dismissed the application to set aside the certificate and notice was given for the pronouncement of

the decree on February 24, 1983. On that date Judge Paynter Reece gave leave to the husband to appeal against the registrar's order and adjourned the pronouncement of the decree. On March 24, Judge Barr allowed the husband's appeal and ordered that, on the filing of the answer within seven days the registrar's certificate would be set aside.

The wife appealed against the order of Judge Barr, and also the order of Judge Paynter Reece granting leave to appeal, on the grounds that Judge Barr erred in law and/or misdirected himself and/or wrongly exercised such discretion as he had in the case, in that he (1) failed properly or at all to inquire into the merits of the husband's appeal and appeared to consider that it was an administrative matter; (2) failed to appreciate or apply the law that the burden of proof was on the husband appellant, who needed to make out a positive case to succeed in his appeal; (3) failed to hear evidence on the merits of the appeal against the registrar's order; (4) upset the registrar's order without giving his full attention to it or the oral evidence which supported it; (5) gave leave to appeal after long delay since the service on the husband of both the petition and the amended petition, to which no acknowledgments or documents of answer had been filed; (6) failed properly to consider the matters set out in the husband's notice of appeal; (7) failed to give any or any proper weight to the report of the welfare officer in the case; (8) failed to consider whether the parties' marriage could be mended by reconciliation or was dead, failed to weigh or properly weigh the admissions made by the husband in his draft answer, and failed to appreciate or give due weight to the fact that the husband had been ordered by the court prior to March 24, 1983, to vacate the parties' matrimonial home; (9) failed to give due weight to the husband's answer, which was purely defensive and contained no cross-prayer; (10) failed to consider the effect of delay upon the wife, then being a sick woman; (11) failed properly to appreciate the cost involved (both to the wife and to the legal aid fund) in permitting the case to become a defended one; (12) improperly exercised his discretion and the order of March 24, 1983, was contrary to the weight of the evidence; (13) in the alternative, the judge was effectively deprived of jurisdiction to hear the application; and (14) neither Judge Paynter Reece nor Judge Barr had jurisdiction to grant the husband leave to appeal as the jurisdiction in the special procedure was exclusively with the registrar.

Philip Turl for the wife.

Paul Norris for the husband.

Cur. adv. vult.

July 15. CUMMING-BRUCE L.J. handed down the following judgment of the court, which, having set out the facts, continued: The first point taken before us on behalf of the wife was that the judge had no jurisdiction to hear the husband's appeal from the refusal of the registrar to give leave to file an answer out of time because, for the reasons explained in *Day v. Day* [1980] Fam. 29, by the so-called "special procedure" in the absence of an answer it is the registrar who is empowered to grant his certificate under rule 48 (1) (a) of the Matrimonial Causes Rules 1977, thus adjudication has been transferred from the judge to the registrar. This is a misunderstanding of the judgment of Ormrod L.J. in that case. The applications made to Registrar Smee were interlocutory applications to which rule 124 of the Matrimonial Causes Rules 1977 applied. The hearing

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- A before the judge was an appeal under that rule. Such an appeal is a rehearing and the only procedural difference from the hearing before the registrar is that the party appealing opens the case before the judge. The procedure and the approach to be taken by the judge to the registrar's order are specifically explained in the judgment of Ormrod L.J. in *G. (formerly P.) v. P. (Ancillary Relief: Appeal)* [1977] 1 W.L.R. 1376, 1378-1382. The discretion to be exercised was that of the judge, and the
- B appellate duty of this court is limited to review of the exercise of that discretion as explained in *Evans v. Bartlam* [1937] A.C. 473 and the cases noted in *Rayden on Divorce*, 14th ed. (1983), vol. 1, p. 644, note 7.

- C The first substantial ground of appeal was that the judge on his own showing failed or refused to consider the merits of the case other than to satisfy himself that the reason why an answer was not filed in time was a mistake of the husband's second solicitors, or at least confusion between an unsophisticated client and a solicitor who failed until much too late to take explicit instructions on whether the husband wanted to defend. In order to determine this ground of appeal it is necessary to consider the principles which the judge should apply. They were explained by Ormrod L.J. in *Day v. Day* [1980] Fam. 29, 34:

- D "The second question concerns the principles to be applied when considering whether or not to grant leave to file an answer out of time. It follows from what we have already said that it is difficult not to regard the registrar's certificate in the special procedure under rule 48 as tantamount to a decree nisi under the former procedure. Consequently, an application by a respondent after the registrar's certificate has been made should, logically, be dealt with on the same
- E lines as an application for a rehearing after decree nisi under the former procedure. If this is right, the present application falls to be dealt with in accordance with the principles laid down by a strong Divisional Court consisting of Sir Jocelyn Simon P. and Scarman J. in *Owen v. Owen* [1964] P. 277, that is to say the application should have been refused unless there were 'substantial grounds for the belief' that the decree would have been obtained 'contrary to the
- F justice of the case.'

- "The analogy, however, is not wholly accurate because in some respects a respondent is less favourably placed under the special procedure than he was under the ordinary procedure in force in 1964 and too rigid an approach to these matters may cause injustice, particularly now that many people will have to act in person in these
- G matters.

- "Under the special procedure rules the filing of an answer is the crucial step since it alone will stop the progress from petition to registrar's certificate under rule 48 and the almost inevitable pronouncement of a decree. But respondents must find the rules difficult to follow. For example, rules 15 (1) and (2) and rule 18 (1), and Forms 5 and 6 which accompany the petition at the time of service are quite clear. Notice of intention to defend must be given within 8 days and an answer filed within 21 days thereafter, making 29 days in all. But rule 15 (3) and rule 18 (2) seem to contradict this simple scheme because they respectively provide that a notice of intention to defend or an answer may properly be given or filed 'at any time before directions have been given for the trial of the cause.' But a respondent does not know, and is not told, when directions for trial
- H

are going to be applied for under rule 33 (1) or given. Under the ordinary procedure he *does* receive notice that directions have been given and is informed of the date and place of trial: see rule 33 (2). Under the special procedure the registrar enters the cause in the special procedure list, but does *not* notify the respondent that he is about to consider the evidence with a view to making his certificate that the petitioner has proved his or her case. The first that the respondent knows of what is happening, is the receipt of a notice of the date and place for the pronouncement of the decree, by which time the process of adjudication is over.

"Thus, if he allows the original 29 days to elapse without filing an answer, he is in the dark until he is told the date for the pronouncement of the decree, whether or not he has given notice of intention to defend. Unless he studies the rules he is also unaware of his rights under rule 15 (3) and rule 18 (2) and is necessarily unaware of the deadline, i.e. the date when directions for trial have been, or are about to be, given.

"These handicaps must be borne in mind in considering whether to grant an application by a respondent to enable him or her to defend the suit after the initial 29 days have elapsed. They may have an important bearing on whether the justice of the case requires that he be given, in effect, leave to defend."

Mr. Norris submitted that the test declared by Scarman L.J. in *Owen v. Owen* [1964] P. 277, 284, that the application should have been refused unless there was "substantial ground for the belief that a decree would have been obtained contrary to the justice of the case," imposed too heavy a burden upon the applicant.

This submission derives from the judgments of the Divisional Court in *Nash v. Nash* [1968] P. 597 where Sir Jocelyn Simon P. and Cairns J. examined the principles stated by Davies L.J. in *Stevens v. Stevens* [1965] P. 147 and decided that there was a class of cases additional to the two classes of case there considered in *Stevens v. Stevens*. Davies L.J. had said in *Stevens v. Stevens*, at pp. 162-163:

"As it seems to me, these applications to the Divisional Court fall into at least two classes. There is the class where the applicant comes along and says 'I was not served; I knew nothing about it,' or, 'I was deceived; all the proceedings took place behind my back.' In that sort of case the applicant obtains a rehearing almost automatically. The other class of case is the *Winter v. Winter* [1942] P. 151 class of case, the *Tucker v. Tucker* [1949] P. 105 class of case, and this class of case, where an applicant may come along and say 'I knew all about this: I chose not to defend; but it was all wrong: let me defend now and grant me a rehearing.' In a case of that latter kind, speaking for myself, I think that for an applicant to succeed he has to convince the Divisional Court, or this court if it comes before this court, that on the evidence before the court on the application as a whole it is more probable than not that the decree was obtained contrary to the justice of the case."

The third class is that described by Cairns J. in *Nash v. Nash* [1968] P. 597, 603:

"I think there is probably at least one more class. That is the type of case where the respondent in divorce proceedings is aware that the

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- A proceedings are in progress and is anxious to defend and although no sort of deception has occurred, nevertheless, through ignorance or lack of full advice he is unaware of the necessity of taking procedural steps in order to preserve his position and has no knowledge of the actual hearing until after it has taken place. In such circumstances, I am of opinion that this court should not automatically, or almost automatically, grant a rehearing, but on the other hand should not
- B require to be satisfied that, if there were a rehearing, a different result would be more probable than not. I think it is necessary and sufficient that the applicant should satisfy the court that he has a case which he wishes to put forward and which, if accepted, might well lead to a different result. The court is not bound to accept the applicant's affidavit at its face value, but on the other hand should
- C not attempt to make any such investigation of its truth as would be more appropriate at the hearing of the suit . . . I take the view that [the husband's] affidavit is sufficient to show that [he] has a case which he wants to put before the court and which, if accepted, might well lead to a result different from the result of the first hearing."

- D Sir Jocelyn Simon P., at p. 603, expressly concurred with the way that Cairns J. had put it in his judgment.

- E The appeal to this court in *Day v. Day* [1980] Fam. 29 arose in the context of facts which came within the second class of case described by Davies L.J. in *Stevens v. Stevens* [1965] P. 147, as were the facts upon which the Divisional Court had decided *Owen v. Owen* [1964] P. 277. The instant appeal, however, arose upon facts which came within the category of the third class of case described by the Divisional Court in *Nash v. Nash* [1968] P. 597. It follows that the test approved by this court in *Day v. Day*, i.e., the application should have been granted if there were substantial grounds for the belief that the decree would have been obtained contrary to the justice of the case, is not binding upon us. We have to decide whether the test stated in *Nash v. Nash* in respect of the third class of case is correct and should be applied in the instant case. We
- F so hold. On the facts of the husband's application to set aside the registrar's certificate, it is necessary and sufficient that he should satisfy the court that he has a case which he wishes to put forward and which, if accepted, might well lead to a different result. And we also endorse the words of Cairns J. in *Nash v. Nash* [1968] P. 597, 603:

- G "The court is not bound to accept the applicant's affidavit at its face value, but on the other hand should not attempt to make any such investigation of its truth as would be more appropriate at the hearing of the suit."

- H Consideration of the note of the proceedings before Judge Barr, made by Mr. Shine of the wife's solicitors, compels us to hold that when the judge stated that he was "not interested" in "the merits" he must have meant that he was satisfied that the failure to file an answer within time was due to genuine mistake for which the husband was not personally responsible and that he was not concerned to consider critically whether, if the husband was allowed to defend, this might well lead to a different result. This may be unfair to the judge because when Mr. Shine made his final address he relied upon the wife's cancer, her wish to lead a quiet life and to the costs of a defended suit which the legal aid fund would have to bear, all which considerations were irrelevant. The judge indicated that

he had read both Mr. Shine's affidavit and the wife's affidavit in reply to the husband's application to set aside the certificate. But when Mr. Shine again referred to the wife's affidavit, the judge said once more that he was not concerned with the merits. *Day v. Day* [1980] Fam. 29 was apparently referred to in the proceedings, though not discussed. There are in our view sufficient grounds for holding that the judge did not address his mind sufficiently to the question whether, if the husband was allowed to defend, the result might well be different.

In these circumstances we are entitled to hold that the judge misdirected himself in law, and we are entitled, on a review of the relevant material, to decide whether he came to the right result. In effect, this court should itself decide how the discretion should be exercised upon application of the correct legal criteria and thus decide whether to grant or refuse the applications.

The primary material for consideration is the husband's affidavit dated December 17, 1982, and the proposed answer exhibited to it. By the terms of that answer he seeks to put in issue the truth of the allegations in the petition (a) that the marriage had irretrievably broken down and (b) that he had so behaved that his wife could not reasonably be expected to live with him on the grounds particularised in paragraph 11 of the petition. There do seem to us to be arguable grounds for believing, as he pleads, that the marriage had not irretrievably broken down. We are not moved by the grant of the ouster injunction on July 22, 1982, nor its continuance, because the ground of the ouster was not the husband's behaviour to his wife but the broad ground, now known to be wrong in law, that the children's interests were paramount and that it would be better for the children if the parents lived apart, although the husband's account of the trouble might be true. It must also be material that sexual intercourse has continued after the separation of the spouses and the filing of the divorce petition. More formidable is the history of the matrimonial proceedings. It does look as if the petition for dissolution after 25 years of marriage was instigated by the decision of the wife to apply for an ouster injunction. To provide jurisdiction for this she filed a divorce petition which was not served for several months. The ouster proceedings and the proceedings for dissolution have been so closely interlinked that we have thought it right to set out in this judgment a summary of the history of both sets of proceedings, because that is necessary for an understanding of the husband's contention that the marriage had not irretrievably broken down. Our conclusion, after considering also the wife's affidavit dated January 12, 1983, is that we cannot hold that if the husband is allowed to defend he may well show that the parties are likely to live together again, though that may be due to her personal wishes to live independently as she resents her husband's objection to her way of life. That probably means that the marriage has irretrievably broken down.

That, however, is not the end of the matter. The wife is not entitled to a decree merely on proof that she is unlikely to live with her husband again. By section 1 (2) of the Matrimonial Causes Act 1973:

"The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say— . . . (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent . . ."

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A And by section 1 (3):

“On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.”

B In the draft answer exhibited to his affidavit in support of his application to set aside the certificate and for leave to file an answer out of time, the husband has pleaded a detailed response to all the allegations in paragraph 11 of the petition. In some paragraphs he pleads a straight denial, in others he pleads affirmatively by way of explanation, confession and avoidance, facts which, if proved, would make it most unlikely that a decree would be granted on the ground that the wife had proved paragraph 10 of the petition, or that any of the matters pleaded in sub-paragraphs (a) to (j) of paragraph 11 were facts that together or in isolation proved that the husband had behaved in such a way that she could not reasonably be expected to live with him. His draft answer is confirmed by the terms of his affidavit and also by the affidavit of Mr. Baldwin dated December 17, 1982.

D The affidavit of the wife dated January 12, 1983, gives a totally different account of the husband's behaviour from that given by the husband in his affidavit and answer. She further submits that it would be contrary to the interests of herself, her health, the children and the legal aid fund to permit the husband to defend the suit. The affirmation of Mr. Shine dated January 13, 1983, gives his grounds for thinking that the wife would not live with the husband again. He goes on to say that whatever the husband's views are about the matter, it would be a complete waste of public funds in this matter in which both parties are legally aided, if the divorce were to proceed to trial on a defended basis as, if he succeeded, she would still refuse to live with him. This contention is manifestly irrelevant to the question whether if he defended he might well succeed. The interest which lies at the root of jurisdiction to set aside a decree nisi on the ground that the respondent through ignorance or his solicitor's failure failed to file an answer in time is the public interest. That interest is to ensure that decrees of dissolution of marriage shall not be allowed to stand if a respondent has a case which may well succeed and, if heard and successful, will have a result different from the result obtained in undefended proceedings. This is made clear enough in the judgment of Sir Jocelyn Simon P. in *Nash v. Nash* [1968] P. 597, 598 and his approval of the passage which he quotes at p. 601 from the judgment of Scarman J. in *Owen v. Owen* [1964] P. 277, 284. It would be a strange thing if the court's decision upon the justice of the case depended on a decision of the legal aid committee not to grant a legal aid certificate to a respondent who wanted to defend, if that decision was based on some policy decision that public funds should not be used irrespective of the merits of the respondent's pleaded case.

H The wife relies upon her health. But she protests that she is quite well and has evidently been strong enough to persist in late nights at her disco club. She has a history of serious chronic disease, and the doctor's letter cannot give a prognosis. She obtained her registrar's certificate on November 8, 1982, and has been waiting for a decree nisi ever since. It is contended that it is not humane to prolong her anxiety and that it would be better to allow her to reach early finality in her proceedings for dissolution. There is not sufficient force in these considerations to make it just to allow the certificate to stand if the husband has a case which he

has always wanted to present which may well succeed. The failure to file an answer within time was shown to be a mistake of the husband's solicitor who had not taken specific instructions about defending the case until the time for filing an answer had already expired. That appears from Mr. Baldwin's affidavit of December 17, 1982. If the wife had not then opposed the application to set aside the certificate, the answer would probably have been filed in January 1983. The time programme of the contested proceedings would have been postponed for three months longer than if an answer had been filed in mid-October 1982 within the time limited by the rules. It is this period of three months which is the relevant delay due to failure to file an answer within time, not the difference between the programme in an undefended suit and that in a defended one.

Approaching the material before the court in the way proposed by Cairns J. in *Nash v. Nash* [1968] P. 597, 603 we would therefore hold that the husband's case may well lead to a rejection of the wife's petition for dissolution. We exercise the discretion to set aside the registrar's certificate in the husband's favour, and give him leave to file an answer out of time. Our reasons may not be the same as the judge's reasons, though as he gave no judgment we do not precisely know what his reasons were. On our understanding of the note of the hearing before the registrar on January 17, 1983, the horn of the dilemma on which he regarded himself as impaled was that, although on that day he again held that the marriage had irretrievably broken down, he nevertheless could not still find that the husband had so behaved that the wife could not reasonably be required to live with him, although he had so certified in November 1982. This greatly reduces the weight to be given to the registrar's decision of January 17, 1983.

We therefore arrive at the same result as the judge and dismiss the appeal.

Appeal dismissed.

No order for costs save legal aid taxation.

Leave to appeal refused.

Solicitors: *Brecher & Co., Hayes, Middlesex; Woodbridge & Sons, Uxbridge.*

[Reported by MISS STELLA SOLOMON, Barrister-at-Law]

[QUEEN'S BENCH DIVISION]

WHITTAKER AND ANOTHER v. CAMPBELL

1983 May 3; 20

Robert Goff L.J. and Glidewell J.

Crime—Theft—Taking conveyance without authority—Owner's consent obtained by means of fraudulent misrepresentation—Whether "consent" vitiated—Theft Act 1968 (c. 60), s. 12(1)

The defendants, neither of whom held a full driving licence, represented to a director of a vehicle-hire firm that the first defendant was D., the holder of a full driving licence, and produced D.'s licence. Acting upon that misrepresentation, the

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A director agreed to their hiring a van, and the first defendant signed D.'s name on the hire agreement. The director would not have agreed to the hire had he known that neither defendant held a full driving licence and that they would consequently not be insured to drive the van. The defendants were convicted before justices of taking the van without the owner's consent or other lawful authority, contrary to section 12(1) of the Theft Act 1968.¹ Their appeals to the Crown Court were dismissed on the ground that the director of the hire firm had not consented to their taking the van since the deception as to the first defendant's identity had vitiated his de facto consent.

On appeal to the Divisional Court by way of case stated:—

Held, allowing the appeal, that there was no general principle of law that fraud vitiated consent; that on the true construction of section 12(1) of the Theft Act 1968, and in view of the mischief to which it was directed, where a person had given de facto consent to another to drive a conveyance owned by him, that consent was not vitiated by reason of its having been obtained by means of a fraudulent deception perpetrated by the other and that, accordingly, the defendants were not guilty of an offence under the subsection (post, pp. 681E–F, 683B–D, E–G, 684E–F, H—685A, B–C).

Dictum in *Reg. v. Peart* [1970] 2 Q.B. 672, 676 considered.

Per curiam. It is dangerous to assume that the law adopts a uniform definition of the word “consent” in all its branches, and in other parts of the criminal law the word must be construed in its own particular context (post, pp. 681E, 685A–B).

The following cases are referred to in the judgment:

Centrovincial Estates P.L.C. v. Merchant Investors Assurance Co. Ltd. (unreported), March 4, 1983; Court of Appeal (Civil Division) Transcript No. 103 of 1983, C.A.

Ingram v. Little [1961] 1 Q.B. 31; [1960] 3 W.L.R. 504; [1960] 3 All E.R. 332, C.A.

Lewis v. Averay [1972] 1 Q.B. 198; [1971] 3 W.L.R. 603; [1971] 3 All E.R. 907, C.A.

Reg. v. Peart [1970] 2 Q.B. 672; [1970] 3 W.L.R. 63; [1970] 2 All E.R. 823, C.A.

Reg. v. Tolson (1889) 23 Q.B.D. 168.

The following additional cases were cited to in argument:

McKnight v. Davies [1974] R.T.R. 4, D.C.

Phillips v. Brooks Ltd. [1919] 2 K.B. 243.

Reg. v. Hodgson [1962] Crim.L.R. 563, C.C.A.

Reg. v. Phipps (1970) 54 Cr.App.R. 300; [1970] R.T.R. 209, C.A.

CASE STATED by the Crown Court at Durham.

On March 4, 1982, Teesdale and Wear Valley justices in the County of Durham sitting at Bishop Auckland convicted the defendants of a joint offence committed on October 16, 1981, of taking a conveyance without the owner's consent or other lawful authority, contrary to section 12(1) of the Theft Act 1968.

Appeals against the convictions were made by the defendants to the Crown Court at Durham, which appeals the Crown Court heard together on May 24, 1982. The facts were not in dispute and the appeals proceeded on a question of law only. Accordingly, the Crown Court found the following agreed facts. In about June 1981 the defendants, who were

¹ Theft Act 1968, s.12(1): “a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use. . . .”

brothers aged 27 and 25 years, and who lived in St. Helens Auckland, County Durham, had an opportunity to obtain some coal at an advantageous price from a private colliery quite lawfully. In order to remove the coal the defendants required their own means of transport. At all material times, the defendant Wilson Coglan Whittaker had no driving licence whatsoever and the defendant Stewart Whittaker had a provisional licence only and neither defendant had a vehicle of his own. In about June 1981 the defendants came into possession of a full driving licence belonging to one Derek Dunn. The defendant Wilson Coglan Whittaker said that he had found it near Mr. Dunn's place of work. The defendants decided to use the licence to hire a van to remove the coal. On June 24, 1981, the defendants went to a local vehicle hire firm called Stangarths Ltd. in Leazes Lane, St. Helens Auckland and there hired from a director, one Duncan Stuart Robson, aged 23, a Ford Transit van for a day. The defendant Wilson Coglan Whittaker represented himself as being Derek Dunn of the address shown on the driving licence which he produced to Mr. Robson. The same defendant also signed the name "D. Dunn" on the hire agreement form No. 0309. The appropriate hire charge was paid by the defendants and the defendant Wilson Coglan Whittaker drove away the Ford Transit van. On five subsequent occasions the defendants did the same thing—on July 2, July 16, July 22, October 8, and October 15, 1981, on each occasion the defendant Wilson Coglan Whittaker signing the hire agreement form "D. Dunn." On the later occasions the driving licence was not produced to Mr. Robson who acted in reliance on what had happened on earlier occasions. On each occasion the defendants paid the appropriate hire charge. On October 16, 1981, the defendant Stewart Whittaker was driving the hire van when it was stopped and checked by police officers. The van was found to have an incorrect excise licence displayed. The defendants were questioned and their true identities were established. According to Mr. Robson, the hire company's director, on the occasion of each hire, he was deceived by the defendants into believing that the defendant Wilson Coglan Whittaker was Derek Dunn and that he was the holder of a full driving licence, and had he known that that was not the case the defendant Wilson Coglan Whittaker would not have been allowed to hire any of his (Robson's) vehicles or drive any of his vehicles. By summonses dated January 21, 1982, it was alleged that the defendants jointly on October 16, 1981, without the consent of the owner or other lawful authority took a certain conveyance, namely a motor van, for their own use, contrary to section 12(1) of the Theft Act 1968. The offence alleged referred to the last occasion of hire. They were convicted by the justices of that offence following a submission that there was no case to answer in law. The defendants pleaded guilty to various related road traffic offences, including driving with no licence, no insurance, no "L" plates and fraudulent use of a driving licence. The appeals related solely to the offence of taking a conveyance without the owner's consent.

It was contended by the defendants that (i) there was no case to answer in law in that they had the consent of the owner to take the conveyance in question; (ii) the consent given by the owner, Mr. Robson, was given to the persons with whom he was dealing, namely the defendants, and that consent was not vitiated by the misrepresentation by the defendant Wilson Coglan Whittaker that he was in fact Derek Dunn and was the holder of a full driving licence; (iii) the misrepresentations as to identity and the holding of a full driving licence were not fundamental so as to vitiate the consent given, but were merely misrepresentations as to

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- A the representor's attributes; (iv) as a matter of law, a contracting party was taken to be dealing with the person in front of him, and a misrepresentation as to the other party's attributes rendered a contract voidable as opposed to void ab initio; (v) the evidence of the vehicle owner, Mr. Robson, that he would not have consented to parting with possession of the vehicle in question had he known the true position was not conclusive against the defendants; (vi) the fact that the defendants would not be insured to drive the vehicle in question was also not conclusive against the defendants: the fundamental matters as regards the hire contract were that the owner parted with possession of the vehicle to the hirer and that the hirer paid for that possession; (vii) *Reg. v. Peart* [1970] 2 Q.B. 672 and *Reg. v. Phipps* (1970) 54 Cr.App.R. 300 were not irreconcilable and *Reg. v. Phipps* was distinguishable in that in that case the defendant took the vehicle without not only the consent but also the knowledge of the vehicle owner; and (viii) section 12(1) of the Theft Act 1968 was appropriate to and was aimed at cases where the defendant took a vehicle without not only the consent but also the knowledge of the vehicle owner.

- It was contended by the prosecutor that (i) the defendants were guilty of the offence because in law and in fact they did not have the consent of the vehicle owner or other lawful authority to take the vehicle in question; (ii) although the vehicle owner gave his "de facto" consent to the defendants' taking the vehicle, that consent was not a true consent or a consent at all in law or in fact because it was vitiated by the fraudulent misrepresentations as to identity and the holding of a full driving licence made by the defendants which induced the vehicle owner to part with possession of the vehicle; (iii) the misrepresentations as to identity and the holding of a full driving licence were fundamental to the transaction in that the vehicle owner would not have parted with possession of the vehicle had he known the true position because the hirer would not have been insured to drive the vehicle; and (iv) *Reg. v. Peart* [1970] 2 Q.B. 672 and *Reg. v. Phipps*, 54 Cr.App.R. 300 were difficult to reconcile and *Reg. v. Phipps* was to be preferred to *Peart's* case. In addition, counsel for the prosecutor adopted as part of his submission the matters set out in paragraph 287 of *Smith, The Law of Theft*, 4th ed. (1979).

- The Crown Court was of the opinion that the defendants' misrepresentations were fundamental in that the vehicle owner would not have contemplated handing over the vehicle had he known the true position, that his consent was therefore vitiated by the fraudulent misrepresentations of the defendants and that none of the cases to which it had been referred was directly on the point. In *Reg. v. Peart* [1970] 2 Q.B. 672, which concerned a misrepresentation as to the journey for which the vehicle was borrowed which was held not to be fundamental, the court had clearly reserved the point in issue in the present appeals as to whether a fundamental misrepresentation such as to identity would vitiate consent. Both counsel conceded that the point in the present appeal was not decided by *Peart's* case, and that they could find no authority directly on the point. The prosecutor relied on *Reg. v. Phipps*, 54 Cr.App.R. 300. The Crown Court did not think that *Peart* and *Phipps* could stand together and was of the opinion that *Phipps* was to be preferred.

Both *Reg. v. Peart* [1970] 2 Q.B. 672 and *Reg. v. Phipps*, 54 Cr.App.R. 300 were decided before the Court of Appeal's decision in the civil case of *Lewis v. Averay* [1972] 1 Q.B. 198, referred to by counsel for the defendants. The issue in that case was whether the contract of sale was void or voidable. The Crown Court did not think that the civil cases

assisted it in deciding the law under a criminal statute, the words of section 12 of the Theft Act 1968 being clear. The question in the present appeals was whether the vehicle owner gave his consent to the defendants' taking the vehicle. In the Crown Court's opinion he did not. He consented to someone called Derek Dunn with a full driving licence taking the vehicle. The Crown Court accordingly held that in law the defendants were guilty of the offence under section 12(1) of the Theft Act 1968. It seemed to the court to be the common sense view and it was fortified in that view by the opinion of an eminent academic. The appeal was accordingly dismissed.

The questions for the opinion of the High Court were (i) whether in law the de facto consent to take a conveyance, namely a motor vehicle, given by the vehicle owner to a person hiring that vehicle, was vitiated by reason of its being induced by the false representations of the person hiring the vehicle as to his identity and the holding of a full driving licence, so that the person taking the vehicle under the contract of hire was guilty of taking a conveyance without the owner's consent or other lawful authority contrary to section 12(1) of the Theft Act 1968, and (ii) whether, on the facts found by the Crown Court and having regard to the cases cited, the Crown Court was wrong in law in rejecting the appeals of the defendants.

John Bassett for the defendants.

Eric Elliott for the prosecutor.

Cur. adv. vult.

May 20. ROBERT GOFF L.J. read the following judgment of the court. There is before the court a case stated by the Crown Court at Durham, when sitting on appeal from Durham justices of the Petty Sessional Division of Teesdale and Wear Valley. The case raises for decision a point of construction of section 12(1) of the Theft Act 1968, relating to the meaning of the words "without having the consent of the owner" in the offence which is committed under that subsection if a person, without having the consent of the owner or other lawful authority, takes any conveyance for his own or another's use. The defendants were also charged with a number of other offences arising out of the same facts, to which they pleaded guilty. The justices convicted the two defendants of such an offence, committed on October 16, 1981. Appeals against these convictions were heard by the Crown Court at Durham on May 24, 1982. The facts were not in dispute, and the appeals proceeded on a question of law only.

[His Lordship stated the agreed facts as set out in the case stated and continued:] Before the Crown Court, it was contended by the defendants that they had the consent of the owner to take the conveyance, that consent having been given by Mr. Robson to the persons with whom he was dealing, namely the defendants, and that consent not having been vitiated by the misrepresentation of Wilson Cogan Whittaker that he was in fact Derek Dunn and the holder of a full driving licence. The misrepresentations as to identity and the holding of a full driving licence were not fundamental so as to vitiate the consent given, but were merely misrepresentations as to the representor's attributes, such as to render a contract voidable and not void ab initio. The mere fact that Mr. Robson would not have consented to parting with possession of the vehicle if he

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A had known of the true position was not conclusive against the defendants; nor was the fact that the defendants would not be insured to drive the vehicle.

B The prosecutor, on the other hand, contended that the defendants were guilty of the offence because in law and in fact they did not have the consent of the vehicle owner or other lawful authority to take the vehicle in question. Although the vehicle owner gave his de facto consent to the defendants' taking the vehicle, that consent was not a true consent or a consent at all in law or in fact because it was vitiated by the fraudulent misrepresentations as to identity and the holding of a full driving licence made by the defendants which induced the owner to part with possession of his vehicle. These misrepresentations were fundamental to the transaction in that the owner would not have parted with possession had he known of the true position because the hirer would not have been insured to drive the vehicle.

C These arguments were repeated and developed in the submissions made by counsel before this court. We, like the Crown Court, were referred to certain authorities, some of which we shall consider later in this judgment. The conclusion of the Crown Court was that the defendants' misrepresentations were fundamental in that the vehicle owner would not have contemplated handing over the vehicle had he known the true position, and that his consent was therefore vitiated by the fraudulent misrepresentation of the defendants. [His Lordship stated the opinion of the Crown Court and the questions for the opinion of the High Court set out in the case stated and continued:]

E We are concerned in present case with the construction of certain words, viz., "without having the consent of the owner," in their context in a particular subsection of a criminal statute. However the concept of consent is relevant in many branches of the law, including not only certain crimes but also the law of contract and the law of property. There is, we believe, danger in assuming that the law adopts a uniform definition of the word "consent" in all its branches.

F Furthermore there is, in our opinion, no general principle of law that fraud vitiates consent. Let us consider this proposition first with reference to the law of contract. In English law, every valid contract presupposes an offer by one party which has been accepted by the offeree. Plainly, there can be no such acceptance unless offer and acceptance correspond: the offer can only be accepted by the offeree, the acceptance must relate to the same subject matter as the offer, and must also be, in all material respects, in the same terms as the offer. But the test whether there has been correspondence between offer and acceptance is not subjective but objective. If there is objective agreement, there may be a binding contract, even if in his mind one party or another has not consented to it—a principle recently affirmed by the Court of Appeal in *Centrovincial Estates P.L.C. v. Merchant Investors Assurance Co. Ltd.* (unreported) May 4, 1983; Court of Appeal (Civil Division) Transcript No. 103 of 1983.

G Furthermore, putting on one side such matters as the ancient doctrine of non est factum and relief from mistake in equity, there is no principle of English law that any contract may be "avoided," i.e., not come into existence, by reason simply of a mistake, whether a mistake of one or both parties. The question is simply whether objective agreement has been reached and, if so, upon what terms. If objective agreement has been reached, in the sense we have described, then the parties will be bound, unless on a true construction the agreement was subject to a

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condition precedent, express or implied, failure of which has in the event prevented a contract from coming into existence.

What is the effect of fraud? Fraud is, in relation to a contract, a fraudulent misrepresentation by one party which induces the other to enter into a contract or apparent contract with the representor. Apart from the innocent party's right to recover damages for the tort of deceit, the effect of the fraud is simply to give the innocent party the right, subject to certain limits, to rescind the contract. These rights are similar to (though not identical with) the rights of a party who has been induced to enter into a contract by an innocent, as opposed to a fraudulent, misrepresentation; though there the right to recover damages derives from statute, and the limits to rescission are somewhat more severe. It is plain, however, that in this context fraud does not "vitiates consent," any more than an innocent misrepresentation "vitiates consent." Looked at realistically, a misrepresentation, whether fraudulent or innocent, induces a party to enter into a contract in circumstances where it may be unjust that the representor should be permitted to retain the benefit (the chose in action) so acquired by him. The remedy of rescission, by which the unjust enrichment of the representor is prevented, though for historical and practical reasons treated in books on the law of contract, is a straightforward remedy in restitution subject to limits which are characteristic of that branch of the law.

The effect of rescission of a contract induced by a misrepresentation is that property in goods transferred under it may be revested in the transferor (the misrepresentee). But this may not be possible if the goods have been transferred to a third party, for the intervention of third party rights may preclude rescission. In such a case, especially if the misrepresentor has disappeared from the scene or is a man of straw so that damages are an ineffective remedy, the misrepresentee's only practical course may be to seek to establish that there never was any contract (i.e., that the supposed contract was "void"), so that he never parted with the property in the goods and he can claim the goods or their value from the third party. To succeed in such a claim, he has generally to show that there was no objective agreement between him and the representor. For that purpose, however, the misrepresentation (fraudulent or innocent) is simply the origin of a set of circumstances in which it may be shown that there was no objective agreement, e.g., that the offer was, objectively speaking, made to one person and (perhaps as a result of fraud) objectively speaking, accepted by another. Again, it cannot be said that fraud "vitiates consent"; fraud was merely the occasion for an apparent contract which was, in law, no contract at all.

Similar criteria to those applied in order to ascertain whether property in goods had passed in circumstances such as these were at one time of particular relevance in criminal law. This was because, under the old law of larceny, the crime of larceny as the result of a mistake was only committed if the mistake was sufficient to prevent the property from passing to the accused; and the crime of larceny by a trick was only committed if the accused, having the relevant mens rea, induced the owner to transfer possession of the goods to him, though the owner did not intend to convey the property to the accused. If the owner was induced to convey the property to the accused, the latter could not be guilty of larceny but could be guilty of obtaining by false pretences. The nature of the mistake in cases of larceny as the result of a mistake, and the distinction between larceny by a trick and obtaining by false pretences,

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A were, not surprisingly, fruitful sources of dispute and of nice distinctions. One purpose of the Theft Act 1968 was to avoid, as far as possible, problems of this kind. And even under the old law of larceny it could not be said that fraud “vitiated consent,” for the existence of the crime of larceny as the result of a mistake demonstrates that the “vitiating” of the consent of the owner to part with the property in the goods was not dependent on fraud on the part of the accused.

B It is against this background that we turn to the problem in the instant case. There being no general principle that fraud vitiates consent, we see the problem simply as this: can a person be said to have taken a conveyance for his own or another’s use “without having the consent of the owner or other lawful authority” within those words as used in section 12(1) of the Theft Act 1968, if he induces the owner to part with possession of the conveyance by a fraudulent misrepresentation of the kind employed by the defendants in the present case? Now there is no doubt about the mischief towards which this provision (like its predecessors, sections 28(1) and 217(1) of the Road Traffic Acts 1930 and 1960, respectively) is directed. It is directed against persons simply taking other persons’ vehicles for their own purposes, for example, for use in the commission of a crime, or for a joyride, or just to get home, without troubling to obtain the consent of the owner, but without having the animus furandi necessary for theft. In the vast majority of circumstances, no approach is made to the owner at all; the vehicle is just taken. But is the crime committed when the owner is approached, and when he is compelled to part with his possession by force, or when he is induced to part with his possession by fraud?

E Now it may be that, if the owner is induced by force to part with possession of his vehicle, the offence is committed, because a sensible distinction may be drawn between consent on the one hand and submission to force on the other. This is a point which, however, we do not have to decide, though we comment that, in the generality of such cases, the accused is likely to have committed one or more other offences with which he could perhaps be more appropriately charged. But where the owner is induced by fraud to part with the possession of his vehicle, no such sensible distinction can be drawn. In common sense terms, he has consented to part with the possession of his vehicle, but his consent has been obtained by the fraud. In such a case no offence under this subsection will have been committed unless, on a true construction, a different meaning is to be placed upon the word “consent” in the subsection. We do not however consider that any such construction is required.

G It is to be observed, in the first instance, that the presence or absence of consent would be as much affected by innocent as by fraudulent misrepresentation. We do not however regard this point as persuasive, for the answer may lie in the fact that, where the misrepresentation is innocent, the accused would lack the mens rea which, on the principle in *Reg. v. Tolson* (1889) 23 Q.B.D. 168, may well be required as a matter of implication (a point which, once again, we do not have to decide). It is also to be observed that the owner’s consent may, to the knowledge of the accused, have been self-induced, without any misrepresentation, fraudulent or innocent, on the part of the accused. More compelling, however, is the fact that it does not appear sensible to us that, in cases of fraud, the commission of the offence should depend not upon the simple question whether possession of the vehicle had been obtained by fraud, but upon the intricate question whether the effect of the fraud had been

such that it precluded the existence of objective agreement to part with possession of the car, as might for example be the case where the owner was only willing to part with possession to a third party, and the accused fraudulently induced him to do so by impersonating that third party.

We find it very difficult to accept that the commission of an offence under this subsection should depend upon the drawing of such a line which, having regard to the mischief to which this subsection is directed, appears to us to be irrelevant. The judge in the Crown Court felt it necessary to inquire, on the appeal before him, whether this line had been crossed before he could hold that the defendants had committed the offence. An inquiry of this kind is by no means an easy one, as is demonstrated by, for example, the disagreement on a similar point among the members of the Court of Appeal in *Ingram v. Little* [1961] 1 Q.B. 31, and by the subsequent preference by the Court of Appeal in *Lewis v. Avery* [1972] 1 Q.B. 198 for the dissenting judgment of Devlin L.J. in the earlier case. Indeed, we would (had we thought it necessary to do so) have reached a different conclusion on the point from that reached by the judge in the Crown Court in the present case, considering that the effect of the defendants' fraud was not that the owner parted with possession of his vehicle to a different person from the one to whom he intended to give possession, but that the owner believed that the person to whom he gave possession had the attribute, albeit a very important attribute, of holding a driving licence. However, on our view of the subsection, the point does not arise.

In circumstances such as those of the present case, the criminality (if any) of the act would appear to rest rather in the fact of the deception, inducing the person to part with the possession of his vehicle, rather than in the fact (if it be the case) that the fraud has the effect of inducing a mistake as to, for example, "identity" rather than "attributes" of the deceiver. It would be very strange if fraudulent conduct of this kind has only to be punished if it happened to induce a fundamental mistake; and it would be even more strange if such fraudulent conduct has only to be punished where the chattel in question happened to be a vehicle. If such fraudulent conduct is to be the subject of prosecution, the crime should surely be classified as one of obtaining by deception, rather than an offence under section 12(1) of the Act of 1968, which appears to us to be directed to the prohibition and punishment of a different form of activity. It was suggested to us in argument that, in the present case, the defendants could have been accused of dishonestly obtaining services by deception contrary to section 1(1) of the Theft Act 1978; the submission was that, having regard to the broad definition of "services" inherent in section 1(2) of the Act of 1978, the hiring of a vehicle could, untypically, be regarded as a form of services. Since we did not hear full argument upon the point, we express no opinion upon it, commenting only that, in a comprehensive law of theft and related offences, a decision of policy has to be made whether a fraudulent obtaining of temporary possession of a vehicle or other goods should be punishable, irrespective of any of the nice distinctions which the Crown Court felt required to consider in the present case.

We are fortified in our conclusion by the opinion expressed by Sachs L.J. in *Reg. v. Peart* [1970] 2 Q.B. 672. In that case, on comparable facts, the Court of Appeal held that no offence had been committed under section 12(1) of the Act of 1968, because the fraudulent misrepresentation did not relate to a fact which was sufficiently fundamental. But Sachs L.J., in delivering the judgment of the court, at p. 676, expressly reserved

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A the question whether, in any case where consent had been induced by fraud, an offence would be committed under the subsection; and it is plain from his comments that he had serious misgivings whether any such offence would be committed in those circumstances. These misgivings we share in full measure, and it is our conclusion that the subsection on its true construction contemplates no such offence.

B We wish to add that our judgment is confined to the construction of section 12(1) of the Theft Act 1968. We are not to be understood to be expressing any opinion upon the meaning to be attached to the word "consent" in other parts of the criminal law, where the word must be construed in its own particular context.

C It follows that we answer the first question posed for our decision in the negative, and the second question in the affirmative, and that the convictions of the defendants under section 12(1) of the Theft Act 1968 will be quashed.

Appeal allowed.

Convictions quashed.

Costs of defendants and prosecutor to be paid from central funds.

D

E June 23. The court granted a certificate under section 1(2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved in the decision, namely, "Whether on a true construction of section 12(1) of the Theft Act 1968, the consent of the owner of a motor car to its use by another can be vitiated if such consent is obtained by a fraudulent misrepresentation by that other."

Leave to appeal refused.

Solicitors: *Hextall Erskine & Co. for Llewellyn, Vickers & Chisman, Stockton-on-Tees; D. I. Morgan, Durham.*

F

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

G

H

[1983]

[HOUSE OF LORDS]

COMMISSIONER OR POLICE OF THE METROPOLIS APPELLANT

AND

WILSON (CLARENCE) RESPONDENT

[On appeal from REGINA v. WILSON (CLARENCE)]

REGINA APPELLANT

AND

JENKINS (EDWARD JOHN) RESPONDENT

REGINA APPELLANT

AND

JENKINS (RONALD PATRICK) RESPONDENT

[CONSOLIDATED APPEALS]

1983 July 13, 14, 18; Lord Fraser of Tullybelton
Oct. 13 Lord Elwyn-Jones, Lord Edmund-Davies,
Lord Roskill and Lord Brightman

Crime—Practice—Alternative verdict—Count for inflicting grievous bodily harm—Whether including allegation of assault—“Inflict”—Offences against the Person Act 1861 (24 & 25 Vict. c. 100), s. 20—Theft Act 1968 (c. 60), s. 9(1)(b)—Criminal Law Act 1967 (c. 58), s. 6(3)

In the first appeal, the defendant was tried on an indictment containing a single count specifically charging an offence of contravening section 20 of the Offences against the Person Act 1861,¹ the particulars being that he “maliciously inflicted grievous bodily harm” on L. The jury were directed that, if they were not satisfied that the harm inflicted was grievous bodily harm but were satisfied that it was actual bodily harm, they could convict of an alternative offence of assault occasioning actual bodily harm. Thereupon the defendant was convicted of the lesser offence. On appeal against conviction, the Court of Appeal (Criminal Division) held, applying the decision in *Reg. v. Springfield* (1969) 53 Cr.App.R. 608, that the alternative verdict was not open to the jury, and accordingly, allowed the appeal and quashed the conviction. The Crown appealed.

In the second appeal, the defendants were tried on an indictment containing a single count charging an offence of contravening section 9(1)(b) of the Theft Act 1968,² the particulars being that they had entered a building as “trespassers” and there “inflicted grievous bodily harm” on W. The jury were directed that it was open to them to convict for an assault occasioning actual bodily harm as an alternative verdict to the count on the indictment. The jury found both defendants not guilty of burglary but guilty of assault occasioning actual bodily harm. On appeal, the Court of Appeal (Criminal Division) following the decision in the first appeal allowed the appeals and quashed the convictions.

¹ Offences against the Person Act 1861, s. 20: post, p. 691G.

² Theft Act 1968, s. 9(1)(b): “A person is guilty of burglary if . . . (b) having entered any building . . . inflicts . . . on any person therein any grievous bodily harm.”

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On the Crown's appeals:—

Held, allowing both appeals and restoring the convictions, (1) that the allegations in a charge under section 20 of the Offences against the Persons Act 1861 or under section 9(1)(b) of the Theft Act 1968, at the least, impliedly included allegations of assault occasioning actual bodily harm which constituted "another offence" within the ambit of section 6(3) of the Criminal Law Act 1967³; (2) that accordingly, on a charge of inflicting grievous bodily harm contrary to section 20 of the Act of 1861 or on a charge of burglary contrary to section 9(1)(b) of the Act of 1968, the particulars of the offence being that the accused having entered a building inflicted grievous bodily harm on a person therein, it was open to the jury to return a verdict of not guilty as charged but guilty of occasioning actual bodily harm contrary to section 47 of the Act of 1861 (post, pp. 689E–G, 690F–H, 696A–C, G–H, 697A).

Dicta in Reg. v. Lillis [1972] 2 Q.B. 236, 240, C.A. approved. *Reg. v. Springfield* (1969) 53 Cr.App.R. 608, C.A. overruled. *Reg. v. Salisbury* [1976] V.R. 452 considered.

Per curiam. The trial judge must always ensure, before deciding to leave the possibility of conviction of another offence to the jury under section 6(3) of the Criminal Law Act 1967, that that course will involve no risk of injustice to the defendant and that the defendant has had the opportunity of fully meeting that alternative in the course of his defence (post, p. 696G).

Decision of the Court of Appeal (Criminal Division) in *Reg. v. Wilson (Clarence)* [1983] 1 W.L.R. 356; [1983] 1 All E.R. 993 reversed.

Decision of the Court of Appeal (Criminal Division) in *Reg. v. Jenkins (Edward John)* and *Reg. v. Jenkins (Ronald Patrick)* reversed.

The following cases are referred to in the opinion of Lord Roskill:

Reg. v. Clarence (1888) 22 Q.B.D. 23.

Reg. v. Halliday (1889) 6 T.L.R. 109; 61 L.T. 701.

Reg. v. Hodgson [1973] Q.B. 565; [1973] 2 W.L.R. 570; [1973] 2 All E.R. 552, C.A.

Reg. v. Lillis [1972] 2 Q.B. 236; [1972] 2 W.L.R. 1409; [1972] 2 All E.R. 1209, C.A.

Reg. v. Martin (1881) 8 Q.B.D. 54.

Reg. v. Salisbury [1976] V.R. 452.

Reg. v. Springfield (1969) 53 Cr.App.R. 608, C.A.

Reg. v. Taylor (1869) L.R. 1 C.C.R. 194; 17 W.R. 623; 33 J.P. 358.

Rex v. Hollingberry (1825) 4 B. & C. 329.

Rex v. O'Brien (1911) 6 Cr.App.R. 108, C.C.A.

The following additional cases were cited in argument:

Boaler v. The Queen (1888) 21 Q.B.D. 284.

Cartledge v. Allen [1973] Crim.L.R. 530, D.C.

Fagan v. Metropolitan Police Commissioner [1969] 1 Q.B. 439; [1968] 3 W.L.R. 1120; [1968] 3 All E.R. 442, D.C.

Reg. v. Austin (1973) 58 Cr.App.R. 163, C.A.

Reg. v. Canwell and Dunn (1869) 11 Cox C.C. 263, C.C.A.

Reg. v. Carpenter (unreported), July 30, 1979, C.A.

Reg. v. Collison (1980) 71 Cr.App.R. 249, C.A.

Reg. v. Kelly [1964] 1 Q.B. 173; [1963] 3 W.L.R. 835; [1963] 3 All E.R. 558, C.C.A.

Reg. v. Lambert (1976) 65 Cr.App.R. 12, C.A.

Reg. v. Lewis [1970] Crim.L.R. 647, C.A.

³ Criminal Law Act 1967, s. 6(3): post, p. 691D–F.

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Reg. v. McCormack [1969] 2 Q.B. 442; [1969] 3 W.L.R. 175; [1969] 3 All E.R. 371, C.A. A

Reg. v. McCready [1978] 1 W.L.R. 1376; [1978] 3 All E.R. 967, C.A.

Reg. v. Oliver (1860) Bell C.C. 287.

Reg. v. Page [1971] Crim.L.R. 713, C.A.

Reg. v. Radley (1973) 56 Cr.App.R. 394, C.A.

Reg. v. Snewing [1972] Crim.L.R. 267, C.A.

Reg. v. Woods [1969] 1 Q.B. 447; [1968] 3 W.L.R. 1192; [1968] 3 All E.R. 709, C.A. B

Rex v. Beech (1912) 76 J.P. 287, C.C.A.

CONSOLIDATED APPEALS from the Court of Appeal (Criminal Division).

REGINA V. WILSON (CLARENCE)

The respondent, Clarence George Wilson, was charged on an indictment containing a single count of inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861, the particulars being that on November 7, 1980, he maliciously inflicted grievous bodily harm on Maxim James Latham. At the respondent's trial on November 4, 1981, at Kingston-upon-Thames Crown Court (Judge Rubin) the prosecution applied to amend the indictment to add an alternative count of assault occasioning actual bodily harm but the trial judge refused the application on the ground that the depositions did not disclose the identity of the alleged offender, and that therefore there was no evidence of that alternative charge disclosed by the depositions. The prosecution then applied for the indictment to be amended by adding the words, "by assaulting," to the particulars of the offence, but that application was refused. The jury were directed that it was open to them, as the count stood, to find the respondent not guilty as charged, but guilty of assault occasioning actual bodily harm, and the jury so found. He was sentenced to one months' imprisonment suspended for two years. C

On appeal by the respondent, the Court of Appeal (Watkins L.J., Cantley and Hirst JJ.), by a judgment dated January 28, 1983, allowed the appeal and quashed the conviction. The court certified that the following point of law of general public importance was involved in the decision, namely, "whether on a charge of inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861, it is open to a jury to return a verdict of not guilty as charged but guilty of assault occasioning actual bodily harm," but refused leave to appeal. On March 17, 1983, the House of Lords granted the appellant, the Commissioner of Police of the Metropolis, leave to appeal. D E F G

REGINA V. JENKINS

The respondents, Edward John Jenkins and Ronald Patrick Jenkins, were charged jointly in an indictment containing a sole count of burglary contrary to section 9(1)(b) of the Theft Act 1968, the particulars being that on July 3, 1981, at Westgate in the county of Kent having entered a building as trespassers inflicted grievous bodily harm upon Jeffrey Brian Wilson therein. At the respondents' trial on December 4, 1981, at Canterbury Crown Court (Mr. Recorder Michael Lewis Q.C.) the recorder raised the question whether the indictment ought to be amended so as to add an alternative count of assault occasioning actual bodily harm but he ruled that such an amendment was unnecessary since a conviction for assault occasioning actual bodily harm was an alternative verdict to H

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A the count on the indictment under section 6(3) of the Criminal Law Act 1967. The jury were so directed and the jury found both respondents not guilty of burglary but guilty of assault occasioning actual bodily harm. Edward John Jenkins was sentenced, inter alia, to seven days' imprisonment, and Ronald Patrick Jenkins was sentenced, inter alia, to 21 days imprisonment.

B On appeal by the respondents, the Court of Appeal (Purchas L.J., Talbot and Staughton JJ.) by a judgment dated February 18, 1983, allowed the appeal and quashed the convictions. The court certified that the following point of law of general public importance was involved in the decision, namely, "whether on a charge of burglary contrary to section 9(1)(b) of the Theft Act 1968, the particulars of the offence being that the accused having entered a building as trespassers inflicted grievous bodily harm upon a person therein, it is open to a jury to return a verdict of not guilty as charged, but guilty of assault occasioning actual bodily harm,"

C but refused leave to appeal. On March 28, 1983, the House of Lords granted the appellant, the Chief Constable of Kent, leave to appeal.

D *Michael Hill Q.C.* and *Derek Zeitlin* for the Crown in the first appeal. *Anthony Scrivener Q.C.* and *David Guy* for the respondent. *Michael Hill Q.C.* and *Anthony Webb* for the Crown in the second appeal.

David Guy and *Gregory Stone* for the respondents.

Their Lordships took time for consideration.

E October 13. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Roskill. For the reasons given by him I would allow both appeals and answer both certified questions in the affirmative.

F LORD ELWYN-JONES. My Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend, Lord Roskill. I agree with it and for the reasons he gives I would allow both appeals.

G LORD EDMUND-DAVIES. My Lords, I am grateful for the opportunity of reading during the long vacation the speech prepared by my noble and learned friend, Lord Roskill. I am in respectful agreement with the views he has expressed and the conclusions at which he has arrived.

H LORD ROSKILL. My Lords, these two consolidated appeals by the prosecution are brought by leave of your Lordships' House and necessitate the House considering the true construction of section 6(3) of the Criminal Law Act 1967 for the first time since its enactment some 16 years ago. The Court of Appeal (Criminal Division) granted certificates in each case. Wilson, the respondent in the first appeal, was indicted at Kingston-upon-Thames Crown Court on a single count of "maliciously inflicting grievous bodily harm" on a man named Latham. Wilson was acquitted on that count but the learned trial judge, Judge Rubin, directed the jury that if they were not satisfied that Latham's injuries were sufficiently serious to justify conviction, they might on that single count convict Wilson of assault occasioning actual bodily harm. The jury did so. That direction

was given after the learned judge had heard argument. I shall refer to this case as "*Wilson*."

The two respondents, Edward and Ronald Jenkins, were father and son. They faced a single count of burglary at Canterbury Crown Court before Mr. Recorder Michael Lewis Q.C. and a jury. That charge was laid under section 9(1)(b) of the Theft Act 1968, the particulars being that they had entered a building at Westgate "as trespassers" and there "inflicted grievous bodily harm" upon a man named Wilson. If one omits the references to entering the building "as trespassers," the particulars, apart from the omission of the word "maliciously" were identical with those in *Wilson*. I shall refer to this case as "*Jenkins*." The learned recorder, after lengthy legal arguments—he himself had first raised the question—gave the same direction to the jury as had been given in *Wilson* regarding the possibility, in the event of acquittal on the burglary count, of convicting these respondents of assault occasioning actual bodily harm.

These rulings and directions were founded upon section 6(3) of the Act of 1967. All the respondents, upon their respective convictions, appealed. *Wilson* was heard by the Court of Appeal (Criminal Division) (Watkins L.J. and Cantley and Hirst JJ.) judgment being given on January 28, 1983, by Cantley J. (*Jenkins* was heard by a differently constituted Court of Appeal (Criminal Division)) (Purchas L.J. and Talbot and Staughton JJ.) judgment being given on February 18, 1983, by Purchas L.J. The convictions in both cases were quashed. The reasons were substantially the same with the additional reason in *Jenkins* that that court was bound by the earlier decision in *Wilson*. Stated briefly, the reason was that the decision of the Court of Appeal (Criminal Division) in *Reg. v. Springfield* (1969) 53 Cr.App.R. 608 made it impossible to justify a conviction for assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861, by virtue of section 6(3) of the Act of 1967, since the offence charged of "*inflicting* grievous bodily harm" did not, upon the authorities, *necessarily* include the offence of *assault* occasioning actual bodily harm. The emphasis added to these three words is mine.

Both courts granted certificates but refused leave to appeal. That leave was, as already stated, granted by this House. The certificate in *Wilson* was in the following terms:

"Whether on a charge of inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 it is open to a jury to return a verdict of not guilty as charged but guilty of assault occasioning actual bodily harm."

The certificate in *Jenkins* was in slightly different terms. It read:

"Whether on a charge of burglary contrary to section 9(1)(b) of the Theft Act 1968, the particulars of the offence being that the accused having entered a building as trespassers inflicted grievous bodily harm upon a person therein, it is open to a jury to return a verdict of not guilty as charged but guilty of assault occasioning actual bodily harm."

In substance both certificates raised the same point of law.

My Lords, it is a regrettable fact that, at least in *Wilson*, the question raised in the courts below and now in your Lordships' House need never have arisen had the prosecution's case at the time of committal for trial been properly prepared in the magistrates' court. Wilson was committed only on the section 20 charge. Two applications were made to the learned

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A trial judge when the present issue arose, one to add a count under section 47 of the Act of 1861, and the other, to overcome the point on which both appeals ultimately succeeded, by adding to the particulars of the offence charged under section 20, the words "by assaulting."

B The learned judge rejected the first application, on the ground that he had no power to add the count under section 47, since the witness statement from Latham did not even identify Wilson as his assailant. This reasoning was unassailable. Your Lordships were shown a copy of the statement. It is a matter for severe criticism of those who had charge of the prosecution's case at the time of committal that it should have been so slovenly prepared. For this reason the learned judge declined, to quote his own words, "to help the prosecution" by amending the count since the problem was entirely of the prosecution's own making.

C It was in these circumstances that the learned judge came to leave the section 47 charge to the jury in the exercise of what he believed to be his power under section 6(3) of the Act of 1967. Thus it was as regards *Wilson* that this matter has reached this House. This need never have happened. In *Jenkins*, the learned recorder himself raised the question, but after an argument the transcript of which occupied some 40 pages, decided against any other course than that he would leave the alternative section 47 charge to the jury in accordance with his view of section 6(3).

D My Lords, it would be convenient to preface discussion of the problems to which section 6(3) of the Act of 1967 gives rise by first setting out the several statutory provisions which fall for consideration in this appeal. Section 6(3) itself reads:

E "(3) Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

F The words "falling within the jurisdiction of the court of trial" can now be ignored since the creation of the Crown Court.

Section 18 of the Act of 1861 so far as presently relevant reads:

G "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . to do some . . . grievous bodily harm to any person . . . shall be guilty . . ."

Section 20 of the Act of 1861 reads:

H "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person . . . shall be guilty of a misdemeanor . . ."

I draw attention to the fact that the word "assault" nowhere appears in this section. Section 47 of the Act of 1861 reads: "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . ."

Section 9(1)(a) and (2) of the Theft Act 1968 reads:

"(1) A person is guilty of burglary if—(a) he enters any building or part of a building as a trespasser and with intent to commit any such

offence as is mentioned in subsection (2) below; . . . (2) The offences referred to in subsection (1)(a) above are offences . . . of inflicting on any person therein any grievous bodily harm . . .”

A

My Lords, there can be no doubt that before 1967 the view was widely held that at common law upon a charge under section 20, a defendant might be convicted of at least common assault: see *Archbold Criminal Pleading Evidence & Practice*, 36th ed. (1966), para. 575:

B

“Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor, and thereby occasioning him actual bodily harm, the prisoner may be convicted of common assault. . . . The prisoner may also be convicted of a common assault upon either count of an indictment-charging him in the first count with unlawfully and maliciously wounding, and in the second count with unlawfully and maliciously inflicting grievous bodily harm, although the word ‘assault’ is not used in the indictment. *Reg. v. Taylor* (1869) L.R. 1 C.C.R. 194.”

C

It will be within the recollection of those of your Lordships who have in the past sat, either as recorders or chairmen of quarter sessions, that this statement in *Archbold* accurately stated the practice, at least before 1967. If this be right, it is not easy to see why in principle such a defendant should not equally, at common law, be liable to conviction under section 47. The current edition of *Archbold*, 41st ed. (1982), at para. 20-145, states that upon an indictment under section 20 either for unlawful wounding or for inflicting grievous bodily harm, the defendant may be convicted of common assault. Thus, long after 1967, the same view was expressed as I have already quoted from the 36th edition, published in 1966. These two passages justify the statement by Mr. Hill Q.C. for the prosecution, in opening these appeals, that both before and after 1967 the view was widely held that assault, whether common assault or assault occasioning actual bodily harm, was available at common law as an alternative charge to inflicting grievous bodily harm contrary to section 20 in the event of an acquittal upon that latter charge.

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My Lords, in *Reg. v. Lillis* [1972] 2 Q.B. 236 a five-judge Court of Appeal (Criminal Division) which included my noble and learned friend, Lord Edmund-Davies, then Edmund-Davies L.J., in a judgment delivered by Lawton L.J., described the purposes and effect of section 6(3) as follows, at p. 240:

“Before the passing of the Criminal Law Act 1967 the law applicable to the kind of problem which presented itself to the trial judge in this case was partly to be found in the common law and partly in a number of statutes. At common law on an indictment charging felony the accused could be convicted of a less aggravated felony of which the ingredients were included in the felony charged and similarly as regards misdemeanours: but except under statute a conviction for a misdemeanour was not allowed on a charge of felony. The object of section 6(3) of the Criminal Law Act 1967 was to provide a general rule continuing and combining the rules of common law and the provisions of most of the statutes which enabled alternative verdicts to be returned in specific cases or types of cases.”

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I would respectfully accept that statement as correct. In *Lillis* the court, as in effect it was bound to do, accepted that *Reg. v. Springfield*, 53

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A Cr.App.R. 608, had been correctly decided. Indeed, the contrary does not appear to have been argued. Applying *Springfield*, the court held that the indictment, which had charged burglary, *expressly* (my emphasis) included an allegation of theft, and that burglary not having been proved, but theft having been proved, a conviction for theft could be sustained under section 6(3). My Lords, I entertain no doubt that *Lillis* [1972] 2 Q.B. 236 was correctly decided. But that leaves open the question whether

B *Springfield* was also correctly decided. The statements in *Lillis* to the effect that *Springfield* was correctly decided are, in the circumstances, plainly obiter. The crucial passage in the judgment of Sachs L.J. in *Springfield*, 53 Cr.App.R. 608, 610–611, reads:

C “The question accordingly arises as follows. Where an indictment thus charges a major offence without setting out any particulars of the matters relied upon, what is the correct test for ascertaining whether it contains allegations which expressly or impliedly include an allegation of a lesser offence? The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words, is the lesser offence an essential ingredient of the major one?”

D Two comments may be made upon this passage. First, the words “major offences” and “lesser offences” nowhere appear in the subsection. Secondly, the subsection says nothing about it being “a necessary step” towards establishing the “major offence” to prove the commission of the lesser offence, so that the so-called lesser offence has to be an “essential ingredient” of the major offence. Neither the adjective “necessary” nor

E the adverb “necessarily” appears anywhere in the subsection.

My Lords, the right approach to the solution of the present problem must first be to determine the true construction of section 6(3), bearing in mind the observations of Lawton L.J. in *Lillis* [1972] 2 Q.B. 236 as to its purpose and as to the position before its enactment. Ignoring the reference to murder or treason, there seem to me to be four possibilities envisaged by the subsection. First, the allegation in the indictment expressly amounts

F to an allegation of another offence. Secondly, the allegation in the indictment impliedly amounts to an allegation of another offence. Thirdly, the allegation in the indictment expressly includes an allegation of another offence. Fourthly, the allegation in the indictment impliedly includes an allegation of another offence.

If any one of these four requirements is fulfilled, then the accused may be found guilty of that other offence. My Lords, if that approach to the construction of the subsection be correct, it avoids any consideration of “necessary steps” or of “major” or “lesser” offences, and further avoids

G reading into the subsection words which were never used by the draftsman. I am unable to find that this approach to the construction of the subsection was ever advanced in *Springfield*, 53 Cr.App.R. 608. If it were, there is no reflection of such an argument in the judgment. I would add the

H observation that although section 6(3) is often spoken of as permitting conviction for a less serious offence upon a count charging a more serious offence, the maximum penalties for offences against both section 20 and section 47 are the same—five years’ imprisonment.

There is, in my view, a clear antithesis in the subsection between “amount to” and “include;” the word “or” which joins those two words is clearly disjunctive and must not be ignored. If either limb of the phrase is satisfied, then the stated consequences can follow. Thus, in *Lillis* [1972]

2 Q.B. 236 the allegation of burglary plainly *expressly included* (my emphasis) the allegation of theft. *Rex v. O'Brien* (1911) 6 Cr.App.R. 108 is another example of one charge being expressly included in another. The charge was of riot but that charge included an allegation of assault. The appellant was acquitted of riot but convicted of common assault and the conviction was upheld. *Rex v. Hollingberry* (1825) 4 B. & C. 329, which was followed in *O'Brien*, is another and much earlier example of the application of the same principle. These are examples of the so-called "red-pencil" rule. The rule was that all the facts charged in the indictment need not be proved; provided those facts proved constituted an offence of which by law the offender might be convicted on the indictment. These cases today would plainly fall within that particular limb of section 6(3). In the present case, the issue to my mind is not whether the allegations in the section 20 charge, expressly or impliedly, *amount* to an allegation of a section 47 charge, for they plainly do not. The issue is whether they either expressly or impliedly *include* such an allegation. The answer to that question must depend upon what is expressly or impliedly *included* in a charge of "inflicting any grievous bodily harm."

I can, for present purposes, ignore the first limb of section 20 which is concerned only with unlawful wounding. As regards the second, if A includes B, it must be because A is sufficiently comprehensive to include B. Thus A may include B, but B will not necessarily include A, though of course B may do so. If this reasoning be right, I do not think it is relevant, in order to determine whether A includes B, to ask whether proof of B is a "necessary step" to proof of A. This seems to me to state the problem the wrong way round and, with all respect to *Sachs L.J.* in *Springfield*, 53 Cr.App.R. 608, after the learned Lord Justice asked the right question he applied the wrong test in order to answer it.

What then, are the allegations expressly or impliedly included in a charge of "inflicting grievous bodily harm." Plainly that allegation must, so far as physical injuries are concerned, at least impliedly if not indeed expressly, include the infliction of "actual bodily harm" because infliction of the more serious injuries must include the infliction of the less serious injuries. But does the allegation of "inflicting" include an allegation of "assault"? The problem arises by reason of the fact that the relevant English case law has proceeded along two different paths. In one group it has, as has already been pointed out, been held that a verdict of assault was a possible alternative verdict on a charge of inflicting grievous bodily harm contrary to section 20. In the other group grievous bodily harm was said to have been inflicted without any assault having taken place, unless of course the offence of assault were to be given a much wider significance than is usually attached to it. This problem has been the subject of recent detailed analysis in the Supreme Court of Victoria in *Reg. v. Salisbury* [1976] V.R. 452. In a most valuable judgment—I most gratefully acknowledge the assistance I have derived from that judgment in preparing this speech—the full court drew attention, in relation to comparable legislation in Victoria, to the problems which arose from this divergence in the main stream of English authority. The problem with which your Lordships' House is now faced arose in *Salisbury* in a different way from the present appeals. There, the appellant was convicted of an offence against the Victorian equivalent of section 20. He appealed on the ground that the trial judge had refused to leave to the jury the possibility of convicting him on that single charge of assault occasioning actual bodily harm or of common assault. The full court dismissed the appeal on the ground that

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A at common law these latter offences were not “necessarily included” in the offence of “inflicting grievous bodily harm.” The reasoning leading to this conclusion is plain:

B “It may be that the somewhat different wording of section 20 of the English Act has played a part in bringing about the existence of the two lines of authority in England, but, be that as it may, we have come to the conclusion that, although the word ‘inflicts’ . . . does not have as wide a meaning as the word ‘causes’ . . . the word ‘inflicts’ does have a wider meaning than it would have if it were construed so that inflicting grievous bodily harm always involved assaulting the victim. In our opinion, grievous bodily harm may be inflicted . . . either where the accused has directly and violently ‘inflicted’ it by assaulting the victim, or where the accused has ‘inflicted’ it by doing something, intentionally, which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm. Hence, the lesser misdemeanours of assault occasioning actual bodily harm and common assault . . . are not necessarily included in the misdemeanour of inflicting grievous bodily harm . . .” (See p. 461).

This conclusion was reached after careful consideration of English authorities such as *Reg. v. Taylor*, L.R. 1 C.C.R. 194; *Reg. v. Martin* (1881) 8 Q.B.D. 54; *Reg. v. Clarence* (1888) 22 Q.B.D. 23 and *Reg. v. Halliday* (1889) 6 T.L.R. 109. My Lords, it would be idle to pretend that these cases are wholly consistent with each other, or even that, as in *Clarence*, though there was a majority in favour of quashing the conviction then in question, the judgments of those judges among the 13 present who formed the majority are consistent with each other. Some of these cases were not argued on both sides. Others are very inadequately reported and different reports vary. Thus, Stephen J. who was in the majority in *Clarence*, described the infliction of grievous bodily harm in these words, at p. 41:

F “The words appears to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down. Indeed, though the word ‘assault’ is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result. This is supported by *Taylor* . . .”

G But Wills J., also in the majority, was clearly of the view that grievous bodily harm could be inflicted without an assault, as for example, by creating panic. On the other hand, in *Taylor*, L.R. 1 C.C.R. 194, where the accused was charged on two counts, one under each limb of section 20, the jury convicted him of common assault. Kelly C.B. said that each count was for an offence which necessarily included an assault, and a verdict of guilty of common assault was upheld. *Taylor* is not easy to reconcile with the later cases unless it is to be supported on the basis of the wounding count in the indictment. In *Martin*, 8 Q.B.D. 54, on the other hand, there was no reference to the issue whether the accused’s conduct in creating panic among a theatre audience constituted assault. He did an unlawful act calculated to cause injury and injury was thereby caused. He was thus guilty of an offence against section 20.

My Lords, I doubt whether any useful purpose would be served by further detailed analysis of these and other cases, since to do so would only be to repeat less felicitously what has already been done by the full court of Victoria in *Salisbury* [1976] V.R. 452. I am content to accept, as did the full court, that there can be an infliction of grievous bodily harm contrary to section 20 without an assault being committed. The critical question is, therefore, whether it being accepted that a charge of inflicting grievous bodily harm contrary to section 20 may not necessarily involve an allegation of assault, but may nonetheless do so, and in very many cases will involve such an allegation, the allegations in a section 20 charge "include either expressly or by implication" allegations of assault occasioning actual bodily harm. If "inflicting" can, as the cases show, include "inflicting by assault," then even though such a charge may not necessarily do so, I do not for myself see why on a fair reading of section 6(3) these allegations do not at least impliedly include "inflicting by assault." That is sufficient for present purposes though I also regard it as also a possible view that those former allegations expressly include the other allegations.

The courts below were bound by *Springfield*, 53 Cr.App.R. 608. On the basis that *Springfield* was correctly decided, those decisions were without doubt correct. But once the reasoning in *Springfield* is rejected, and the reasoning I have endeavoured to set out in this speech is accepted, it follows that both the learned judge and learned recorder were correct in leaving the possibility of conviction of the section 47 offences to the jury in these cases. It also follows that by the law of this country, as I conceive it to be, *Salisbury* [1976] V.R. 452 would have been differently decided.

Mr. Scrivener Q.C., for the respondents, urged your Lordships to leave *Springfield*, 53 Cr.App.R. 608, undisturbed on the ground that it had not given rise to difficulties. With respect, I cannot accept that that is so. Not only does it produce a result inconsistent with that previously widely accepted as correct and still accepted in the 41st edition of *Archbold*, but the difficulties to which it has given rise are demonstrated by cases such as *Reg. v. Hodgson* [1973] Q.B. 565, 570, and a number of more recent cases to which your Lordships' attention was drawn in argument but to which I do not find it necessary to refer in detail. I hope that in the future some of those difficulties at least will disappear and technical arguments of the type which have arisen in the present cases avoided for the future.

If it be said that this conclusion exposes the defendant to the risk of conviction on a charge which would not have been fully investigated at the trial on the count in the indictment, the answer is that a trial judge must always ensure, before deciding to leave the possibility of conviction of another offence to the jury under section 6(3), that that course will involve no risk of injustice to the defendant and that he has had the opportunity of fully meeting that alternative in the course of his defence.

I would, therefore, allow both appeals and answer both certified questions in the affirmative. It follows that the convictions for offences against section 47 of the Act of 1861 should be restored in both appeals.

My Lords, at the close of the argument a request was made that your Lordships should allow three counsel on either side in this case. My Lords, in my view it would be improper so to do. Two counsel on either side are adequate. I suggest that the appellants' costs should be borne out of central funds but that only two counsel should be allowed on taxation.

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The respondents' costs, limited to two counsel, will be taxed in accordance with the appropriate legal aid provisions.

LORD BRIGHTMAN. My Lords, I would allow both appeals for the reasons given by my noble and learned friend, Lord Roskill.

Appeals allowed.

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Solicitors: *Solicitor, Metropolitan Police; H. C. L. Hanne & Co.; Sharpe Pritchard & Co.; Boxall & Boxall for Godfrey Davis & Waitt, Ramsgate.*

J. A. G.

C

[HOUSE OF LORDS]

ANDERTON RESPONDENT

AND

BURNSIDE APPELLANT

REGINA RESPONDENT

D

AND

MORRIS (DAVID) APPELLANT

[CONSOLIDATED APPEALS]

E

1983 July 20, 21;
Oct. 13

Lord Fraser of Tullybelton, Lord
Edmund-Davies, Lord Roskill, Lord
Brandon of Oakbrook and
Lord Brightman

F

Crime—Theft—Dishonest appropriation—Self-service store—Customer switching price labels from cheaper articles to articles taken by him from shelves—Whether “appropriation” by “assumption . . . of the rights” of owner—“Appropriates”—Theft Act 1968 (c. 60), ss. 1(1), 3(1), 15(1)

Section 1(1) of the Theft Act 1968 provides:

“A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; . . .”

Section 3(1) provides:

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“Any assumption by a person of the rights of an owner amounts to an appropriation . . .”

Section 15(1) provides:

“A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall . . . be liable to imprisonment . . .”

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In the first case, the defendant removed a price label from a joint of pork in a supermarket and attached it to a second, more expensive, joint. His action was detected at the check-out point before he had paid for the joint. He was arrested and charged with theft contrary to section 1(1) of the Act of 1968. He was convicted by the justices, and his appeal against conviction was dismissed by the Divisional Court of the Queen's Bench Division. In the second case, the defendant took goods from the shelves of a supermarket and replaced the price labels attached to them with labels showing lesser prices. At the check-out point he was asked for and paid the lesser prices. He was arrested and

subsequently tried in the Crown Court on two counts of theft contrary to section 1(1) of the Act of 1968 and one of obtaining property by deception contrary to section 15. The jury convicted him on the counts of theft. The assistant recorder did not take a verdict from them on the third count, ordering it to lie on the file. The defendant's appeal against conviction was dismissed by the Court of Appeal (Criminal Division).

On appeal by the defendants by leave of the House of Lords:—

Held, dismissing the appeals, that on the true construction of sections 1(1) and 3(1) of the Theft Act 1968 it was sufficient, to establish an appropriation, for the prosecution to prove an assumption by the defendant of any of the rights of the owner of the goods; that the concept of appropriation involved adverse interference with, or usurpation of, some right of the owner, which interference or usurpation might be evidenced by one act or by a combination of acts, which need not be overt, the precise moment when the appropriation occurred varying according to the circumstances of the case; that the defendants, by removing the goods in question from the shelves and switching the labels, had adversely interfered with or usurped the rights of the owners of the goods to ensure that they were sold and paid for at the proper prices, it being immaterial in which order those acts had taken place; and that those acts had constituted an appropriation within section 1(1) of the Act of 1968 and the defendants had rightly been convicted (post, pp. 700A, 703B–C, E, G, 704A–C, 705A, B–C, 706D–F).

Reg. v. Lawrence (Alan) [1972] A.C. 626, H.L.(E.) applied.

Reg. v. McPherson [1973] Crim.L.R. 191, C.A.; *Anderton v. Wish (Note)* (1980) 72 Cr.App.R. 23, D.C. and *Eddy v. Niman* (1981) 73 Cr.App.R. 237, D.C. approved.

Kaur (Dip) v. Chief Constable for Hampshire [1981] 1 W.L.R. 578, D.C. disapproved.

Reg. v. Meech [1974] Q.B. 549, C.A. considered.

Per curiam. (i) In cases such as these, the offence of obtaining property by deception contrary to section 15(1) of the Act of 1968, unlike that of theft under section 1(1), is not committed until payment of the wrong amount is made at the checkpoint. The counts in the second appeal were not alternative and verdicts should have been taken on all of them. These cases are essentially simple in their facts and their factual simplicity should not be allowed to be obscured by ingenious legal arguments. There is no reason in principle why, when there is clear evidence of both offences being committed, both offences should not be charged. But where a shoplifter has passed the checkpoint and quite clearly has, by deception, obtained goods either without paying or by paying only a lesser price than he should, those concerned with prosecutions may in future think it preferable in the interests of simplicity to charge only an offence against section 15(1) (post, pp. 700A, 705E–F, H—706A, D–F).

(ii) It is wrong to introduce into this branch of the criminal law questions whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract, which are not relevant questions under the Act of 1968 (post, pp. 700A, 705C–D, 706D–F).

Decisions of the Divisional Court of the Queen's Bench Division (unreported) and the Court of Appeal (Criminal Division) [1983] Q.B. 587; [1983] 2 W.L.R. 768; [1983] 2 All E.R. 448 affirmed.

The following cases are referred to in the opinion of Lord Roskill:

Anderton v. Wish (Note) (1980) 72 Cr.App.R. 23, D.C.

Eddy v. Niman (1981) 73 Cr.App.R. 237, D.C.

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- A *Kaur (Dip) v. Chief Constable for Hampshire* [1981] 1 W.L.R. 578; [1981] 2 All E.R. 430, D.C.
Reg. v. Lawrence (Alan) [1972] A.C. 626; [1971] 3 W.L.R. 225; [1971] 2 All E.R. 1253, H.L.(E.).
Reg. v. McPherson [1973] Crim.L.R. 191, C.A.
Reg. v. Meech [1974] Q.B. 549; [1973] 3 W.L.R. 507; [1973] 3 All E.R. 939, C.A.
B *Reg. v. Skipp* [1975] Crim.L.R. 114, C.A.

The following additional cases were cited in argument:

- Davies v. Leighton* (1978) 68 Cr.App.R. 4, D.C.
Martin v. Puttick [1968] 2 Q.B. 82; [1967] 2 W.L.R. 1131; [1967] 1 All E.R. 899, D.C.
C *Oxford v. Peers* (1980) 72 Cr.App.R. 19, D.C.
Reg. v. Hale (Robert) (1978) 68 Cr.App.R. 415, C.A.
Reg. v. Hircock (1978) 67 Cr.App.R. 278, C.A.
Reg. v. McHugh [1977] R.T.R. 1; 64 Cr.App.R. 92, C.A.
Reg. v. Monaghan [1979] Crim.L.R. 673, C.A.

- D CONSOLIDATED APPEALS from the Divisional Court of the Queen's Bench Division and the Court of Appeal (Criminal Division).

ANDERTON V. BURNSIDE

- The defendant, James Burnside, appealed from a decision of the Divisional Court of the Queen's Bench Division (Ackner L.J. and Webster J.) given on November 5, 1982, on an appeal by the defendant by case stated from Manchester Magistrates' Court. The justices had found the defendant guilty of an offence of theft contrary to sections 1 and 7 of the Theft Act 1968. The Divisional Court refused the defendant leave to appeal, but certified under section 33(2) of the Criminal Appeal Act 1968 that their decision involved the point of law of general public importance set out in the opinion of Lord Roskill, post, p. 701B–C. On May 5, 1983, the Appeal Committee of the House of Lords (Lord Diplock, Lord Roskill and Lord Bridge of Harwich) allowed a petition by the defendant for leave to appeal.
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REGINA V. MORRIS (DAVID)

- The defendant, David Alan Morris, appealed from a decision of the Court of Appeal (Criminal Division) (Lord Lane C.J., O'Connor L.J. and Talbot J.) given on March 8, 1983, dismissing the defendant's appeal from his conviction in the Acton Crown Court (assistant recorder W. Thomas and a jury) on April 23, 1982, on two counts of theft, contrary to section 1(1) of the Act of 1968, a count of obtaining property by deception contrary to section 15 of the Act being ordered to lie on the file. The Court of Appeal on March 24, 1983, refused the defendant leave to appeal, but certified that their decision involved the point of law of general public importance set out in the opinion of Lord Roskill, post, p. 701A. On May 5, 1983, the Appeal Committee of the House of Lords [1983] 1 W.L.R. 625 (Lord Diplock, Lord Roskill and Lord Bridge of Harwich) allowed a petition by the defendant for leave to appeal.
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The appeals were consolidated by order of the House of Lords of May 5, 1983.

Neil Denison Q.C. and Philippa Jessel for the defendants.
David Jeffreys Q.C. and Laura Harris for the Crown.

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Their Lordships took time for consideration.

October 13. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Roskill. I entirely agree with it, and for the reasons given by him I would answer the certified questions in the way he proposes, and I would dismiss both appeals.

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LORD EDMUND-DAVIES. My Lords, having had the advantage of reading in draft form the speech prepared by my noble and learned friend, Lord Roskill, I too would answer the questions certified in these appeals in the manner indicated by him and dismiss both appeals.

C

LORD ROSKILL. My Lords, these two consolidated appeals, one from the Court of Appeal (Criminal Division), the other from the Divisional Court, have been brought by leave of your Lordships' House in order that controversial questions of law arising from the dishonest practice of label switching in connection with shoplifting in supermarkets may be finally decided. These matters have been in controversy for some time and have been the subject of judicial decisions which are not always easy to reconcile as well as disagreement between distinguished academic lawyers.

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The facts giving rise to these appeals are simple. Morris, the appellant from the Court of Appeal (Criminal Division), on October 30, 1981, took goods from the shelves of a supermarket. He replaced the price labels attached to them with labels showing a lesser price than the originals. At the check-out point he was asked for and paid those lesser prices. He was then arrested. Burnside, the appellant from the Divisional Court, was seen to remove a price label from a joint of pork in the supermarket and attach it to a second joint. This action was detected at the check-out point but before he had paid for that second joint which at that moment bore a price label showing a price of £2.73 whereas the label should have shown a price of £6.91½. Burnside was then arrested.

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The only relevant difference between the two cases is that Burnside was arrested before he had dishonestly paid the lesser price for the joint of pork. Morris was arrested after he had paid the relevant lesser prices. Morris was tried in Acton Crown Court on two charges of theft contrary to section 1(1) of the Theft Act 1968. A third count of obtaining property by deception contrary to section 15 of that Act appeared in the indictment but the learned assistant recorder did not take a verdict upon it and ordered that count to remain on the file. Morris appealed. The Court of Appeal (Criminal Division) (Lord Lane C.J., O'Connor L.J. and Talbot J.) dismissed his appeal in a reserved judgment given on March 8, 1983, by the learned Lord Chief Justice.

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Burnside was convicted at Manchester Magistrates' Court on January 27, 1982, on a single charge of theft contrary to section 1(1) of the Theft Act. He appealed by way of case stated. On November 5, 1982, the Divisional Court (Ackner L.J. and Webster J.) dismissed the appeal.

Both the Court of Appeal (Criminal Division) and the Divisional Court granted certificates. The former certificate read:

A "If a person has substituted on an item of goods displayed in a self-service store a price label showing a lesser price for one showing a greater price, with the intention of paying the lesser price, and then pays the lesser price at the till and takes the goods, is there at any stage a 'dishonest appropriation' for the purposes of section 1 of the Theft Act 1968, and, if so, at what point does such appropriation take place?"

B The certificate in the latter case read:

C "If a person has substituted on an item of goods displayed in a self-service store a price label showing a lesser price for one showing a greater price, with the intention of paying the lesser price, and then pays the lesser price at the till and takes the goods, is there at any stage a 'dishonest appropriation' for the purposes of section 1 of the Theft Act 1968?"

D The two certificates though clearly intended to raise the same point of law are somewhat differently worded and, with respect, as both learned counsel ultimately accepted during the debate before your Lordships, do not precisely raise the real issue for decision, at least in the terms in which it falls to be decided.

E My Lords, in his submissions for the appellants, which were conspicuous both for their clarity and for their brevity, Mr. Denison urged that on these simple facts neither appellant was guilty of theft. He accepted that Morris would have had no defence to a charge under section 15(1) of obtaining property by deception for he dishonestly paid the lesser prices and passed through the checkpoint having done so before he was arrested. But Morris, he said, was not guilty of theft because there was no appropriation by him before payment at the checkpoint sufficient to support a charge of theft, however dishonest his actions may have been in previously switching the labels.

F Mr. Denison pointed out that if, as he accepted, an offence was committed against section 15(1) and if the prosecution case were right, Morris would be liable to be convicted of obtaining property by deception which he had already stolen—a situation which learned counsel suggested was somewhat anomalous.

G As regards Burnside, Mr. Denison submitted that for the same reason there was no appropriation before his arrest sufficient to support a charge of theft. He also submitted that Burnside's actions however dishonest would not support a charge of attempting to obtain property by deception contrary to section 15(1) since his dishonest act was no more than an act preparatory to obtaining property by deception and was not sufficiently proximate to an attempt to obtain property by deception.

H My Lords, if these submissions be well founded it is clear that, however dishonest their actions, each respondent was wrongly convicted of theft. The question is whether they are well founded. The answer must depend upon the true construction of the relevant sections of the Act of 1968 and it is to these that I now turn. For ease of reference I set them out:

"1(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly. (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit. (3) The five following sections of this Act shall have effect as regards the

interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

"(1) A person's appropriation of property belonging to another is not to be regarded as dishonest—(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

"(3(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner. (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

"(4(1) 'Property' includes money and all other property, real or personal, including things in action and other intangible property."

It is to be observed that the definition of "appropriation" in section 3(1) is not exhaustive. But section 1(1) and section 3(1) show clearly that there can be no conviction for theft contrary to section 1(1) even if all the other ingredients of the offence are proved unless "appropriation" is also proved.

The starting point of any consideration of Mr. Denison's submissions must, I think, be the decision of this House in *Reg. v. Lawrence (Alan)* [1972] A.C. 626. In the leading speech, Viscount Dilhorne expressly accepted the view of the Court of Appeal (Criminal Division) in that case that the offence of theft involved four elements, (1) a dishonest (2) appropriation (3) of property belonging to another, (4) with the intention of permanently depriving the owner of it. Viscount Dilhorne also rejected the argument that even if these four elements were all present there could not be theft within the section if the owner of the property in question had consented to the acts which were done by the defendant. That there was in that case a dishonest appropriation was beyond question and the House did not have to consider the precise meaning of that word in section 3(1).

Mr. Denison submitted that the phrase in section 3(1) "any assumption by a person of *the rights*" (my emphasis) "of an owner amounts to an appropriation" must mean any assumption of "*all the rights of an owner.*" Since neither respondent had at the time of the removal of the goods from the shelves and of the label switching assumed *all* the rights of the owner, there was no appropriation and therefore no theft. Mr. Jeffreys for the prosecution, on the other hand, contended that *the rights* in this context only meant *any* of the rights. An owner of goods has many rights—they have been described as "a bundle or package of rights." Mr. Jeffreys contended that on a fair reading of the subsection it cannot have been the intention that every one of an owner's rights had to be assumed

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A by the alleged thief before an appropriation was proved and that essential ingredient of the offence of theft established.

My Lords, if one reads the words "the rights" at the opening of section 3(1) literally and in isolation from the rest of the section, Mr. Denison's submission undoubtedly has force. But the later words "any later assumption of a right" in subsection (1) and the words in subsection (2) "no later assumption by him of rights" seem to me to militate strongly against the correctness of the submission. Moreover the provisions of section 2(1)(a) also seem to point in the same direction. It follows therefore that it is enough for the prosecution if they have proved in these cases the assumption by the respondents of *any* of the rights of the owner of the goods in question, that is to say, the supermarket concerned, it being common ground in these cases that the other three of the four elements mentioned in Viscount Dilhorne's speech in *Reg. v. Lawrence (Alan)* had been fully established.

My Lords, Mr. Jeffreys sought to argue that any removal from the shelves of the supermarket, even if unaccompanied by label switching, was without more an appropriation. In one passage in his judgment in Morris's case, the learned Lord Chief Justice appears to have accepted the submission, for he said [1983] Q.B. 587, 596:

D "it seems to us that in taking the article from the shelf the customer is indeed assuming one of the rights of the owner—the right to move the article from its position on the shelf to carry it to the check-out."

With the utmost respect, I cannot accept this statement as correct. If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the checkpoint there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of section 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the checkpoint and there pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts and thus obtains at least control if not actual possession of the goods preparatory, at a later stage, to obtaining the property in them upon payment of the proper amount at the checkpoint. I do not think that section 3(1) envisages any such act as an "appropriation," whatever may be the meaning of that word in other fields such as contract or sale of goods law.

If, as I understand all of your Lordships to agree, the concept of appropriation in section 3(1) involves an element of adverse interference with or usurpation of some right of the owner, it is necessary next to consider whether that requirement is satisfied in either of these cases. As I have already said, in my view mere removal from the shelves without more is not an appropriation. Further, if a shopper with some perverted sense of humour, intending only to create confusion and nothing more, both for the supermarket and for other shoppers, switches labels, I do not think that that act of label switching alone is without more an appropriation, though it is not difficult to envisage some cases of dishonest label-switching which could be. In cases such as the present, it is in truth a

combination of these actions, the removal from the shelf and the switching of the labels, which evidences adverse interference with or usurpation of the right of the owner. Those acts, therefore, amount to an appropriation and if they are accompanied by proof of the other three elements to which I have referred, the offence of theft is established. Further if they are accompanied by other acts such as putting the goods so removed and re-labelled into a receptacle, whether a trolley or the shopper's own bag or basket, proof of appropriation within section 3(1) becomes overwhelming. It is the doing of one or more acts which individually or collectively amount to such adverse interference with or usurpation of the owner's rights which constitute appropriation under section 3(1) and I do not think it matters where there is more than one such act in which order the successive acts take place, or whether there is any interval of time between them. To suggest that it matters whether the mislabelling precedes or succeeds removal from the shelves is to reduce this branch of the law to an absurdity.

My Lords, it will have been observed that I have endeavoured so far to resolve the question for determination in these appeals without reference to any decided cases except *Reg. v. Lawrence (Alan)* [1972] A.C. 626 which alone of the many cases cited in argument is a decision of this House. If your Lordships accept as correct the analysis which I have endeavoured to express by reference to the construction of the relevant sections of the Theft Act; a trail through a forest of decisions, many briefly and indeed inadequately reported, will tend to confuse rather than to enlighten. There are however some to which brief reference should perhaps be made.

First, *Reg. v. McPherson* [1973] Crim.L.R. 191. Your Lordships have had the benefit of a transcript of the judgment of Lord Widgery C.J. I quote from page 3 of the transcript:

"Reducing this case to its bare essentials we have this: Mrs. McPherson in common design with the others takes two bottles of whisky from the stand, puts them in her shopping bag; at the time she intends to take them out without paying for them, in other words she intends to steal them from the very beginning. She acts dishonestly as the jury found, and the sole question is whether that is an appropriation of the bottles within the meaning of section 1. We have no hesitation whatever in saying that it is such an appropriation and indeed we content ourselves with a judgment of this brevity because we have been unable to accept or to find any argument to the contrary, to suggest that an appropriation is not effective in those simple circumstances."

That was not, of course, a label switching case, but it is a plain case of appropriation effected by the combination of the acts of removing the goods from the shelf and of concealing them in the shopping bag. *Reg. v. McPherson* is to my mind clearly correctly decided as are all the cases which have followed it. It is wholly consistent with the principles which I have endeavoured to state in this speech.

It has been suggested that *Reg. v. Meech* [1974] Q.B. 549, *Reg. v. Skipp* [1975] Crim.L.R. 114—your Lordships also have a transcript of the judgment in this case—and certain other cases are inconsistent with *Reg. v. McPherson*. I do not propose to examine these or other cases in detail. Suffice it to say that I am far from convinced that there is any inconsistency between them and other cases as has been suggested once it is appreciated

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A that facts will vary infinitely. The precise moment when dishonest acts, not of themselves amounting to an appropriation, subsequently, because of some other and later acts combined with those earlier acts, do bring about an appropriation within section 3(1) will necessarily vary according to the particular case in which the question arises.

B Of the other cases referred to, I understand all your Lordships to agree that *Anderton v. Wish (Note)* (1980) 72 Cr.App.R. 23 was rightly decided for the reasons given. I need not therefore refer to it further. *Eddy v. Niman* (1981) 73 Cr.App.R. 237 was in my view also correctly decided on its somewhat unusual facts. I think that Webster J., giving the first judgment, asked the right question at p. 241, though, with respect, I think that the phrase "some overt act . . . inconsistent with the true owner's rights" is too narrow. I think that the act need not necessarily be "overt."

C *Kaur (Dip) v. Chief Constable for Hampshire* [1981] 1 W.L.R. 578 is a difficult case. I am disposed to agree with the learned Lord Chief Justice that it was wrongly decided but without going into further detail I respectfully suggest that it is on any view wrong to introduce into this branch of the criminal law questions whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract. These difficult questions D should so far as possible be confined to those fields of law to which they are immediately relevant and I do not regard them as relevant questions under the Theft Act 1968.

E My Lords, it remains briefly to consider any relationship between section 1 and section 15. If the conclusion I have reached that theft takes place at the moment of appropriation and before any payment is made at the checkpoint be correct it is wrong to assert, as has been asserted, that the same act of appropriation creates two offences one against section 1(1) and the other against section 15(1) because the two offences occur at different points of time; the section 15(1) offence is not committed until payment of the wrong amount is made at the checkpoint while the theft F has been committed earlier. It follows that in cases such as Morris's two offences were committed. I do not doubt that it was perfectly proper to add the third count under section 15(1) in this case. I think the assistant recorder was right to leave all three counts to the jury. While one may sympathise with his preventing them from returning a verdict on the third count once they convicted on the theft counts if only in the interests of simplification, the counts were not alternative as he appears to have treated them. They were cumulative and once they were left to the jury G verdicts should have been taken on all of them.

H My Lords, these shoplifting cases by switching labels are essentially simple in their facts and their factual simplicity should not be allowed to be obscured by ingenious legal arguments upon the Theft Act which for some time have bedevilled this branch of the criminal law without noticeably contributing to the efficient administration of justice—rather the reverse. The law to be applied to simple cases, whether in magistrates' courts or the Crown Court, should if possible be equally simple. I see no reason in principle why, when there is clear evidence of both offences being committed, both offences should not be charged. But where a shoplifter has passed the checkpoint and quite clearly has, by deception, obtained goods either without paying or by paying only a lesser price than he should, those concerned with prosecutions may in future think it preferable in the interests of simplicity to charge only an offence against

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section 15(1). In many cases of that kind it is difficult to see what possible defence there can be and that course may well avoid any opportunity for further ingenious legal arguments upon the first few sections of the Theft Act. Of course when the dishonesty is detected before the defendant has reached the checkpoint and he or she is arrested before that point so that no property has been obtained by deception, then theft is properly charged and if appropriation, within the meaning that I have attributed to that word in this speech, is proved as well as the other three ingredients of the offence of theft, the defendant is plainly guilty of that offence.

My Lords, as already explained I have not gone through all the cases cited though I have mentioned some. Of the rest those inconsistent with this speech must henceforth be treated as overruled.

I would answer the certified questions in this way:

“There is a dishonest appropriation for the purposes of the Theft Act 1968 where by the substitution of a price label showing a lesser price on goods for one showing a greater price, a defendant either by that act alone or by that act in conjunction with another act or other acts (whether done before or after the substitution of the labels) adversely interferes with or usurps the right of the owner to ensure that the goods concerned are sold and paid for at that greater price.”

I would dismiss these appeals.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Roskill. I agree with it, and for the reasons which he gives I would dismiss both appeals.

LORD BRIGHTMAN. My Lords, I would dismiss these appeals for the reasons given by my noble and learned friend, Lord Roskill.

Appeals dismissed.

Costs of appellant Burnside to be taxed in accordance with Schedule 2 to Legal Aid Act 1974.

Costs of respondents in House of Lords to be paid out of central funds pursuant to sections 6 and 10 of Costs in Criminal Cases Act 1973 respectively.

Solicitors: W. A. G. Davidson & Co., Acton; Ferris & Evans, Ealing.

M.G.

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A

[HOUSE OF LORDS]

DEPARTMENT OF TRANSPORT RESPONDENTS

AND

NORTH WEST WATER AUTHORITY APPELLANTS

B

1983 July 25, 26, 27;
Oct. 13Lord Fraser of Tullybelton, Lord
Edmund-Davies, Lord Roskill, Lord
Brandon of Oakbrook and
Lord Brightman

C

*Highway—Public utilities—Nuisance—Burst water main—Escape of
water constituting nuisance—Damage to street—Water authority
not negligent—Whether liable to street authority for cost of
repair—Public Utilities Street Works Act 1950 (14 Geo. 6, c. 39),
s. 18(2)*

Section 18(2) of the Public Utilities Street Works Act 1950 provides:

D

"If any nuisance is caused—(a) by the execution of code-regulated works, or (b) by explosion, ignition or discharge of, or any other event occurring to, gas, electricity, water or any other thing required for the purposes of a supply or service afforded by any undertakers which at the time of or immediately before the event in question was in apparatus of those undertakers the placing or maintenance of which was or is a code-regulated work . . . nothing in the enactment which confers the relevant power to which section 1 of this Act applies . . . shall exonerate the undertakers from any action or other proceeding at the suit . . . (i) of the street authority . . ."

E

The plaintiffs were a street authority responsible for a street for the purposes of the Public Utilities Street Works Act 1950 and the defendants were the water authority responsible for a water main running beneath the street. The defendants were under a duty by virtue of section 11 of the Water Act 1973 to supply water within their area and at all material times were acting in pursuance of that Act. The water main burst and water escaped damaging the street, causing an appreciable obstruction and constituting a nuisance which was not attributable to any negligence on the part of the defendants or anyone for whom the defendants were liable. The water discharged from the broken main was water required for the purposes of a supply or service afforded by the defendants which at the time of, or immediately before, the discharge was in apparatus of the defendants, the placing or maintenance of which was a code-regulated work within the meaning of section 18(2)(b) of the Public Utilities Street Works Act 1950. Work was carried out by the plaintiffs to repair the damage at a cost of £1,014.87. The defendants agreed to reimburse the plaintiffs for the sum representing the cost of obtaining access through the street to repair the broken water main, but they disputed any liability in respect of the cost of repairing the damage to the street due to the escape of water. Webster J. gave judgment for the plaintiffs on their claim for damages in reliance on the provisions of section 18(2)(b) of the Act of 1950.

F

G

H

On appeal by the defendants direct to the House of Lords:—

Held, allowing the appeal, that, on its true construction, section 18(2) of the Public Utilities Street Works Act 1950 was

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not intended to alter the existing law that a body was not liable for a nuisance attributable to its performance of a statutory duty even though the statute expressly made it liable, or did not exempt it from liability, for nuisance; and that, since Webster J. had correctly held that the burst had occurred due to the statutory duty of the defendants to supply water under pressure, the defendants were not liable to the plaintiffs for nuisance in respect of it (post, pp. 710A—C, F—G, 711H—712C, G—713A).

Stretton's Derby Brewery Co. v. Mayor of Derby [1894] 1 Ch. 431 and *Smeaton v. Ilford Corporation* [1954] Ch. 450 applied.

Per curiam. Section 18(2) is simply a non-exoneration clause of general application to undertakers acting in the exercise of a power (but not in the performance of a duty), and its effect is to make a uniform provision for their liability (post, pp. 711H—712A, G—713A).

Decision of Webster J. [1983] 3 W.L.R. 105; [1983] 1 All E.R. 892 reversed.

The following cases are referred to in the opinion of Lord Fraser of Tullybelton:

Allen v. Gulf Oil Refining Ltd. [1981] A.C. 1001; [1981] 2 W.L.R. 188; [1981] 1 All E.R. 353, H.L.(E.).

Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 K.B. 772, C.A.

Hammond v. Vestry of St. Pancras (1874) L.R. 9 C.P. 316.

Smeaton v. Ilford Corporation [1954] Ch. 450; [1954] 2 W.L.R. 668; [1954] 1 All E.R. 923.

Stretton's Derby Brewery Co. v. Mayor of Derby [1894] 1 Ch. 431.

The following additional cases were cited in argument:

Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd. [1933] A.C. 402, H.L.(Sc).

Dunne v. North Western Gas Board [1964] 2 Q.B. 806; [1964] 2 W.L.R. 164; [1963] 3 All E.R. 916, C.A.

Geddis v. Proprietors of Bann Reservoir (1873) 3 App.Cas. 430, H.L.(I.).

Green v. Chelsea Waterworks Co. (1894) 70 L.T. 547, C.A.

Metropolitan Asylum District v. Hill (1881) 6 App.Cas. 193, H.L.(E.).

Midwood & Co. Ltd. v. Manchester Corporation [1905] 2 K.B. 597, C.A.

Stock v. Frank Jones (Tipton) Ltd. [1978] 1 W.L.R. 231; [1978] 1 All E.R. 948, H.L.(E.).

APPEAL from Webster J.

This was an appeal by the defendants, the North West Water Authority, by leave of the House of Lords from a judgment of Webster J. given on December 3, 1982, in favour of the plaintiffs, the Department of Transport, for damages for nuisance. Webster J. granted the defendants a certificate under section 12 of the Administration of Justice Act 1969 for leave to apply direct to the House of Lords for leave to appeal. On January 26, 1983, the Appeal Committee of the House of Lords in accordance with section 13 of the Act of 1969 allowed a petition by the defendants for leave to appeal.

The facts are set out in the opinion of Lord Fraser of Tullybelton.

John Roch Q.C. and *Giles Wingate-Saul Q.C.* for the defendants.

John Davies Q.C. and *Simon D. Brown* for the plaintiffs.

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A Their Lordships took time for consideration.

October 13. LORD FRASER OF TULLYBELTON. My Lords, this appeal is solely concerned with the proper construction of section 18(2) of the Public Utilities Street Works Act 1950.

B On September 7, 1978, a water main laid under the A57 trunk road outside no. 746, Warrington Road, Rainhill, Merseyside, burst. The appellants are, and at all material times have been, the regional water authority responsible for the main. They were established by the Water Act 1973, section 2 and Schedule 1. The respondents were at the material time the highway authority for the stretch of the A57 trunk road where the burst occurred. That part of the road was a "street" and the respondents were a "street authority," as both these terms are defined in C section 39(1) of the Act of 1950. That stretch of the A57 road is now no longer a trunk road. As a result of the bursting of the main, water escaped from it and caused damage to the road outside no. 746. The parties are agreed that the burst was not caused by any negligence on the part of the appellants, or those for whom they are responsible. They are also agreed that the appellants used all reasonable diligence to prevent the main becoming a nuisance.

D The damage to the road caused an appreciable obstruction of the public highway. The total cost to the respondents of the work carried out in making good the damage to the road was £1,014·87. Of that total, the sum of £459·66 is accepted by the appellants as representing the cost which would have been incurred in any event in obtaining access through the highway to repair the broken water main. The appellants admitted E liability for that sum and have paid it, but they dispute any liability in respect of the remainder of the total, amounting to £555·21. That sum represents the cost of repairing the damage due to the escape of water from the burst main.

F The issue between the parties accordingly is whether or not the appellants are liable to pay damages to the respondents to compensate them for the cost of repairing the damage to the highway caused by the escape of water from the burst main. The solution to that issue depends upon the construction of section 18(2) of the Act of 1950. That subsection provides as follows:

G "If any nuisance is caused—(a) by the execution of code-regulated works, or (b) by explosion, ignition or discharge of, or any other event occurring to, gas, electricity, water or any other thing required for the purposes of a supply or service afforded by any undertakers which at the time of or immediately before the event in question was in apparatus of those undertakers the placing or maintenance of which was or is a code-regulated work . . . nothing in the enactment which confers the relevant power to which section 1 of this Act applies or in any enactment which regulates the exercise of that power . . . shall exonerate the undertakers from any action or other H proceeding at the suit either—(i) of the street authority or street managers, or (ii) . . ."

"Code-regulated works" is defined in section 1(5) of the Act of 1950. It concerns works executed by undertakers under statutory powers, and to which the street works code applies. For present purposes, it is enough to note that the work of laying the appellants' water main in the street where the burst occurred would have been a code-regulated work. Counsel

for the appellants conceded that the escape of water from the main would have constituted a nuisance at common law and would have been actionable at the instance of the respondents, if the appellants had not been acting in discharge of a statutory duty. Counsel for the respondents conceded that the appellants, in maintaining water under pressure in the main, were acting in the discharge of a statutory duty. The duty is imposed by the Water Act 1973, section 11(1) and section 11(7)(b) incorporating Part IX of Schedule 3 to the Water Act 1945. Counsel for the respondents further conceded that the respondents could not succeed in their present claim unless the law as it stood before the passing of section 18(2) of the Act of 1950 was amended. Thus he attributed to section 18(2) the effect of imposing upon the appellants a liability to which they would not otherwise have been subject.

Before Webster J. there was some argument as to whether the escape of water was due to the performance by the appellants of their statutory duty to supply water under pressure or to their exercise of the statutory power to lay water pipes in the highway. Webster J. [1983] 3 W.L.R. 105, 110 held that the escape was attributable to the performance of a statutory duty and that the burst occurred because of the pressure of water in the main. In my opinion that is clearly correct. The importance of this finding will appear in what follows.

The question at issue therefore comes to be whether, as the respondents contend, section 18(2) has the effect of imposing strict liability on the appellants as water authority for a nuisance caused by them in the course of performing their statutory duty, so that they are liable for the nuisance notwithstanding that they were not negligent and that they took all reasonable care to avoid it. Their liability could, according to the respondents' contention, be avoided only if the nuisance was attributable to act of God or of a third party. Webster J. decided that the respondents' contention was correct and he gave judgment in their favour for the sum of £555.21. This appeal comes direct to your Lordships' House under the leap-frog procedure of section 12 of the Administration of Justice Act 1969.

The general law on this subject is well established and is not in dispute between the parties. It was correctly summarised by the learned judge, at p. 109, in four propositions, the first two of which are directly relevant to this case, in which the nuisance was attributable to the performance of a statutory duty. These propositions are:

"1. In the absence of negligence, a body is not liable for a nuisance which is attributable to the [performance] by it of a duty imposed upon it by statute: see *Hammond v. Vestry of St. Pancras* (1874) L.R. 9 C.P. 316. 2. It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance: see *Stretton's Derby Brewery Co. v. Mayor of Derby* [1894] 1 Ch. 431, and *Smeaton v. Ilford Corporation* [1954] Ch. 450."

Where the nuisance is attributable to the exercise of a power, the position is different. The contrast was brought out in the fourth of the learned judge's propositions, which was as follows:

"4. A body is liable for a nuisance [by it attributable] to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not exempted from liability, for nuisance: see *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914] 3 K.B. 772."

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A The word “negligence” is used in these propositions in the special sense explained by Lord Wilberforce in *Allen v. Gulf Oil Refining Ltd.* [1981] A.C. 1001, 1011 of requiring the undertaker, as a condition of obtaining immunity from action, “to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons: . . .”

B Having regard to the judge’s finding that the nuisance in this case was attributable to the performance of a statutory duty, the respondents have to show that section 18(2) of the Act of 1950 made a substantial change in the previously established law, by in effect superseding proposition 2 and making proposition 4 apply to a nuisance attributable to performance of a statutory duty as well as to one attributable to exercise of a statutory power. The learned judge held that the respondents had succeeded in showing that. In considering whether he was right, the first point to be

C observed is that the subsection does not in terms purport to impose any new liability. All it provides is that “nothing in the enactment which confers the relevant power . . . shall exonerate the undertakers.” Those words are in marked contrast to the words of sections 18(1) and 19(1), both of which expressly impose on undertakers absolute liability in certain circumstances. The contrast with section 19(1)(b) is particularly striking.

D Sections 18 and 19 are parallel sections, the former dealing with liability of undertakers to street authorities and the latter with liability to transport authorities, such as railway or harbour authorities. Section 19(1) provides that, if damage is caused to a bridge or other property of a transport authority, by any such event as is mentioned in section 18(2)(b) (viz. explosion, ignition, etc.) occurring in code-regulated works in a street, the undertakers “shall indemnify” the transport authority against expense

E reasonably incurred by them of making good the damage. If the draftsman intended by section 18(2) to impose a similar liability to indemnify the street authority for the events of explosion, ignition, etc. I do not understand why he did not use similarly clear and direct language. Webster J., at pp. 113–114, recognised that subsection 18(2), if literally construed, did not impose strict liability for nuisance, but he was disposed to read into it additional words, which I have emphasised in the following

F passage and which would have the effect of making it read as follows:

“nothing in the enactment which confers the relevant power . . . or in any enactment which regulates the exercise of that power *nor the fact that the nuisance is attributable to the exercise of such a power* . . . shall exonerate the undertakers. . . .”

G His reason for reading in the additional words was that he considered they were necessary to make section 18(2) consistent with the provisions of subsections 18(1) and 19(1). My Lords, I am bound to say that the reading in of additional words in that way seems to me unjustifiable. No doubt subsection 18(2) should, if possible, be construed in a way that would be consistent with the scheme of the Act as a whole, and especially of other subsections dealing with similar subject matter. But that is not to

H say that the subsection should be extended by adding a new provision which the draftsman has not included. That is especially true where, as here, the subsection as it stands can be given a sensible meaning. In my opinion the subsection is simply a non-exoneration clause of general application to undertakers acting in the exercise of a power (but not in the performance of a duty), and its effect is to make a uniform provision for their liability to replace the various differing provisions in different enactments which confer power on authorities such as the Post Office and

electricity boards to lay cables and gas boards and statutory water and sewerage authorities to lay pipes in public streets. It makes a useful amendment of the law, but one which is much more limited than the complete reversal of the general rule contended for by the respondents. Such a limited effect is entirely consistent with the purpose of the Act as stated in the first part of the long title which is as follows:

“An Act to enact *uniform provisions* for regulating relations as to apparatus in streets between authorities . . . having statutory powers to place and deal with apparatus therein, and those having the control or management of streets . . .” (emphasis added).

It is not necessary to construe the subsection as having any wider effect in order to give content to it or to make it consistent with the purpose of the Act as a whole. I am therefore of opinion that the learned judge erred in his construction of the subsection.

An additional reason why I reject the respondents' construction is that section 18(2) provides for non-exoneration by anything in “the enactment which confers the relevant *power* to which section 1 of this Act applies.” The power referred to must be “any statutory power to execute undertakers' works in a street”—see section 1(1). But the learned judge's finding, at p. 109, that the bursting of a pipe in the present case was attributable to the appellants' performance of a duty to supply water under pressure, and not to their exercise of their power to lay the pipe, makes the provision of any enactment conferring a mere power to lay pipes irrelevant. It also makes the words which the learned judge was willing to add to section 18(2) (viz. “nor the fact that the nuisance is attributable to the exercise of such a *power*”) irrelevant. Even if they were read in they would not have the effect for which the respondents contend. In order to produce that effect it would be necessary to include a reference to the nuisance being attributable to the performance of a statutory duty. But such a reference would be quite out of place in subsection 18(2) which provides that nothing in the enactment which confers the relevant “power” or which regulates the exercise of “that power” shall exonerate the undertakers from liability.

For these reasons I am of the opinion that the respondents' contention is not well founded and I would allow the appeal.

LORD EDMUND-DAVIES. My Lords, I am in respectful agreement with the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton, and accordingly concur that this appeal should be allowed.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Fraser of Tullybelton. For the reasons he gives I too would allow this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I would allow the appeal.

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Dept. of Transport v. N.W. Water Authy. (H.L.(E.))

Lord Brandon
of Oakbrook

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LORD BRIGHTMAN. My Lords, I would allow this appeal for the reasons given by my noble and learned friend, Lord Fraser of Tullybelton.

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*Appeal allowed with costs.
Declaration that section 18(2) of the
Public Utilities Street Works Act
1950 did not impose a duty of strict
liability on the defendants.*

Solicitors: *Hextall Erskine & Co. for Keogh Ritson & Co., Bolton;
Treasury Solicitor.*

M.G.

C

[COURT OF APPEAL]

SYBRON CORPORATION AND ANOTHER v. ROCHEM LTD. AND
OTHERS

D

[1974 G. No. 3313]

1983 Feb. 21, 22, 23

Stephenson, Fox and Kerr L.JJ.

E

Employment—Contract of employment—Implied term—Duty to disclose misconduct—Manager and other employees conspiring against company—Retirement of manager on company pension—Company claiming pension paid under mistake of fact—Whether manager under duty to disclose conspiracy against company

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The fourth defendant was employed as European zone controller of the second plaintiff company. During the period of his employment both the fourth defendant and the company made payments to a life assurance scheme by which the fourth defendant would receive on retirement a lump sum and annual payments under a life assurance policy to himself and his wife, the 12th defendant. Under rule 8(b) of the scheme, if a member was dismissed for fraud or serious misconduct in connection with the affairs of the company, the member would be entitled only to the benefit secured by virtue of his own contributions to the scheme, with the balance to be dealt with at the discretion of the company. The fourth defendant retired in 1973 and the company paid him the lump sum and effected the two life assurance policies. At a later date the company discovered that during the period of his employment with them, the fourth defendant had engaged with other employees in setting up and operating rival businesses in competition with the company. In 1980 the fourth and other defendants, excluding the 12th defendant, were found guilty of a conspiracy amounting to a large scale commercial fraud. As part of a larger claim for many millions of dollars as damages for conspiracy against the defendants, the company and their parent company, the first plaintiffs, sought orders that the company stand possessed of the two life assurance policies and that the fourth defendant repay the lump sum minus his own contributions, on the ground that the policies and payment had been made under a mistake of fact that the fourth defendant had been entitled to his rights under the scheme and had carried out his duties as an employee, whereas they had had good cause to invoke rule 8(b) of the scheme on the ground that he could have

been dismissed for serious misconduct. The fourth defendant submitted that in regard to the negotiations which had taken place in relation to the pension provisions there had been no fraud, misconduct or misrepresentation, and that he owed no duty to the company to disclose his breaches of duty, and accordingly the settlement of his pension provisions could not be upset. The judge decided that the company could rely on rule 8(b) and granted the orders sought.

On appeal by the fourth defendant and his wife:—

Held, dismissing the appeal, that although a contract of employment was not a contract uberrimae fidei requiring disclosure by an employee of his own past misconduct and there was no general requirement for an employee to disclose misconduct or breaches of duty by fellow employees, the terms and nature of the employment might be such that there was a contractual duty to disclose the misconduct of other employees; that the position of the fourth defendant as European zone controller was such that he was under a duty to disclose the misconduct of his fellow employees notwithstanding that such disclosure would inevitably disclose his own misconduct, and accordingly his breach of duty in not reporting the misconduct of other employees had induced a mistake of fact by the company which had caused them not to exercise their rights under rule 8(b) of the agreement but to implement the pension agreement and make payment thereunder (post, pp. 722E–F, 726A–C, F–H, 727G–H, 728D–F, 729A–E).

Bell v. Lever Bros. Ltd. [1932] A.C. 161, H.L.(E.) distinguished.

Swain v. West (Butchers) Ltd. [1936] 3 All E.R. 261, C.A. applied.

Decision of Walton J. affirmed.

The following cases are referred to in the judgment:

Bell v. Lever Bros. Ltd. [1931] 1 K.B. 557, C.A.; [1932] A.C. 161, H.L.(E.)

Fletcher v. Krell (1873) 28 L.T. 105.

Healey v. Société Anonyme Française Rubastic [1917] 1 K.B. 946.

Ramsden v. David Sharratt & Sons Ltd. (1930) 35 Com.Cas. 314, H.L.(E.)

Swain v. West (Butchers) Ltd. [1936] 1 All E.R. 224; [1936] 3 All E.R. 261, C.A.

No additional cases were cited in argument.

APPEAL from Walton J.

The fourth and twelfth defendants, Wilfred Seymour Roques and Muriel Roques, appealed from an order of Walton J. on March 27, 1981, declaring that the second plaintiffs, Gamlen Chemical Company (U.K.) Ltd., a subsidiary of the first plaintiffs, Sybron Corporation, stood possessed of two policies of assurance and the moneys payable thereunder free and discharged from any trust in favour of the defendants and ordering the fourth defendant to pay £13,208.10 with interest to the company.

The notice of appeal dated October 6, 1981, averred that the judge misdirected himself in law or alternatively misapplied the facts in holding that the fourth defendant was under a duty to disclose to his employers breaches of duty on the part of other employees notwithstanding that such disclosures would necessarily have involved disclosure by him of his own breaches of duty; failed to apply the principal laid down in *Bell v. Lever Brothers Ltd.* [1932] A.C. 161 that an employee who had committed a fraudulent breach of the terms of his employment was not under a duty

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A to disclose that breach of duty to his employer; and misdirected himself in law or alternatively misapplied the facts in holding that the fourth defendant was guilty of a fraudulent misrepresentation sufficient to avoid the pension provision made for the fourth and 12th defendants by the second plaintiffs.

The facts are stated in the judgment of Stephenson J.

B

James Munby for the fourth and twelfth defendants.

C. A. Brodie Q.C. and *Ian Geering* for the plaintiffs.

C

STEPHENSON L.J. This is an appeal by two out of 13 defendants against three parts of an order made by Walton J. on March 27, 1981, and entered on August 26, 1981. That order provided for three things by the only relevant part of it for the purposes of this appeal. The first was a declaration that the second plaintiffs, Gamlen Chemical Co. (U.K.) Ltd.:

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“stand possessed of two policies of assurance referred to in paragraph 23(D) of the re-re-re-amended statement of claim and the moneys payable thereunder respectively, and the full benefit thereof, free and discharged from any trust in favour of the appellants or either of them.”

The second was an order that the appellant Wilfred Seymour Roques, the fourth defendant:

“do pay to the company on February 5, 1981, the sum of £13,208·10 with interest thereon at 10 per centum per annum from October 31, 1973, until payment.”

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The third was an order that the appellants—that is, Mr. Roques and his wife, who is the 12th defendant—“do pay to the plaintiffs”—that is, Sybron Corporation as well as the Gamlen Chemical Co. (U.K.) Ltd.:

“such of the costs of the plaintiffs of the action taxed if not agreed as are properly attributable to the issues raised by paragraph 23 of the said re-re-re-amended statement of claim.”

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That paragraph is in these terms:

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“(A) Roques was employed by Gamlen from October 2, 1952, until September 30, 1973. During the period of his said employment both Roques as employee and Gamlen as employer made payments to the Scottish Widows Fund and Life Assurance Society (‘the society’) under a pension and life assurance scheme (‘the scheme’) administered by Gamlen. Roques paid contributions to the scheme amounting in the aggregate to £4,641·90. Under the rules of the scheme (to which Gamlen will at the trial refer for their full terms and true effect) on the retirement of a member such member becomes entitled to a pension payable by the society or under rule 11 Gamlen may take part or the whole of the benefits for the member in the form of a cash payment to be applied in purchasing an annuity for that member from an insurance company or the member may request Gamlen to arrange for a lump sum to be paid to him in lieu of the annuity or part thereof and Gamlen may at its discretion arrange accordingly. Under the scheme the normal retirement age of any member is that member’s 65th birthday. Under rule 8(b) if before his normal retirement date a member leaves the service of Gamlen voluntarily or is dismissed for fraud or serious misconduct in connec-

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tion with the affairs of Gamlen he is entitled to the benefit secured by his own contributions towards the premiums due and in respect of his membership of the scheme and the balance of the benefit secured by such premiums will be dealt with at the discretion of Gamlen.

“(B) Roques was 62 years of age on January 20, 1973, and from about February 1973 was desirous of retiring from the service of Gamlen before reaching his normal retiring age of 65 under the scheme.

“(C) By virtue of the said rule 11 of the scheme in the event of Roques retiring on September 30, 1973, there would be payable to Gamlen by the society the sum of £49,672.

“(D) By an agreement between Gamlen and Roques in or about July, August and September 1973 it was agreed: (i) that Roques should retire on September 30, 1973; (ii) that Gamlen would exercise the option conferred by rule 11 of the scheme and claim the sum of £49,672; (iii) that Gamlen would add to the sum of £49,672 a further sum of £7,177·14 making an aggregate of £56,849·14; (iv) that Gamlen would apply the said sum of £56,849·14 as follows: (a) by paying £17,850 thereof to Roques; (b) by purchasing in the name of Gamlen from the society a policy of assurance under which the sum of £3,360·12 per annum would be paid to Gamlen during the joint lives of Roques and Mrs. Roques and the life of the survivor of them and Gamlen would hold such sum upon trust for Roques and Mrs. Roques as in the policy mentioned; (c) by purchasing from the society a further policy under which the annual sum of £756·36 would be payable to Gamlen for the same period and be held on the same trusts as affected the said annual sum of £3,360·12; (v) that Roques would enter into a consultancy agreement with Gamlen for a period of three years (such consultancy agreement to include a covenant against competition with Gamlen for a period of three years from August 31, 1976) in consideration of the sum of £7,500 to be paid in 12 quarterly instalments of £625 each.

“(E) Roques retired on September 30, 1973.

“(F) Pursuant to the said agreement Gamlen (1) in or about October 1973 paid to Roques the said sum of £17,850 and (2) effected the said two policies at a total cost of £38,999·14.

“(G) Gamlen effected the said policies and each of them and made the said payment under or pursuant to a mistake of fact namely that (i) Roques was entitled to his pension rights under the scheme and that Gamlen had no good cause to invoke the provisions of rule 8(b) on the ground that Roques was liable to be dismissed for serious misconduct in connection with the affairs of Gamlen and (ii) that Roques had faithfully and diligently carried out his duties as an employee of Gamlen prior to his said retirement.

“(H) Gamlen had good cause to invoke the provisions of rule 8(b) on the ground that Roques could have been summarily dismissed for serious misconduct in connection with the affairs of Gamlen and Gamlen repeats the particulars given under paragraphs 6, 15(1), (2), (3), (4) and 20 hereof. Further or alternatively Roques did not faithfully or diligently carry out his duties as an employee of Gamlen prior to his said retirement and Gamlen repeats the said particulars.

“(I) In the premises the said payment of £17,850 was made under a mistake of fact and Gamlen effected the said policies and created the trusts thereof under the same mistake. As regards the sum of

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A £17,850 Gamlen is willing to give credit for the sum of £4,641·90 to which Roques would have been entitled under the provisions of rule 8(b).”

I need read no more of that document.

B So the claim to £13,208·10 is a claim for the balance of £17,850 after deducting the £4,641·90 contributed by Mr. Roques himself to the scheme. This claim, to be repaid £13,208·10, is a very small part of a very much larger claim for many millions of dollars as damages for conspiracy; it is a claim by two companies for conspiracy against three companies with the name Rochem, and nine others, including Mr. Roques, a Mr. Bove and other employees; I say nine others and not 10, because Mrs. Roques was not a conspirator but simply a beneficiary under the policy and throughout no allegations whatever have been made against that lady and it is her misfortune that the judge has found her husband guilty of the conspiracy to which I shall shortly come.

C Mr. Roques and all the other defendants, companies and individuals except Mrs. Roques, and three other defendants against whom the plaintiffs discontinued, were found by the judge guilty of a conspiracy amounting to a massive commercial fraud, after a trial lasting more than 90 days, in a judgment given on December 3 and 4, 1980, of which the transcript runs to 240 pages.

D The first plaintiff Sybron was described by the judge as “an American financial conglomerate.” It acquired another American company called Gamlen Chemical Co. Ltd., which specialised in chemicals and equipment for cleaning ships and industrial sludge. On the merger of Gamlen Chemical Co. Ltd. with Sybron all the subsidiaries of Gamlen Chemical Co. Ltd. became subsidiaries of Sybron, and those subsidiaries included the second plaintiffs, Gamlen Chemical Co. (U.K.) Ltd., who were responsible for the activities of the company in the United Kingdom, and also for its activities in Norway and in the Middle East and the Gulf area. Included in those subsidiaries were a French subsidiary, an Italian subsidiary, a German subsidiary and a Dutch subsidiary with a branch in Belgium.

F The French subsidiary took an independent line to a considerable extent. In his judgment the judge said:

G “Leaving, therefore, Gamlen France completely out of the picture for present purposes, the manner in which the Gamlen Division of Sybron, through the former subsidiaries of Gamlen Chemical Co. Ltd., and the Gamlen Division of Sybron Italia, operated was through a unified European zone, and at all times material for present purposes the no. 1 in Europe of this unified zone was the defendant Wilfred Seymour Roques (Mr. Roques).”

H After 1971 his right hand man was a United States’ citizen much younger than he, called Bove; of him and his relationship to Mr. Roques the judge said:

“On August 1, of that year (1971) he was appointed controller of the European zone; later he became director of operations, European zone. Whatever his official position may have been designated he was, in effect, throughout this history, Mr. Roques’s right-hand man. They were respectively no. 2 and no. 1 in the Gamlen European zone.”

As the judge found, Mr. Roques had power of hiring and firing over the whole of the European zone, including those countries which I have already named. In June 1970 he used that power to dismiss a Mr. Van den Heuval, who was the manager for Germany and Holland. For reasons which are obvious he denied in the witness-box his responsibility for that dismissal but, according to the judgment of the judge, he was caught out in a direct lie in dealing with that dismissal and his denial of responsibility for it was rejected by the judge.

Mr. Munby, for Mr. and Mrs. Roques, has conceded that the conspiracy as pleaded in the statement of claim, and indeed all or most of the overt acts there pleaded, were in fact proved to the satisfaction of the judge; and they are admitted for the purposes of this appeal. I can therefore best describe the conspiracy of which Mr. Roques, Mr. Bove and others were found guilty by reading the way in which it is pleaded in paragraph 6 of the statement of claim:

"From a date not earlier than 1971 Roques, Bove, Baldwin and Fletcher and each of them" (they were two other English employees of the company) "or some one or more of them wrongfully and with intent to injure Sybron and/or Gamlen and/or the relevant subsidiaries or some one or more of them conspired and agreed together and/or with"—and a number of other employees are named—"to do the following acts or some one or more of such acts: (a)(i) To set up in the case of Roques, Bove, Baldwin and Fletcher while they were respectively employed by the plaintiffs or one of them and in the case of the other said conspirators while they were respectively employed by a subsidiary of Sybron business organisations (hereinafter called 'the new business') throughout the world including England which would carry on business of the same kind as the said business carried on by Sybron through Gamlen and/or the relevant subsidiaries or one or more of them (hereinafter together called 'the said subsidiaries of Sybron'). (ii) To carry on business through the new business while still employed as aforesaid in competition with and so as to injure the said business of Sybron. (iii) To hide and disguise from Sybron and/or the said subsidiaries of Sybron their respective interests in the new business during their respective employment by Sybron or the said subsidiaries of Sybron as the case might be."

That is the "guts" of the conspiracy; I need read no more of that paragraph.

In effect the judge found that what he called the top management, headed by Mr. Roques and Mr. Bove, defected, unknown to the plaintiffs, while still employed by the plaintiffs, to these Rochem companies who form three of the defendants to the plaintiffs' action, and worked actively against their employers.

The judge also found that Mr. Roques was a party to the conspiracy—reluctant, hesitant, it may be, but a party from its inception—doomed, as the judge described it, to dance to the dominant Mr. Bove's tune, but nevertheless the judge found that the conspiracy would not have got off the ground if Mr. Roques had disclosed to the plaintiffs what, in the judge's view, he ought to have disclosed, namely the activities of his fellow conspirators and fellow employees. He saw to it that nothing was passed to the plaintiffs or to their lawyers; he was not prepared to "rock the boat," as the judge put it, by doing his duty to report their activities and so to risk losing his pension.

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A In February 1973 he was telling Mr. Gamlen that he wanted to retire early, at the age of 62 in January 1974. He was writing what the judge called "window-dressing letters" to Mr. Gamlen in March and in July of that year; I think I should read one or two sentences from the letter of July 13, 1973, which was quoted by the judge. In that letter he expressed his anger at references being made to a product called Roquesite, indicating, as he said in the letter:

B "this might belong to some company of mine. I know you do not need me to assure you I have no company nor do I contemplate such."

C That was written to Mr. Gamlen, the son of the founder of the Gamlen Chemical Co. Ltd., in the United States, by a man who was at that time busy forming a company, or companies, of his own in competition with the plaintiffs. I would spare Mrs. Roques's feelings by not going further into the sorry details of Mr. Roques's part in this conspiracy, his visits to various lawyers and perhaps in particular his visit to Kuwait, nominally to advance the interests of the plaintiffs but in fact to destroy them.

D Common sense might suggest that a man in the responsible position of Mr. Roques, which I have outlined, was under a duty to the plaintiffs, his employers, to stop what was going on, to dismiss the perpetrators, or at least to report the perpetrators and what was going on to his employers, the plaintiffs. He did not do any of these things; he did not do any of them because he could not, and he could not do them because he was in the conspiracy himself up to the hilt. Yet it is submitted by Mr. Munby, on behalf of Mr. and Mrs. Roques, that Mr. Roques owed no duty of the kind which I have suggested common sense might indicate, he did not break any such duty because he did not owe any such duty and, submits Mr. Munby, the House of Lords has said so. If he owed no duty, and broke no duty, by being unfaithful in the way which I have described in outline, he is entitled to keep the £13,000 which his employers have paid him in ignorance, and again the House of Lords has said so. If this is the law, in my judgment there is something very seriously wrong with the law.

F Walton J. would not accept it as the law, and neither do I. After reading rule 8(a) and (b) of the scheme, the judge said:

G "Based on these rules, the statement of claim reads, in relation to Mr. Roques's pension, as I have already indicated, that Gamlen effected the policies, and each of them, and made the payment under or pursuant to a mistake of fact, namely, in substance, that Roques was entitled to his pension rights under the scheme and that Gamlen had no good cause to invoke the provisions of rule 8(b), and that Gamlen had been caused to invoke those provisions on the ground that Mr. Roques could have been summarily dismissed for serious misconduct.

H "Mr. Munby submitted that it was nowhere there alleged that in regard to the negotiations which took place in relation to the pension provisions finally agreed for Mr. Roques there had been any fraud, misconduct or misrepresentation by Mr. or Mrs. Roques. But that even if there had been any such pleaded there was certainly no evidence to support any such allegation. Consequently he claimed that the matter was concluded in favour of Mr. and Mrs. Roques by the decision of the House of Lords in *Bell v. Lever Bros. Ltd.* [1932] A.C. 161. As will be recalled, that was a case where the respondents,

Lever Brothers paid two of their employers, Bell and Snelling, considerable sums representing, in effect, damages for premature termination of their service contracts. Unknown to Lever Bros. at the time the payments were negotiated they had the right, because of certain breaches of the terms of such contracts which Messrs. Bell and Snelling had committed, to terminate such contracts without compensation and immediately. Upon discovering their servants' peccadilloes Lever Brothers sued to recover the amount of compensation so paid, alleging fraud. Fraud was, however, completely negated. So the case was then put on the ground of mistake, both mutual or, alternatively, unilateral, on the part of Lever Brothers.

"The Court of Appeal, agreeing with the trial judge, held that the parties were under a mutual mistake, both of them believing (contrary to the fact) that the one was entitled to, and the other bound to pay, compensation for termination of the agreements. The Court of Appeal further held that each of them, Bell and Snelling, owed a duty to their employer to disclose their breaches of duty, and that such non-disclosure invalidated the compensation agreements.

"By one vote the House of Lords reversed this decision. Lord Blanesburgh would have decided the matter on the ground that, after a charge of fraud had been made and negated, it would not be just to allow the employers to succeed on a ground based on the alternative hypothesis of good faith. But he was content also to agree with Lord Atkin and Lord Thankerton that the action failed, as to mutual mistake on the ground that the mutual mistake related not to the subject matter of the action but to its quality, and as to unilateral mistake on the ground that the defendants owed no duty to their employers to disclose the impugned transactions."

I cannot improve on that summary of *Bell v. Lever Bros. Ltd.*, but I would add that I take the judge to mean, when he says that the Court of Appeal further held that each of them owed a duty to their employer to disclose *their* breaches of duty, that each was to disclose his own breaches of duty because, as I shall point out, there is nothing in the decision of *Bell v. Lever Bros. Ltd.* which decides what, if any, duty is owed by a servant to disclose to his master breaches of other servants' duty. The judge went on:

"The relevance of that case to the claim against Mr. and Mrs. Roques is at once apparent: if Mr. Roques owed no duty to the plaintiffs to disclose his serious breaches of duty then the settlement of his pension provisions could not, as such, be upset. I say 'as such' because it appears to me that, as far as Mr. Roques himself is concerned, there might well be arguments for saying that the plaintiffs could recover the costs of such settlement by way of damages for breach of his service agreement. But, whether that is so or not, it would be quite clear that the position of Mrs. Roques would remain unaffected, and she would continue to be entitled to the pension provision made for her.

"Mr. Munby pointed out—and I think that his observation is well founded—that the House of Lords in that case made it perfectly clear that, in general, even if the servant has committed a fraudulent breach of the terms of his employment (e.g., he has stolen from his master), there is no superadded duty upon him to report his own dishonesty."

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A I make no apology for reading that passage also from the judge's judgment because it contains an admirable statement of the relevance of *Bell v. Lever Bros. Ltd.* and also, I think, of Mr. Munby's argument.

B In *Bell v. Lever Bros. Ltd.* the trial judge, Wright J., did not find it necessary to decide whether these two servants owed a duty to their employers to disclose their own misconduct or breaches of contract, though he clearly indicated that he thought they well might: see [1931] 1 K.B. 557, 573. All the Lords Justices in the Court of Appeal were, I think, of opinion that there was such a duty, or that there certainly was such a duty in that case, and that they could have put their decision upon that ground: see the judgments of Scrutton L.J. at p. 586 and following, Lawrence L.J. at p. 593 and following, and Greer L.J. at p. 599 and following.

C But the House of Lords said No, there was no such duty; and they held, by a majority of three to two, that Messrs. Bell and Snelling were entitled to retain from their employers the moneys which had been paid to them in spite of their misconduct or breach of contract and their failure to disclose it.

D Mr. Munby has, in the course of his admirably presented argument on behalf of Mr. and Mrs. Roques in this court, made some further concessions. First he has conceded that Mrs. Roques, though innocent, can be in no better position than her husband because, though bona fide, she was a volunteer and not a purchaser for value. Secondly, neither Mr. Roques nor Mrs. Roques can be in any better position by seeking to argue the matter in trust rather than in contract. I also understand him to concede that the judge's three orders stand or fall together; either the
E plaintiffs are entitled to their declaration and are entitled to their order for repayment, and I think it must follow that they are entitled to their order for costs; or if they are not entitled to one, they are not entitled to any.

F Mr. Munby then made four submissions. (1) In the circumstances of this case the plaintiffs cannot set aside the pension arrangements on the ground of mistake unless they can show either (a) that their mistake was induced by some misrepresentation on the part of Mr. Roques, or (b) that their mistake was induced by some breach on the part of Mr. Roques of a duty of disclosure; for that he relies on *Bell v. Lever Bros. Ltd.* [1932] A.C. 161. (2) Neither a servant nor a director is under any legal obligation to his employer or principal to disclose any breaches by him of obligations arising out of their relationship. (3) It makes no difference to the principle
G just submitted (a) that the servant or director has in fact had his misconduct present to his mind at the moment when it is said that he ought to have made disclosure; it likewise makes no difference to that principle (b) that his wrongdoing is fraudulent; nor (c) that the breach of the obligation was deliberately effected in such a way that it remains secret from the employer; nor (d) that he conceals his breach of obligation by submitting to his employer false and misleading reports, intending to deceive him. Then, says Mr. Munby, if all those three submissions are
H correct, it is puzzling why it never appears to have been considered, if not decided, that Bell might have been under a duty to disclose Snelling's breach of contract and Snelling might have been under a duty to disclose Bell's. (4) Fraud in respect of the misconduct not disclosed is irrelevant; there must be fraud specifically in relation to the negotiating and carrying out of the subsequent transaction which gives rise to the mistake on which the employers are relying.

In support of each of those propositions, Mr. Munby has referred us to particular passages in the speeches of Lord Atkin and Lord Thankerton in *Bell v. Lever Bros. Ltd.*, and to the decision and an observation of Avory J. in *Healey v. Société Anonyme Française Rubastic* [1917] 1 K.B. 946, and what Lord Atkin and Lord Thankerton said about them.

It is quite plain that Bell's and Snelling's concealment of their misconduct was innocent; that appears clearly from the argument of Mr. Schiller K.C., leading counsel for the appellant at [1932] A.C. 161, 165, and from the argument of Sir John Simon K.C., the respondents' leading counsel, at p. 167, as well as from the jury's answers to the questions put to them by Wright J., which are set out at pp. 185 and 186 of the report, negating fraud and finding that neither Bell nor Snelling had his previous misconduct in mind at the time when he claimed compensation for early termination of the contract of employment. It is also reasonably plain, I think, that the headnote is justified in saying that it was the dictum of Avory J. in the *Healey* case, and not merely his decision, which was approved by Lord Atkin at p. 228 of the report and by Lord Thankerton at p. 231. Avory J.'s decision in that case had already won the approval of Lord Warrington of Clyffe in *Ramsden v. David Sharratt & Sons Ltd.* (1930) 35 Com.Cas. 314, 319. The decision was that a servant who had been dismissed for misconduct was entitled to recover arrears of salary due to him after the time when he committed the misconduct and before the time when his misconduct became known to his employers and he was consequently dismissed.

The dictum of Avory J. which I think was accepted by their Lordships is [1917] 1 K.B. 946, 947:

"I cannot accept the view that the omission to confess or disclose his own misdoing was in itself a breach of the contract on the part of the plaintiff. . . ."

I accept, as I must accept, that by a majority the House of Lords were saying that a contract of employment, though often described as creating a relationship of trust between master and servant, is not a contract uberrimae fidei so as to require disclosure by the servant of his own misconduct, either before he is taken into employment as in *Fletcher v. Krell* (1873) 28 L.T. 105 or during the course of his employment as in *Healey's* or *Bell's* case. But I find it unnecessary to consider further how far Mr. Munby's submissions, in particular his third submission, are supported by *Bell's* case or are correct, or whether the case pleaded and proved against Mr. Roques covers an allegation of payment induced by fraudulent misrepresentation within Mr. Munby's fourth submission, because what in my judgment entitles the plaintiffs to recover the £13,000 here, is Mr. Roque's serious misconduct in breach of contract in failing to report to the plaintiffs the fraudulent misconduct of Bove and other subordinates.

Mr. Munby was forced to concede that if the plaintiffs had known of Mr. Roques's failure to report that misconduct they would have invoked rule 8(b) of the scheme and would not have paid the pension; and if that failure was a breach of duty because Mr. Roques was under a duty to report that misconduct, the plaintiffs were under a mistake of fact which entitled them to recover the £13,000 as money paid under a mistake of fact, so in those circumstances the judge would be right to make the declaration and the orders which he did.

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Sybron Corp. v. Rochem Ltd. (C.A.)

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A In *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 nothing was said about a duty to disclose the misconduct of fellow servants, except by Scrutton L.J. in the Court of Appeal and Lord Atkin in the House of Lords. In the Court of Appeal [1931] 1 K.B. 557, Scrutton L.J. said, at pp. 586-587:

B "I do not propose to lay down any general rule for disclosure by servants: I only desire to say that I notice that Wright J. held himself bound by the remark of Avory J. in *Healey v. Société Anonyme Française Rubastic*: [1917] 1 K.B. 946, 947: 'I cannot accept the view that an omission to confess or disclose his own misdoing was in itself a breach of the contract on the part of the plaintiff.' This statement was also accepted, though I think it was not material to his decision, by Lord Warrington in *Ramsden v. David Sharratt & Sons Ltd.*, 35 Com.Cas. 314, 319. I must reserve myself liberty to reconsider this as a general rule if it becomes relevant in any subsequent case. I cannot think that a servant who knows his fellow servant is stealing the goods of his employer is under no obligation to disclose this to his employer. If the servant himself has stolen goods, and his employer, finding out the theft accuses an innocent fellow servant of having committed it, is not the real thief bound to inform his employer of his delinquency? His theft is a vital breach of his contract of employment: is he not bound by his contract of service to inform his employer of acts detrimental to his employer? However, it is not in the present case necessary to lay down any general rule: it is enough to deal with the present case."

E There, as Mr. Munby rightly pointed out, Scrutton L.J. is, as it were, tacking on what he says about a duty, which he plainly accepted, to disclose a theft by a fellow servant, to his duty to disclose his own theft, which was also accepted by Scrutton L.J. and the other Lords Justices but has been negated by the House of Lords. In the House of Lords, Lord Atkin said [1932] A.C. 161, 228:

F "It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but, having stolen, is there super-added a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned."

G So there again, what that judge is saying about the duty to report a fellow servant is linked to the question of a duty to report his own wrongdoing, but it is I think significant that Lord Atkin is agreeing that the duty of a servant to protect his master's property "may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property," (p.228) although Lord Atkin was of the firm view that the servant had no such duty to report his own wrongful conduct. It is, as I have already indicated, puzzling that it never seems to have occurred to counsel or to any of the many judges who dealt with *Bell v. Lever Bros. Ltd.*, that they might have to consider the duty of Bell to report Snelling's misconduct, or Snelling's duty to report Bell's.

H But the question was not there considered, let alone decided, and there is the direct authority of a decision of this court, in a case in which

Bell v. Lever Bros. Ltd. [1932] A.C. 161 was considered, that there is in certain circumstances a duty to report the misconduct of fellow servants. That case is *Swain v. West (Butchers) Ltd.* [1936] 1 All E.R. 224; [1936] 3 All E.R. 261, C.A. There the plaintiff was employed for a term of five years as a general manager of the defendant company. His contract of service provided, inter alia, that he would do all in his power to promote, extend and develop the interests of the company. The managing director gave the plaintiff certain unlawful orders, which orders the plaintiff carried out. The matter came to the notice of the chairman of the board of directors who, in an interview with the plaintiff, told the plaintiff that if he gave conclusive proof of the managing director's dishonesty he would not be dismissed. The plaintiff duly supplied the information required and was then dismissed, the defendants alleging fraud and dishonesty. The plaintiff did not deny the allegations, but he brought an action for breach of contract and wrongful dismissal on the grounds that under the terms of a verbal agreement between the plaintiff and the chairman it was not open to the defendants to rely upon information given by the plaintiff relating to his own fraud and dishonesty. It was held that it was the plaintiff's duty, as part of his contract of service, to report to the board of directors any acts which were not in the interests of the company; that there was therefore no consideration for the alleged verbal agreement and the defendant company was not prevented from relying upon the information received from the plaintiff.

There is an interesting report of an interchange of observations between the Lords Justices and Mr. Schiller K.C., appearing for the plaintiff Swain, who had, it will be remembered, been leading counsel for the appellant in *Bell's* case. Mr. Schiller is reported as having said [1936] 3 All E.R. 261, 262:

"In my submission the view of the law upon which the learned judge acted is erroneous. The judge took the view that the chairman was entitled to ask questions of the appellant which were likely to incriminate him. Greer L.J.: It was his duty to report the wrong of somebody else and his greater duty when asked to do so. Mr. Schiller: I do not think there is any authority which says that a servant is under an obligation to report the misdeeds of his fellow-servant. Greene L.J.: As I recollect the decision in *Bell v. Lever Bros. Ltd.*, the question whether a servant should report the misconduct of a fellow-servant depends upon the circumstances of the particular case."

I am not sure how far that observation of Greene L.J. is justified, but Greer L.J.'s observation is important. From the judgments of Greer and Greene L.J.J. I take the following passages. Greer L.J. said, at p. 264:

"It was his duty"—that is the duty of the plaintiff—"if he knew of acts which were not in the interests of the company to report them to the board. He did not do so."

After referring to his interview with the chairman, which I have summarised from the headnote, Greer L.J. went on:

"I find it impossible to come to any other conclusion but that it was the duty of the general manager to find out what he could. In the course of time he did find out and sent in his report. In sending in that report I think he was doing what was his obvious duty as manager of the company to do. I do not decide that in every case where the

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A relation of master and servant exists it is the duty of the servant to disclose, or to disclose upon inquiry, any discrepancies of which he knows of his fellow servants."

Greene L.J., at p. 264:

B "It was submitted to us that there was some general principle of law applicable to contracts of service in general and to this contract in particular that a servant is under no duty to disclose the improper conduct of his fellow servant. I am unable to accept such a proposition. Whether there is such a duty or not must depend upon the circumstances of each particular case."

He said, at p. 265:

C "If the dishonesty of a fellow servant came within his notice he should tell the board. The true position in my view is this: what are the obligations undertaken in this particular contract? The managing director gave the plaintiff unlawful orders. The plaintiff's duty was to report to his employer that the managing director had endeavoured to persuade him to do something which was dishonest and which would, if carried out, be a breach of his duties in controlling the business of the company. If this was his duty it is not altered by the circumstances that he carried out the suggestion made to him. The fact that he carried out the suggestion made it none the less his obligation to inform his directors of the orders which had unlawfully been given to him. He was invited thereafter to give the board details of the complicity of the managing director in these proceedings. He gave a statement of his knowledge of the facts. Can it be said that what he was invited to do was not already his duty to do? His duty to give information to the board arose at the moment when the original improper orders were given to him, and this duty is not lessened by the fact that he obeyed those orders himself."

F I find that case, when considered from the point of view of Mr. and Mrs. Roques, uncomfortably close to this. I think the passage I have read from Greene L.J.'s judgment must dispose of Mr. Munby's point that no duty to inform against other fellow servants arises if by so doing you inevitably incriminate yourself. Swain was engaged in carrying out the improper practices—in breach of some order in council—which he had been persuaded to carry out by the managing director, and it was of course because he had incriminated himself by admitting his part in the practices that, contrary to what he had been promised by the chairman, he was ultimately dismissed. But Mr. Munby seeks also to distinguish *Swain v. West (Butchers) Ltd.* [1936] 3 All E.R. 261 from this by the fact, not present in this case, that the plaintiff Swain was asked by the chairman of the board of his employers for the information which he did disclose. But I am afraid that that does not assist him; I cannot accept that that is a valid distinction. The trial judge in *Swain's* case, Finlay J., found it unnecessary to decide what the position would have been if Swain had volunteered the information—whether there would then have been a duty and whether there would then have been consideration for the agreement; he decided the case on the basis that as Swain was asked to supply the information he was under a duty to supply it. But the passages I have read from what was said by Greer L.J. and Greene L.J., with whom MacKinnon J. agreed, I think indicate, all too clearly for Mr. Munby's

purpose, that the fact that Swain was asked to supply the information created, perhaps, a greater duty, but the duty to volunteer the information was there and the Court of Appeal expressly decided that case on the ground on which Finlay J. found it unnecessary to decide it: see [1936] 3 All E.R. 261.

It follows from that decision, which is consistent with *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 and is binding upon us, that there is no general duty to report a fellow-servant's misconduct or breach of contract; whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, as in *Swain v. West (Butchers) Ltd.* [1936] 3 All E.R. 261, or the misconduct of his inferiors, as in this case. Mr. Munby will not have it that Mr. Roques's "no. 2" was subordinate to Mr. Roques, or that the other managers involved in the conspiracy were his subordinates or inferiors; but on this point I agree with Walton J. and I refer, again without apology and with approval, to the way in which he put the matter in his judgment below:

"I do not think that there is any general duty resting upon an employee to inform his master of the breaches of duty of other employees; the law would do industrial relations generally no great service if it held that such a duty did in fact exist in all cases. The duty must, in my view, depend upon all the circumstances of the case, and the relationship of the parties to their employer and inter se. I think it would be very difficult to have submitted, with any hope of success, that Messrs. Bell and Snelling, having been appointed to rescue the affairs of their employers' African subsidiary in effect jointly, ought to have denounced each other."

That is a reference to the finding that Messrs. Bell and Snelling were, according to the report of the case in the House of Lords, in joint management and therefore one was not subordinate to the other. Walton J. goes on:

"However, where there is an hierarchical system, particularly where the person in the hierarchy whose conduct is called into question is a person near the top who is responsible to his employers for the whole of the operation of a complete sector of the employers' business—here the European zone—then in my view entirely different considerations apply. That the principle of disclosure extends at least as far as I think it extends (and perhaps further, but that is of no consequence for present purposes) has been decided once and for all, so far as this court is concerned, by *Swain v. West (Butchers) Ltd.*, a decision of the Court of Appeal. *Bell v. Lever Bros. Ltd.* was very much in the forefront of everybody's mind in that case, but none of the Lords Justices thought it had any bearing on the case before them."

After reading, pretty well in full, the judgment of Greene L.J., from which I have read extracts, Walton J. went on:

"This judgment has, if I may respectfully say so, the great merit of common sense. A person in a managerial position cannot possibly stand by and allow fellow servants to pilfer the company's assets and do nothing about it, which is really what Mr. Munby's submissions would come to when applied to the present type of case. Certainly at

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- A all events where the misconduct is serious and the servant is not discharged immediately it must be quite obvious that, as part of his duties generally, the senior employee is under a duty to report what has happened as soon as he finds out, and further to indicate which steps (if any) he has taken to prevent a repetition thereof.
- B "Of course, this all depends upon the duties of the relevant employee under his contract of service. In the present case there was a well-recognised reporting procedure, whereunder the zone controller, Mr. Roques, was expected to make reports as to the state of matters in his zone every month. It may possibly be argued that in such a case the duty to report was not an immediate duty but one to be fulfilled at the next reporting date; so be it, because even if this is correct no such report was ever made by Mr. Roques to his superiors.
- C "I therefore reach the not very surprising conclusion that Mr. Roques was under a duty to report all he knew about the misdeeds of his subordinate employees, commencing with those of Mr. Bove, as soon as he found out about them, and that he did not do so, deliberately and fraudulently, because he was one of the conspirators himself. The duty which lay upon him was, I repeat, not a duty to report his own misdeeds—this may well be regarded as negated by *Bell v. Lever Bros. Ltd.*—but to report those of his fellow conspirators."
- D

- E Sorry as I am for Mrs. Roques, I am happy to find that the law is not so outrageous as to enable Mr. Roques to keep the £13,000. What Mr. Roques did disentitled him, and I am afraid his wife, from keeping the money, and the plaintiffs are entitled to the declaration and orders for which they have asked, against these two defendants.
- I would accordingly dismiss the appeal.

- F Fox L.J. I agree. In *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 Lord Atkin and Lord Thankerton decided, and Lord Blanesburgh, who decided the case on another ground, agreed with them, that there is no contractual duty upon a servant to confess to his employer his past misconduct. Lord Atkin said that to imply such a duty would be a departure from the ordinary usage of mankind. Mr. Munby contends, therefore, that *Bell v. Lever Bros. Ltd.* really determines the present matter in his favour so far as breach of duty is concerned.

- G *Bell v. Lever Bros. Ltd.* was concerned with breaches of duty by the appellants themselves, which had occurred in the past—they were completed. What we are concerned with in the present case is continuing breaches of duty, not merely by Mr. Roques but by other servants of the company. Those breaches were part of a continuing fraudulent design, damaging to the company, which Mr. Roques was involved in and of which he was well apprised. Mr. Roques, in effect, was in executive control of the European zone. The judge said that he was expected to make reports on the state of the zone every month. It seems to me that by any test of general commercial usage a man in such a position must have been under a duty to report to his superiors upon the continuing malpractices of the servants of the company, who were engaged in fraudulent activities designed to maraud the assets of the company.
- H

Authority for that is, in my view, to be found in *Swain v. West (Butchers) Ltd.* [1936] 3 All E.R. 261 in this court. I see no reason to suppose, any more than did the court which decided it, that that decision is in any way contrary to *Bell v. Lever Bros. Ltd.* [1936] A.C. 161. Mr.

Munby points out that Lord Atkin in *Bell v. Lever Bros. Ltd.*, at p. 228, after stating his view that a servant has no general duty to disclose his own wrongdoing, says that an employer who wishes to protect himself can question his servant and will then be protected by the truth or otherwise of his answers. Mr. Munby says that in *Swain v. West (Butchers) Ltd.* it was after the chairman had told the plaintiff "if you don't get us the conclusive proof, you're for it; if you do, you can carry on," that the plaintiff provided the information against the other employee. That is quite true, but the issue in the case was whether there was consideration for the promise to permit the plaintiff to carry on if he provided the information. It was held that it was not. That was because there was, as it seems to me, at all relevant times a duty on the plaintiff to disclose; it did not depend upon any obligation arising from the questioning by, or the requirement of, the chairman. Thus Greene L.J., [1936] 3 All E.R. 261, 265, said:

"The plaintiff was responsible for the management of the business and was responsible for seeing that the business was conducted honestly and efficiently by all who came under his control. If the dishonesty of a fellow-servant came within his notice he should tell the board."

That applies equally to Mr. Roques in the present case. The effect of a disclosure of the activities of the other employees would, of course, have been to disclose Mr. Roques's own misconduct. In my view that is not a justification for failure to disclose. As Greene L.J. said in *Swain v. West (Butchers) Ltd.* [1936] 3 All E.R. 261, 265:

"His duty to give information to the board arose at the moment when the original improper orders were given to him, and this duty is not lessened by the fact that he obeyed those orders himself."

I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important circumstances in the present case are that Mr. Roques was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware.

In my view Walton J.'s decision was quite right and, despite Mr. Munby's skilful argument, I too would dismiss the appeal.

KERR L.J. I also agree. In the face of the findings of Walton J., Mr. Munby had to make a number of inevitable concessions for the purposes of his argument on these appeals. First, that Gamlen had ample grounds for dismissing Mr. Roques for fraud and serious misconduct. Secondly, that if they had known this when Mr. Roques retired before his normal retiring date, as he did, they would clearly have exercised their discretion adversely to him under rule 8(b) of the rules of the pensions scheme, and that in not doing so they acted under a mistake. Thirdly, that if this mistake on their part was induced either by a misrepresentation or a breach of duty on the part of Mr. Roques, then Gamlen are entitled to rescission of the pension transaction, both in the law of trust and of contract, and to recovery of the sum paid to Mr. Roques other than to the extent of his own contribution. Fourthly, that Mrs. Roques, for whom

A one cannot but have sympathy, cannot be in a better position than Mr. Roques in this regard.

B Since mistake induced by misrepresentation has not been pleaded, although I think that, in the circumstances of this case, it might well have been, the issue is whether or not Mr. Roques was in breach of a duty to his employers which induced the mistake on their part. As to this, it seems to me that there can only be one answer. Mr. Roques was throughout in fraudulent breach of a clear duty owed to his employers to put an end to the activities of Mr. Bove and the other conspirators, who were engaged in seeking to destroy the employers' business for their own purposes, and this continuing breach of his duty induced the mistake. His duty was to report the activities of the conspirators in any event, and to dismiss them forthwith in so far as it lay within his powers to do so. Covering up and deliberately concealing their activities, which is what he was doing throughout, was the clearest possible breach of duty for a person in his position, and equally clearly it induced the mistake in question.

C All that *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 decides in this regard, at most, is that Mr. Roques was under no duty to disclose his own misconduct. I say "at most" because I am far from convinced that *Bell v. Lever Bros. Ltd.* applies, even to this extent, to cases where the concealment is fraudulent, as here, since the absence of fraud was stressed throughout the appellate proceedings in that case, including the speeches of Lord Atkin, at p. 223, and Lord Thankerton, at pp. 231 and 235, with which Lord Blanesburgh agreed. On no view, however, can *Bell v. Lever Bros. Ltd.* be invoked by Mr. Roques to a greater extent than this. The fact that compliance by Mr. Roques with his duties in this regard would in this case inevitably have revealed his own fraudulent complicity is irrelevant, as shown by the decision of this court in *Swain v. West (Butchers) Ltd.* [1936] 3 All E.R. 261; and in my view the approval of the decision of Avory J. in *Healey v. Société Anonyme Française Rubastic* [1917] 1 K.B. 946 by the House of Lords in *Ramsden v. David Sharratt & Sons Ltd.*, 35 Com.Cas. 314 and in *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 makes no difference whatever to these conclusions. *Healey's* case merely decided, as confirmed by *Bell v. Lever Bros. Ltd.* that, at any rate in the absence of fraudulent concealment, there is no continuing duty on an employee to disclose his own misconduct, and that an employer cannot rely on past, and evidently spent, acts of misconduct as a ground for refusing to pay the employee for his subsequent services.

F I therefore do not accept that it makes any difference that the pension arrangements as such were not directly induced by misrepresentation or breach of duty on the part of Mr. Roques. What matters is that when these arrangements were concluded and acted upon by his employers, he was in clear breach of his duty to his employers, and indeed in fraudulent breach, and that these breaches induced the mistake on their part, which caused them not to exercise their rights under rule 8(b).

G Accordingly I agree that the appeal must be dismissed.

H *Appeal dismissed.*

Solicitors: *Sampson Harkavy; Herbert Smith & Co.*

[Reported by COLIN BERESFORD ESQ., Barrister-at-Law]

[COURT OF APPEAL]

A

WESTWOOD v. SECRETARY OF STATE FOR EMPLOYMENT

1983 March 21, 22, 23;
June 28

Eveleigh, O'Connor, Purchas L.JJ.

B

Employment—Employer's insolvency—Debt due to employee—Dismissal without notice or payment in lieu—Employee receiving social security benefits—Whether Secretary of State entitled to deduct benefits from notice payment—Whether employee under duty to mitigate loss—Employment Protection (Consolidation) Act 1978 (c. 44), ss. 49(1), 50(1), 122(1)(3), Sch. 3, para. 2

C

The employee was dismissed for redundancy when his employers became insolvent, without receiving the 12 weeks' notice to which he was entitled under section 49 of the Employment Protection (Consolidation) Act 1978¹ or any payment in lieu of notice. He claimed and received from the time of his dismissal, unemployment benefits and earnings related supplement for the maximum periods of one year and six months respectively. He continued to be unemployed. The Secretary of State for Employment, under section 122 of the Act, paid the employee the equivalent of 12 weeks' wages but deducted from that sum the amount of social security benefits received during the notice period. An industrial tribunal upheld the decision of the Secretary of State to make that deduction. The employee appealed. The appeal tribunal held that the employee's claim was one for breach of contract and the ordinary principles of mitigation of damages applied but that, in the circumstances, no deduction should be made on the grounds that the receipt of social security benefits was not pure gain to the employee because if the employers had fulfilled their obligation to pay wages in lieu of notice, he would not have been entitled to social security benefits during the notice period and, therefore, he would have been able to claim them up to dates 12 weeks later than the dates on which they in fact ended.

D

E

F

On appeal by the Secretary of State:—

Held, dismissing the appeal, that sections 49 and 50 of, and Schedule 3 to, the Employment Protection (Consolidation) Act 1978 created for an employee basic statutory rights which were neither contractual rights nor subject to the principle of mitigation of damages; that, accordingly, the employer's liability to pay the employee for the period of notice required by section 49(1) of the Act created a "debt" within the meaning of section 122(3) of the Act; and that since the employee was under no duty to mitigate his loss the amounts received as social security benefits were not deductible and he was entitled to the full amount of that debt (post, pp. 737D–E, H—738A, C–D, 739F–N, 740E–H, 741D–E).

G

Parsons v. B. N. M. Laboratories Ltd. [1964] 1 Q.B. 95, C.A. considered.

Secretary of State for Employment v. Wilson [1978] 1 W.L.R. 568, E.A.T. doubted.

H

Decision of the Employment Appeal Tribunal [1982] I.C.R. 534 affirmed on different grounds.

¹ Employment Protection (Consolidation) Act 1978, s.49(1)(3): see post, p. 733F–H. S. 50(1): see post, p. 733H.

S. 122: see post, pp. 734F–735A.

Sched. 3, para. 2: see post, p. 734A–D.

The following cases are referred to in the judgments:

- A *Parsons v. B. N. M. Laboratories Ltd.* [1964] 1 Q.B. 95; [1963] 2 W.L.R. 1273; [1963] 2 All E.R. 658, C.A. #
Secretary of State for Employment v. Jobling [1980] I.C.R. 380, E.A.T.
Secretary of State for Employment v. Wilson [1978] 1 W.L.R. 568; [1978] I.C.R. 200; [1978] 3 All E.R. 137, E.A.T.

The following additional cases were cited in argument:

- B *Lincoln v. Hayman* [1982] 1 W.L.R. 488; [1982] 2 All E.R. 819, C.A.
Mack Trucks (Britain) Ltd., In re [1967] 1 W.L.R. 780; [1967] 1 All E.R. 977.
Nabi v. British Leyland (U.K.) Ltd. [1980] 1 W.L.R. 529; [1980] 1 All E.R. 667, C.A.
Norton Tool Co. Ltd. v. Tewson [1973] 1 W.L.R. 45; [1972] I.C.R. 501; [1973] 1 All E.R. 183, N.I.R.C.
C *Parry v. Cleaver* [1970] A.C. 1; [1969] 2 W.L.R. 821; [1969] 1 All E.R. 555, H.L.(E.)

APPEAL from the Employment Appeal Tribunal.

- By notice of appeal dated July 2, 1982, the Secretary of State for Employment appealed from the decision of the Employment Appeal Tribunal given on May 20, 1982, allowing the appeal of the employee, Walter Westwood, from a decision dated November 16, 1981, of an industrial tribunal sitting at Leeds, dismissing the employee's application for a payment pursuant to sections 122 and 124 of the Employment Protection (Consolidation) Act 1978.

- The grounds of the appeal were that (1) the appeal tribunal erred in law in declaring that the Secretary of State ought not to have deducted from the payment made to the employee pursuant to section 122(3)(b) of the Act the amount of unemployment benefit and earnings related supplement in fact paid to and received by the employee during the period to which the payment under section 122(3)(b) related because (a) the payment to be made by the Secretary of State under section 122(3)(b) of the Act of 1978 was no greater than the sum which an employer would be liable to pay for failure to give to his employee the minimum period of notice required by section 49 of the Act; (b) in assessing the liability of an employer to pay damages for such failure, the common law principles of mitigation applied; (c) as part of those principles, there was to be deducted from such payment by an employer the amount of any unemployment benefit or earnings related supplement in fact received by an employee during the period of the notice which he should have received but did not receive; (d) accordingly, such benefits were also to be deducted from a payment by the Secretary of State under section 122(3)(b) of the Act; (e) the employee had in fact received unemployment benefit and earnings related supplement during, and in respect of the notice period which he should have received but did not receive, pursuant to section 49 of the Act and had not been, nor would have been, obliged to repay the sums so received; (f) the employee was not entitled to receive by way, in effect of additional damages, a sum in respect of the possibility that at some date in the future he would not receive unemployment benefit and earnings related supplement which he might have received had he not already received payment of such benefits during and in respect of the minimum notice period; such loss fell outside the minimum notice period and was not a matter in respect of which the employee would be entitled to receive payment from his employer for his employer's failure to give

the period of notice prescribed by section 49 of the Act or from the Secretary of State under section 122(3)(b) of the Act; (g) the appeal tribunal misconstrued the relevant provisions of the Act, and in particular Part VII thereof, the purpose of which was to provide for an employee some limited protection against the insolvency of his employer by way of the provision out of public moneys of some, but not all, payments to which he was entitled from his employer, such payments to be made with relative speed and administrative ease; the effect of the appeal tribunal's decision was to require up to three assessments of an employee's entitlement under section 122(3)(b) and up to three payments, the last of which might not be capable of being assessed and paid until some 15 months after his initial dismissal; (2) the appeal tribunal in any event erred in failing to take into account the fact that the employee had in any event received payments of supplementary benefit to which he would not have been entitled had he received unemployment benefit during the period of 12 weeks after he ceased in fact to receive unemployment benefit and which unemployment benefit the appeal tribunal were by their judgment effectively ordering the Secretary of State to pay now; in failing to take account of the supplementary benefit payments the appeal tribunal failed to give effect to the employee's concession that they should be taken into account and in any event erred in law in failing to take them into account because such failure resulted in the employee receiving a windfall equivalent to the amount of such payments of supplementary benefits.

The facts are stated in the judgment of Eveleigh L.J.

Robert Allen for the employee.

Peter Goldsmith for the Secretary of State.

Cur. adv. vult.

June 28. The following judgments were read.

EVELEIGH L.J. Mr. Westwood lost his job in 1980 when his employer became insolvent. He received no money from his employer. He claimed and received unemployment benefit from May 15, 1980, for the maximum period of one year. He also claimed and received earnings related supplement from May 26, 1980, for the maximum period of six months expiring on November 22, 1980. He continued to be unemployed for a substantial period thereafter. He made a claim under section 122 of the Employment Protection (Consolidation) Act 1978 upon the Secretary of State for payment of the sum which his employer was liable to pay him in respect of a 12-week period which was the length of notice required to be given by his employer to terminate the contract of employment under the provisions of section 49 of the Act. The Secretary of State contended that from the sum which otherwise would have been due there should be deducted the amount of the above-mentioned benefits which he had received over that 12-week period. It was said that the claim against the employer was for breach of contract, that is to say damages for wrongful dismissal, and on the authority of *Parsons v. B. N. M. Laboratories Ltd.* [1964] 1 Q.B. 95, such benefits were deductible. Consequently as the claim under section 122 was in respect of the employer's liability the Secretary of State was entitled to make the same deduction.

A As a workman is not entitled to the above-named benefits for longer than the continuous period of one year and six months respectively, the result of such a deduction would be that the employee would be worse off than he would have been had his employer given him notice and paid the appropriate wages during the notice period. Had that happened no benefits would have been claimed in respect of that 12 weeks and he would have been able to claim benefits up to a date 12 weeks later than the dates upon which they in fact respectively ended.

B The Employment Appeal Tribunal held that the claim was one for breach of contract and that the principle in *Parsons v. B. N. M. Laboratories Ltd.* [1964] 1 Q.B. 95 applied, but that on the facts of the present case the receipt of the benefits was not pure gain to the claimant and that in such a situation the authorities did not compel the tribunal to hold that the full amount of the benefits must be brought into account.

C Consequently it was held that in this particular case no deductions should be made. However, the tribunal observed that there would be considerable difficulty in deciding the amount of a claim where it was made before it could be known whether or not the duration of the claimant's period of employment would extend beyond the maximum. The difficulty did not arise in Mr. Westwood's case because he was unemployed substantially beyond the maximum period and had by drawing the benefits at the beginning of the period suffered a corresponding detriment at the end of the period.

D

E In this appeal it has been contended on behalf of the Secretary of State that while the Employment Appeal Tribunal was right in holding that an employee is under a duty to mitigate, in the circumstances of this kind of claim it was wrong to say that some adjustment to the amount of the deduction should be made to take account of actual or possible detriment at the end of the benefit periods.

It is fundamental to consider the nature of the employee's claim against his employer. Section 49 of the Act reads:

F “(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for four weeks or more—(a) shall be not less than one week's notice if his period of continuous employment is less than two years; (b) shall be not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years; and (c) shall be not less than 12 weeks' notice if his period of continuous employment is 12 years or more . . . (3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for four weeks or more shall have effect subject to the foregoing subsections, but this section shall not be taken to prevent either party from waiving his right to notice on any occasion, or from accepting a payment in lieu of notice.”

G

H Section 50(1) states:

“If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for four weeks or more, the provisions of Schedule 3 shall have effect as respects the liability of the employer for the period of notice required by section 49(1).”

Schedule 3 is entitled "Rights of Employee in Period of Notice." The same words appear in the marginal note to section 50. Paragraph 2 of Schedule 3 is entitled "Employments for which there are normal working hours" and reads:

"(1) If an employee has normal working hours under the contract of employment in force during the period of notice, and if during any part of those normal working hours—(a) the employee is ready and willing to work but no work is provided for him by his employer; or (b) the employee is incapable of work because of sickness or injury; or (c) the employee is absent from work in accordance with the terms of his employment relating to holidays, then the employer shall be liable to pay the employee for the part of normal working hours covered by paragraphs (a), (b) and (c) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours. (2) Any payments made to the employee by his employer in respect of the relevant part of the period of notice whether by way of sick pay, holiday pay or otherwise, shall go towards meeting the employer's liability under this paragraph. (3) Where notice was given by the employee, the employer's liability under this paragraph shall not arise unless and until the employee leaves the service of the employer in pursuance of the notice."

Broadly similar provisions are made for employments for which there are no normal working hours. Section 51 states:

"If an employer fails to give the notice required by section 49, the rights conferred by section 50 (with Schedule 3) shall be taken into account in assessing his liability for the breach of the contract."

The marginal note reads: "Measure of damages in proceedings against employers."

The relevant duty of the Secretary of State is contained in section 122. Subsections (1), (3) and (5) read:

"(1) If on an application made to him in writing by an employee the Secretary of State is satisfied—(a) that the employer of that employee has become insolvent; and (b) that on the relevant date the employee was entitled to be paid the whole or part of any debt to which this section applies, the Secretary of State shall, subject to the provisions of this section, pay the employee out of the Redundancy Fund the amount to which in the opinion of the Secretary of State the employee is entitled in respect of that debt . . . (3) This section applies to the following debts:—(a) any arrears of pay in respect of a period or periods not exceeding in the aggregate eight weeks; (b) any amount which the employer is liable to pay the employee for the period of notice required by section 49(1) or (2) or for any failure of the employer to give the period of notice required by section 49(1); (c) any holiday pay in respect of a period or periods of holiday, not exceeding six weeks in all, to which the employee became entitled during the 12 months immediately preceding the relevant date; (d) any basic award of compensation for unfair dismissal (within the meaning of section 72); (e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk. . . . (5) The total amount payable to an

A employee in respect of any debt mentioned in subsection (3), where the amount of that debt is referable to a period of time, shall not exceed £100 in respect of any one week or, in respect of a shorter period, an amount bearing the same proportion to £100 as that shorter period bears to a week.”

B The above provisions are those which are directly relevant to the present claim. However, the Act forms a comprehensive code governing the relationship between employer and employee and contains many sections in which the employer is under a liability to make a payment of some kind. The issue in the present case is whether the liability with which we are concerned is basically contractual or whether it is statutory, creating rights for the employee which are his by virtue of his status and not by virtue of contract. To answer this question it is necessary to look at the Act as a whole.

C The payment of various sums of money to the employee is provided for in a number of different eventualities. In some cases the amount payable is assessable in relation to a loss sustained. In other cases the sum is arrived at without reference to the loss and takes the form of a basic award; for example guarantee payments, maternity benefits, and part of the award (the basic award) for unfair dismissal. In some cases we find D an express statutory duty to mitigate a loss. In some cases specific provision is made for setting off other moneys received against a basic payment. In some cases provision is made to set off money received under the Act against other payments contractually due. Thus the various entitlements are carefully regulated by their own statutory provisions and generally speaking little room is left for the importation of common law principles at the instance of the court or tribunal.

E The preamble begins “An Act to consolidate certain enactments relating to the rights of employees arising out of their employment. . . .” There is no reference to contract. Part I deals with the obligations of the employer to provide particulars of the terms of employments and to provide itemised pay statements. It also provides for a reference to an industrial tribunal by the employee to enforce his rights under Part I. Part F II is entitled “Rights Arising in Course of Employment.” It deals with guarantee payments, suspension from work on medical grounds, trade union membership and time off work for trade union or public duties. While no doubt the rights which are here given to the employee could be incorporated into a contract appropriately worded the whole language employed is more appropriate to a statute that is introducing a code of rights than one which imposes obligatory terms in a contract.

G Section 12 provides that where an employee is not provided with work for certain causes

“he shall, subject to the following provisions of this Act, be entitled to be paid by his employer a payment, referred to in this Act as a guarantee payment, in respect of that day. . . .”

H Provisions are made for the calculation of the guarantee payment, and section 15(1) states: “The amount of a guarantee payment payable to an employee in respect of any day shall not exceed £6.60.” Section 17(1) permits the employee to present a complaint to an industrial tribunal, and section 17(3) reads:

“Where an industrial tribunal finds a complaint under subsection (1) well-founded, the tribunal shall order the employer to pay the

complainant the amount of guarantee payment which it finds is due to him."

A

A similar remedy is provided if the employer has failed to pay remuneration to which an employer is entitled when suspended on medical grounds.

An example of provisions for time off can be seen in section 29(1):

"An employer shall permit an employee of his who is—(a) a justice of the peace. . . to take time off . . . for the purposes of performing any of the duties of his office . . ."

B

The above provisions and the others in Part II contain no suggestion that the rights are to be incorporated into the contract of employment. Indeed a contrast between the statutory and contractual rights can be seen in section 16. Section 16(1) reads:

"Subject to subsection (2), a right to a guarantee payment shall not affect any right of an employee in relation to remuneration under his contract of employment (in this section referred to as 'contractual remuneration')."

C

Section 16(2) reads:

"Any contractual remuneration paid to an employee in respect of a workless day shall go towards discharging any liability of the employer to pay a guarantee payment in respect of that day, and conversely any guarantee payment paid in respect of a day shall go towards discharging any liability of the employer to pay contractual remuneration in respect of that day."

D

Similar provisions for setting off contractual remuneration against statutory remuneration can be found in section 27(6), section 31(11) and in other sections of the Act.

E

Section 23 provides protection to an employee in relation to trade union membership activities and under section 24 a tribunal may award compensation to the employee whose rights in this respect are infringed. There is to my mind a most significant provision in relation to this compensation which we see in section 26. That section provides that the compensation shall be awarded having regard to various matters, including any loss. Loss includes expense incurred. We then read the significant words in section 26(3):

F

"In ascertaining the said loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or of Scotland, as the case may be."

G

Those words would not be necessary if the particular rights had been included in a contract of employment. I therefore conclude that the legislature is making a right to compensation which is an independent statutory right, liable to be reduced by a principle, i.e. mitigation of damage, which applies in contract and other branches of the common law. I have therefore come to the conclusion that in so far as the rights conferred under Part II of the Act are concerned they are attached to a complainant by virtue of his status as an employee.

H

Part III entitled "Maternity" leads me to the same conclusion in relation to the provisions contained there. Again we find a set-off provision in section 35(4):

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Eveleigh L.J.

A

"Any contractual remuneration paid to an employee in respect of a day within a payment period shall go towards discharging any liability of the employer to pay maternity pay in respect of that day, and conversely . . ."

Part IV, which includes sections 49, 50 and 51, contains a set-off provision which is enacted in Schedule 3, paragraph 7(1):

B

"If, during the period of notice, the employer breaks the contract of employment, payments received under this Schedule in respect of the part of the period after the breach shall go towards mitigating the damages recoverable by the employee for loss of earnings in that part of the period of notice."

C

Here again we have the contrast between the statutory payments and damages for breach of contract.

D

Schedule 3 itself, in my opinion, is a schedule of statutory rights to which an employee is entitled. In order to make a claim for payment the employee has to be ready and willing to work. When an employee is wrongfully dismissed it is not necessary for him to demonstrate his readiness or ability to work for the employer during the period of notice for which he claims damages. He is entitled and may be under an obligation to obtain other work. The effect of doing so is to mitigate the damages, but not to bar his claim. I therefore see the rights under Schedule 3 as basic statutory rights which are not to be reduced on the grounds that there is a duty to mitigate. The duty to mitigate which, as I have pointed out, is to be found in other parts of the Act would, I think, have been mentioned specifically in Part IV if it was the intention of the legislature that it should apply to claims thereunder.

E

F

The distinction between the basic right (and Schedule 3 is a basic right) which is not affected by a duty to mitigate and compensation at large which is so affected is clearly to be seen in Part V, which provides a remedy for unfair dismissal. It is generally recognised that the claim to compensation for unfair dismissal is not a claim for breach of contract. The amount of compensation is dealt with in section 72 onwards. Section 72 states:

"Where a tribunal makes an award of compensation for unfair dismissal . . . the award shall consist of a basic award (calculated in accordance with section 73) and a compensatory award (calculated in accordance with section 74.)"

G

Section 73 provides what is in effect a statutory formula for the calculation of the basic award. Section 74 deals with the calculation of the compensatory award and provides that it is to be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained. Section 74(4) specifically refers to the duty to mitigate in the terms which I have already read in other sections in the earlier Parts of the Act. Quite clearly, as it seems to me, the basic award is not affected by any duty to mitigate.

H

I now return to section 122. In subsection (3) we find the list of what are called debts to which the section applies. The basic award of compensation for unfair dismissal to which I have just referred is one of those debts. It is not, for reasons which I have stated, subject to reduction on the principle of mitigation of loss. I see no reason therefore to import that principle in determining the amount which the employer is liable to pay

the employee for the period of notice required by section 49(1), which is also one of the "debts." There is nothing in section 50, creating the employee's right to payment, which indicates that that right is to be treated differently from all the other rights to which I have referred.

I turn then to the words of section 122(3)(b) with which we are directly concerned:

"any amount which the employer is liable to pay . . . for any failure of the employer to give the period of notice required by section 49(1)."

There is no reference to damages for breach of contract. The words used are more apt to refer to the consequences which will follow as a matter of statutory entitlement if the employer does not give the appropriate notice.

The Secretary of State relies strongly upon section 51 and the reference there to breach of contract. I do not regard that section as saying that the right to Schedule 3 payments is contractual or subject to the principle of mitigation of damages applicable in a case of breach of contract. I regard it as saying that when assessing liability for breach of contract the court shall decide what the plaintiff would have received if section 49 and section 50 had been complied with and award that sum as an independent head of damages. That sum, however, may be set off against the common law damages awarded for breach of contract on the basis of *Parsons v. B. N. M. Laboratories Ltd.* [1964] 1 Q.B. 95: see also paragraph 7(1) of Schedule 3, which reads:

"If, during the period of notice, the employer breaks the contract of employment, payments received under this Schedule in respect of the part of the period after the breach shall go towards mitigating the damages recoverable by the employee for loss of earnings in that part of the period of notice."

In *The Secretary of State for Employment v. Wilson* [1978] 1 W.L.R. 568, it was held that the liability of the employer for failure to give notice was a contractual one and subject to the principle of mitigation. The appeal tribunal in the present case expressed some doubt, but decided to follow it. In *Secretary of State for Employment v. Jobling* [1980] I.C.R. 380, Slynn J. delivering the judgment of the appeal tribunal said, at p. 384:

"It is argued, accordingly, that there is here a duty to mitigate on the basis that the amount for which the Secretary of State is liable is really to be seen as a damages claim and that the same provisions apply. We have considered the provisions of sections 1, 2 and 3 of the Contracts of Employment Act 1972, and of the Schedules which now apply and which applied under the Act of 1975, which define the rights of an employee to whom notice must be given in accordance with the Act of 1972 and define the amount of money to be paid to an employee during the period of notice. At first glance it seemed to us that these provisions, particularly in section 2, were creating a statutory right to a payment; and we ourselves were not at first wholly convinced that the provisions of section 3 changed the position. Section 3 is merely directing what is to be taken into account where a claim is made in the High Court or the county court for damages for breach of contract. In *Wilson's* case doubt was expressed as to what was the proper conclusion, and it was accepted to be arguable that the opposite result to that which was reached might be correct.

A That case was decided in November 1977. We have been told that it has been followed extensively since. We have not heard argument on behalf of the employee in this appeal; accordingly it seems to us that we ought to follow the decision of this appeal tribunal in *Wilson's* case despite some of the doubts which we might have felt in interpreting the relevant legislation."

B In submitting that the employer's liability was contractual the Secretary of State traced the history of the minimum notice period in section 49. The minimum period of notice was introduced by the Contracts of Employment Act 1963 and counsel for the Secretary of State emphasised the word "contract." He referred to section 113 of the Industrial Relations Act 1971. There was, he said, no jurisdiction in the tribunal to deal with a claim based upon section 50. That jurisdiction only arose as a consequence of insolvency by virtue of section 122. In other words the jurisdiction which a tribunal possesses is only a section 122 jurisdiction.

C In my opinion the correct interpretation of the development of the law since the introduction of the minimum period of notice in 1963 is as follows. At common law a workman was entitled to a reasonable period of notice. However, when there was a contract of employment the provisions as to termination, including particularly the length of notice, contained therein prevailed. The effect of the Act of 1963 was that thereafter the length of notice should be at least that provided for in the Act and any unilateral termination of the contract to the contrary would be invalid. Whether or not on a correct analysis this is to be regarded as introducing a term into a contract does not, in my opinion, greatly matter. I am prepared to accept that it is.

E However, in the ensuing years there was a great deal of legislation creating a body of industrial law. Clearly the legislature intended that the principle of the right to a minimum period of notice should be maintained. It is not surprising then that the phraseology of the Act of 1963 should be adopted. However, it was also clearly the intention of the legislature that certain financial benefits, until then unknown, should be accorded to an employee in certain eventualities. On the termination of his employment the employee was to be entitled to the benefit provided for in Schedule 3. Section 49 is the basis for the introduction of a new right contained in section 50 and Schedule 3 and it also governs the period of notice in the contract of employment. When section 51 requires the rights conferred by section 50 to be taken into account in assessing liability for a breach of contract, that, in my opinion, means that his damages shall be assessed on the basis that he is entitled to a minimum statutory payment on the termination of his employment and to the extent that he has been deprived thereof the loss shall be made good. That loss, for the reasons which I have given, is not one affected by any duty to mitigate. It is in the nature of a debt and is so-called in section 122. It is, however, reducible as provided in Schedule 3, paragraph 2(2).

H I would finally deal with the argument that as jurisdiction is not given to the industrial tribunal to deal with a claim by an employee against his employer in respect of Schedule 3 rights but only against the minister in the event of the employer's insolvency, the employee's remedy against the employer is one for breach of contract. Section 128 of the Act of 1978 provides for industrial tribunals to be established "to exercise the jurisdiction conferred on them by or under this Act or any other Act, whether passed before or after this Act." Various sections of the Act of 1978

specifically state that for a particular complaint the employee may apply to a tribunal and thus jurisdiction is conferred upon it. Section 124 provides that a person who has applied for a payment under section 122 may present a complaint to an industrial tribunal. However, it does not follow that the absence of such a provision in relation to a particular right means that that right given to the employee is not a right enjoyed by virtue of his status. Where the tribunal is given exclusive jurisdiction in a matter that is an indication that the right in question is a right arising exclusively under the statute and falls under no other head. It does not follow that the right is contractual if the tribunal is not given the power to enforce it.

Section 131 of the Act of 1978 empowers the minister to confer jurisdiction on industrial tribunals in respect of damages and certain specified claims in respect of breach of contract of employment. As it does not yet possess such jurisdiction it might be argued that if a Schedule 3 right is contractual, section 122 would be letting in a claim for breach of contract by the back door. However, I do not find much assistance in deciding the question with which we are concerned from the arguments based upon jurisdiction.

I would dismiss this appeal.

O'CONNOR L.J. This case raises an important question as to the nature of the rights conferred on employees and employers by sections 49 and 50 of, and Schedule 3 to, the Employment Protection (Consolidation) Act 1978. In form we are concerned with a claim by an employee of an insolvent employer against the Secretary of State under section 122 of the Act. It is common ground that that section confers no greater right upon the employee to recover payment in respect of the statutory notice period than he had against his employer.

Eveleigh L.J. has set out the relevant statutory provisions in his judgment and I need not repeat them. I am satisfied that the payment which has to be made for the section 49 notice period is a statutory requirement and is not to be regarded as a statutory alteration in the quantum of damages recoverable by an employee for breach of contract.

Section 50 is mandatory; it applies Schedule 3 and when I look at Schedule 3 I find a self-contained code defining the obligation of the employer. It will be seen that under paragraphs 2 and 3 of the Schedule it is a basic requirement that the employee must be ready and willing to work for the employer during the statutory notice period unless excused by sickness, injury or absence on holiday. This requirement is irreconcilable with the position of an employee who has been wrongfully dismissed. His duty is to mitigate his damage by getting other work if he can; further he is under no duty to be ready and willing to work for an employer who has wrongfully dismissed him.

In my judgment this statutory payment cannot be forced into the mould of damages for breach of contract. Once this is recognised *Parsons v. B. N. M. Laboratories Ltd.* [1964] 1 Q.B. 95 has no application. The statute states quite clearly that this is a different payment and paragraph 7 of Schedule 3 makes this quite certain by stating that the statutory payment "shall go towards mitigating the damages recoverable by the employee." This payment can be reduced as provided for by paragraphs 2(2) and 3(3) of the Schedule, but not otherwise.

Secretary of State for Employment v. Wilson [1978] 1 W.L.R. 568 was correctly decided on its facts, because having got other work at once the

A employee was not ready and willing to work for the previous employer, but for the reasons given above and by Eveleigh L.J. I cannot accept the ratio of the case.

B This leaves an anomaly in that if a solvent employer fulfils his statutory duty and makes the payments, the days in the notice period are not days of unemployment and unemployment benefit is not payable in respect of those days. This is so because regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 (S.I. 1975 No. 564) provides:

C “For the purposes of unemployment, sickness and invalidity benefit—. . . (d) a day shall not be treated as a day of unemployment if it is a day in respect of which a person receives a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration which he would have received for that day had his employment not been terminated, so however that this sub-paragraph shall not apply to any day which does not fall within the period of one year from the date on which the employment of that person terminated.”

D Where the employer has failed to make the payment and the employee has claimed and received unemployment benefit and earnings related supplement (this will always be so in section 122 cases) a subsequent payment whether by the employer or out of the redundancy fund established that the benefits were not payable in respect of the notice period. For the reasons given by the appeal tribunal I am satisfied that the benefits so paid are not recoverable. This anomaly can only be cured by the necessary legislation.

E I agree with the judgment given by Eveleigh L.J. and I would dismiss this appeal.

PURCHAS L.J. I agree that this appeal should be dismissed. There is nothing that I can usefully add to the judgments already delivered.

F *Appeal dismissed with costs.*

Legal aid taxation.

Leave to appeal on appellants' undertaking to be responsible for respondent's reasonable costs in House of Lords and not to seek to disturb order for costs in Court of Appeal.

G Solicitors: *Pearlman Grazin & Co., Leeds; Treasury Solicitor.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

[1983]

[HOUSE OF LORDS]

A

DAVY RESPONDENT

AND

SPELTHORNE BOROUGH COUNCIL APPELLANTS

1983 July 18, 19;
Oct. 13Lord Fraser of Tullybelton, Lord
Wilberforce, Lord Roskill, Lord Brandon
of Oakbrook and Lord Brightman

B

Judicial Review—Public authority—Local planning authority—Enforcement notice—Action for damages against authority for negligent advice—Whether claim raising question of public law—Whether to be struck out as abuse of process of court—Whether judicial review appropriate remedy—R.S.C., Ord. 53

C

Town Planning—Enforcement notice—Validity—Plaintiff's failure to appeal in time against notice—Allegation that failure resulting from negligent advice of local planning authority—Claim for damages for negligence—Whether proceedings other than by way of appeal to Secretary of State against enforcement notice prohibited—Whether claim raising question of public law—Town and Country Planning Act 1971 (c. 78), s. 243(1)(a) (as amended by Local Government and Planning (Amendment) Act 1981 (c. 41), s. 1, Sch., para. 18(1)(a))

D

Section 243(1) of the Town and Country Planning Act 1971 (as amended) provides:

"Subject to the provisions of this section—(a) the validity of an enforcement notice shall not, except by way of an appeal under Part V of this Act, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought; . . ."

E

On October 15, 1980, the defendants, the local planning authority, served an enforcement notice on the plaintiff in respect of his use of premises within their area. The plaintiff did not appeal against the notice, and the time for doing so expired. On August 24, 1982, the plaintiff issued a writ against the defendants alleging that he had refrained from appealing against the notice as a result of negligent advice given to him by the defendants or their officers and claiming an injunction ordering the defendants not to implement the notice, damages for negligence and an order that the notice be set aside. The defendants applied to have the writ and statement of claim struck out under R.S.C., Ord. 19, r. 1 or under the inherent jurisdiction of the court as an abuse of the process of the court. Sir Robert Megarry V.-C. declined to strike them out, but the Court of Appeal on appeal by the defendants ordered that the first and third of the plaintiff's claims be struck out on the ground that they raised questions of public law that could only be raised by way of judicial review under R.S.C., Ord. 53.

F

G

On appeal by the defendants, seeking to have the remaining claim for damages for negligence struck out on the grounds that it involved a challenge of the enforcement notice that was barred by section 243(1) of the Town and Country Planning Act 1971, that the plaintiff was asserting a public law right that could only be remedied by way of judicial review under R.S.C., Ord. 53 and that his claim for damages would have the same effect as the claims that had already been struck out:—

H

Held, dismissing the appeal, (1) that, even assuming (*sed quare*) that the plaintiff's claim for damages for negligence involved a challenge to the validity of the enforcement notice, his

3 W.L.R.

Davy v. Spelthorne B.C. (H.L.(E.))

assertion that he had acquiesced in the notice because of the defendants' negligent advice was not a ground referred to in Part V of the Act which would have entitled him to appeal to the Secretary of State, and, therefore, the claim was not barred by section 243(1)(a) (post, pp. 747B-E, 750C-D, 753D-F).

Per curiam. "Validity" in section 243(1)(a) means enforceability (post, pp. 746H, 753D-F).

(2) That the plaintiff's action for damages for negligence did not raise any question of public law since he was not seeking to impugn a public authority's determination but was bringing an ordinary action for tort in respect of which the procedure under R.S.C., Ord. 53 would be entirely inappropriate, particularly having regard to the fact that the claim was one for damages; and that, accordingly, there was no abuse of process in proceeding by way of an ordinary action rather than under Order 53 (post, pp. 748B, 749D, 751C-D, 752A-B, G-H, 753D-F).

O'Reilly v. Mackman [1983] 2 A.C. 237, H.L.(E.) and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, H.L.(E.) distinguished.

(3) That the ostensible purpose of the plaintiff's claim for damages was clearly different from that of the claims for an injunction and for the setting aside of the enforcement notice; and that it was not possible to hold that its true purpose was the same as that of those other claims and was only to put pressure on the defendants not to enforce the notice (post, pp. 749E-F, 753C-D).

Decision of the Court of Appeal (1983) 81 L.G.R. 580 affirmed.

The following cases are referred to in the opinions of Lord Fraser of Tullybelton and Lord Wilberforce:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.).

Cocks v. Thanet District Council [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 3 All E.R. 1135, H.L.(E.).

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.).

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.).

Pyx Granite Co. Ltd. v. Minister of Housing and Local Government [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.).

Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.).

Square Meals Frozen Foods Ltd. v. Dunstable Corporation [1974] 1 W.L.R. 59; [1974] 1 All E.R. 441, C.A.

The following additional case was cited in argument:

Scarborough Borough Council v. Adams (unreported), June 21, 1983, D.C.

APPEAL from the Court of Appeal.

By writ dated August 24, 1982, and statement of claim dated August 25, 1982, the plaintiff, Arthur James Davy, claimed against the defendants, the Spelthorne Borough Council, the local planning authority, (1) an injunction to restrain the defendants by themselves, their servants or their agents or otherwise from implementing an enforcement notice dated October 15, 1980, served on him by the defendants in respect of his use of premises known as Riverside Works, Nutty Lane, Shepperton, Surrey and the retention of the buildings on those premises; (2) damages against

the defendants by reason of his loss of the right to appeal against the enforcement notice and to establish his right to use the majority of the buildings for a pre-cast concrete factory; and (3) an order that the enforcement notice be set aside. By their defence, the defendants denied that the plaintiff was entitled to the relief claimed or any relief. By notice of motion dated October 6, 1982, they applied for an order that the writ and statement of claim be struck out under R.S.C., Ord. 19, r. 1 or under the inherent jurisdiction on the ground that they were an abuse of the process of the court. Sir Robert Megarry V.-C. on October 11, 1982, made no order on the defendants' motion.

The defendants appealed to the Court of Appeal (Cumming-Bruce and Fox L.JJ. and Bush J.), who on February 9, 1983, ordered that claims (1) and (3) in the writ and statement of claim be struck out. They refused the defendants leave to appeal from their order, but on March 28, 1983, the Appeal Committee of the House of Lords (Lord Scarman, Lord Bridge of Harwich and Lord Brightman) allowed a petition by the defendants for leave to appeal.

The defendants appealed.

The facts are set out in the opinion of Lord Fraser of Tullybelton.

Jeremy Sullivan Q.C. and *David Mole* for the defendants.

Kenneth Bagnall Q.C. and *Erica Foggin* for the plaintiff.

Their Lordships took time for consideration.

October 13. LORD FRASER OF TULLYBELTON. My Lords, this appeal is a sequel to the decision of this House in *O'Reilly v. Mackman* [1983] 2 A.C. 237. The issue of most general importance raised in the appeal relates to the circumstances in which a person with a cause of action against a public authority, which is connected with the performance of its public duty, is entitled to proceed against the authority by way of an ordinary action, as distinct from an application for judicial review.

The respondent is the owner of premises known as Riverside Works, Nutty Lane, Shepperton. The appellants are the local planning authority for the district within which those premises are situated. On September 28, 1977, the respondent made a planning application for the retention for a period of 10 years of the existing buildings and the continued use of the premises as a pre-cast concrete works. Thereafter, the respondent made another planning application, which was later withdrawn, and amended his original application, which was refused, and he met officers of the appellants on several occasions when he discussed with them the future use of the premises. The respondent alleges that eventually, as a result of the discussions and correspondence with the appellants' officers, on or about November 6, 1979, he entered into an agreement with the appellants whereby he undertook not to appeal against an enforcement notice to be served by the appellants upon him in respect of the use of the premises, provided that the notice would not be enforced by the appellants for a period of three years from the date of its service. The appellants served an enforcement notice on October 15, 1980, which, the respondent alleges, was in accordance with that agreement. The enforcement notice stated that the appellants required the respondent, within three years of the date when the notice took effect, to cease using the land for the manufacture of concrete products and to remove from it all buildings and works. The respondent did not appeal against the enforcement notice and

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A the time for so doing has long since expired. The notice took effect 35 days after the date of service, October 15, 1980, and the time for appealing against it expired when it took effect. The respondent alleges that he refrained from appealing against the enforcement notice in pursuance of the agreement of November 6, 1979, and that he entered into that agreement on the advice of the appellants' officers.

B On August 24, 1982, the respondent issued a writ against the appellants. In his statement of claim he made allegations including those which I have summarised. He also alleged that the agreement of November 6, 1979, was ultra vires the appellants and void on several grounds which I need not now particularise. He claimed damages from the appellants on the ground that the appellants, or their officers, had purported to advise him as to his rights under the Town and Country Planning Act 1971, and that their advice had been negligent. The appellants deny that there was any legally enforceable agreement between the respondent and themselves. They also deny that they, or their officers, purported to advise the respondent on his rights, and they say that, if they did give any such advice, it was not given negligently. For the purposes of the present appeal the respondent's allegations must be taken to be true.

D The relief claimed by the respondent was as follows. 1. An injunction ordering the appellants not to implement the enforcement notice. 2. Damages. 3. An order that the enforcement notice be set aside.

E The appellants applied to have the writ and statement of claim struck out under R.S.C., Ord. 19, r. 1, or under the inherent jurisdiction, on the ground that they were an abuse of the process of the court. Their application was rejected by Sir Robert Megarry V.-C. on October 11, 1982, before the decision of this House in *O'Reilly v. Mackman*, and the learned Vice-Chancellor's reasons have been largely superseded by that decision. The appellants appealed and the Court of Appeal (Cumming-Bruce and Fox L.JJ. and Bush J.), with the decision of your Lordships' House in *O'Reilly v. Mackman* [1983] 2 A.C. 237 before them, ordered that claims 1 and 3, and certain portions of the statement of claim relating to them, be struck out, on the ground that they raised questions of public law which could only be raised by way of judicial review under R.S.C., Ord. 53. The Court of Appeal left the respondent's claim for damages for negligence alive. In the instant appeal, the appellants seek to have that, the only remaining claim, struck out.

G The first contention of the appellants is that the respondent's claim for damages involves a challenge of the enforcement notice which is, in substance, a challenge of its validity, and which is therefore barred by section 243 of the Act of 1971. In order that the respondent may succeed in his claim for damages, he must establish three things—viz. (1) that the appellants, or their officers, advised him on his rights under the Act of 1971 and that they owed him a duty of care when they did so; (2) that they were in breach of that duty by negligently advising him not to appeal against the enforcement notice; and (3) that he has suffered damage flowing from the breach. The damages are claimed because, according to the respondent, he had a good defence to the enforcement notice which he could, or at least might, have established, if he had appealed against the notice timeously, but which he lost the chance of establishing when he acted on the appellants' advice and, in accordance with the agreement of November 6, 1979, did not appeal. It is thus a necessary step in the respondent's case for him to show that he had a good defence, good enough to give him at least a chance of successfully challenging the

enforcement notice, if he had appealed against it in time. The amount of damages to which he would be entitled will, of course, depend largely on the prospects of success if he had appealed. The appellants maintain that the respondent is not entitled to have the merits of his defence investigated in these proceedings because the defence is in substance a challenge of the validity of the enforcement notice, and is therefore barred by section 243 of the Act of 1971. Section 243(1) (as amended by the Local Government and Planning (Amendment) Act 1981) provides as follows:

“Subject to the provisions of this section—(a) the validity of an enforcement notice shall not, except by way of an appeal under Part V of this Act, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought; . . .”

Part V of the Act of 1971 deals with enforcement of planning control. The first section in Part V is section 87 which (as substituted by the Act of 1981) provides that a local planning authority shall have power to serve an enforcement notice in cases where there has been a breach of planning control. Section 88 (as substituted by the Act of 1981, section 1 and the Schedule, paragraph 1) provides:

“(1) A person having an interest in the land to which an enforcement notice relates may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him. (2) An appeal may be brought on any of the following grounds—(a) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged; (b) that the matters alleged in the notice do not constitute a breach of planning control; (c) that the breach of planning control alleged in the notice has not taken place; (d) in the case of a notice which, by virtue of section 87(4) of this Act, may be issued only within the period of four years from the date of the breach of planning control to which the notice relates, that that period had elapsed at the date when the notice was issued; . . .”

The defence on which the respondent would have relied would have been under paragraph (d) of that section. The effect of section 243(1)(a) is to prohibit the bringing of appeals on any of the grounds to which it relates before the High Court and, in accordance with section 88(1), to substitute the Secretary of State as the forum for deciding such appeals. Section 88(1) also limits the time for appealing to the period before the date on which the enforcement notice is to take effect. Accordingly, the appellants say that the present proceedings, being in substance an appeal against the enforcement notice, are incompetent because they are brought before the wrong tribunal and also, although I did not understand this to be relied on as a separate point, because they are out of time.

I note in passing that although section 243(1)(a) provides that the “validity” of an enforcement notice is not to be questioned except as therein provided, the word “validity” is evidently not intended to be understood in its strict sense. It is used to mean merely enforceability. That appears from a consideration of the grounds on which an appeal may be brought under Part V of the Act of 1971, which are not limited to matters affecting the validity of the notice. The relevant grounds are set

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A out in section 88(2), part of which I have already quoted, and it is apparent that paragraph (a) (at least) goes to the merits rather than to the validity (in the strict sense) of the notice. Accordingly, the fact that the respondent is not questioning the “validity” of the notice is immaterial. In fact, of course, the respondent now accepts the notice as perfectly valid and, as at the date of instituting the present proceedings, unappealable; indeed, that is the essential basis of his claim for damages.

B But in my opinion, the respondent’s claim for damages is not barred by section 243(1)(a). That paragraph provides that the validity of an enforcement notice shall not be questioned in any proceedings whatsoever “on any of the grounds on which such an appeal may be brought.” The words “such an appeal” are a reference back to an appeal under Part V of the Act of 1971, and they mean in effect the grounds specified in section 88(2). But section 243(1)(a) does not prohibit questioning the validity of the notice on other grounds. If, for example, the respondent had alleged that the enforcement notice had been vitiated by fraud, because one of the appellants’ officers had been bribed to issue it, or had been served without the appellants’ authority, he would indeed have been questioning its validity, but not on any of the grounds on which an appeal may be brought under Part V. So here, the respondent’s complaint that he acquiesced in the enforcement notice because of negligent advice from the appellants is not one of the grounds specified in section 88(2), and it would not have entitled him to appeal to the Secretary of State under Part V of the Act of 1971. Accordingly, even on the assumption that the validity of the enforcement notice is being questioned in the present proceedings (an assumption which in my opinion is open to serious doubt), it is certainly not being questioned on any of the grounds referred to in section 243(1)(a) and the proceedings are not barred by that subsection. In my opinion, therefore, the appellants’ first contention fails.

E Their second contention is that, when the respondent alleges that he had a good defence to the enforcement order, he is asserting a right to which he is entitled to protection under public law, and one which therefore he cannot be permitted to defend by way of an ordinary action. F The contention was based on the speech of my noble and learned friend, Lord Diplock, in *O’Reilly v. Mackman* [1983] 2 A.C. 237, in the following passage, at p. 285:

G “it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”

H The appellants accept that there are, of course, many claims against public authorities which involve asserting rights purely of private law, and which can be pursued in an ordinary action. They accept also that if a question as to the validity of the enforcement notice had arisen incidentally in an action to which they, the appellants, were not parties, it could properly have been decided in the High Court—for example, if it had arisen as a preliminary issue in an action by the respondent against his solicitors for negligence. But Mr. Sullivan maintained that, when there is an issue between a citizen and a public authority which involves determining whether the citizen can challenge a public notice or order, the only way to decide the issue is by way of procedure under Order 53. He maintained

further that it makes no difference whether the issue concerns a present right or a past right to challenge the notice or order. The only relevant distinction, he says, between a past right and a present right is that investigating a past right tends to be more difficult, and more burdensome to the public authority, than investigating a present right, so that the authority's need for the protection of Order 53 will be all the greater in the former case.

Although the argument was presented most persuasively, it is in my view not well founded. The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue. I cannot improve upon the words of Fox L.J. in the Court of Appeal when he said (1983) 81 L.G.R. 580, 596:

"I do not think that the negligence claim is concerned with 'the infringement of rights to which [the plaintiff] was entitled to protection under public law' to use Lord Diplock's words in *O'Reilly v. Mackman* [1983] 2 A.C. 237, 285. The claim, in my opinion, is concerned with the alleged infringement of the plaintiff's rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim, so far as negligence is concerned."

It follows that in my opinion they do not fall within the scope of the general rule laid down in *O'Reilly v. Mackman*. The present proceedings may be contrasted with *Cocks v. Thanet District Council* [1983] 2 A.C. 286, which was decided in this House on the same day as *O'Reilly v. Mackman*. In *Cocks v. Thanet District Council*, the House held that the general rule stated in *O'Reilly v. Mackman* applied (and I quote the headnote) "where a plaintiff was obliged to impugn a public authority's determination as a condition precedent to enforcing a statutory private law right." In that case, the plaintiff had to impugn a decision of the housing authority, to the effect that he was intentionally homeless, as a condition precedent to establishing the existence of a private law right to be provided with accommodation. It is quite clear from the speech of Lord Bridge of Harwich, with which all the other members of the House agreed, that the plaintiff was asserting a present right to impugn or overturn the decision—see p. 294D: "the decision of the public authority which the litigant wishes to overturn." (Emphasis added.) In the present case, on the other hand, the respondent does not impugn or wish to overturn the enforcement notice. His whole case on negligence depends on the fact that he has lost his chance to impugn it. In my opinion therefore the general rule stated in *O'Reilly v. Mackman* is inapplicable. The circumstances in which the procedure under Order 53 is appropriate were described in some detail by Lord Diplock in *O'Reilly v. Mackman*. At p. 275B he mentioned the fact that in that case no claim for damages would lie against the defendants, and that the only relief sought was for a declaration, a form of relief that is discretionary only. At p. 281B he explained that one of the reasons why the procedure under Order 53 is appropriate in certain cases is that it provides

"a very speedy means, available in urgent cases within a matter of days rather than months, for determining whether a disputed decision was valid in law or not."

The importance of obtaining a speedy decision is (see pp. 280–281) that:

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A "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

B That explanation points the contrast with the present case, where the validity of the enforcement notice is not now challenged, and no public authority or third party is being kept in suspense on that matter. Procedure under Order 53 would in my view be entirely inappropriate in this case.

C A further consideration is that if the claim based on negligence, which is the only one of the original three claims now surviving, were to be struck out, the blow to the respondent's chances of recovering damages might well be mortal. The court has no power to order the proceedings for damages to continue as if they had been made under Order 53. The converse power under Ord. 53, r. 9 operates in one direction only—see *O'Reilly v. Mackman*, at p. 284A-B. So, if the present appeal were to succeed, the respondent's only chance of bringing his claim for damages before the court would be by obtaining leave to start proceedings for judicial review (now long out of time) and then by relying on Ord. 53, r. 7 to attach a claim for damages to his claim for judicial review. That would be an awkward and uncertain process to which the respondent ought not to be subjected unless it is required by statute: see *Pyx Granite Co. Ltd. v. Minister of Housing and Local Government* [1960] A.C. 260, 286, *per* Viscount Simonds. In my view it is not.

E The third contention for the appellants was that the claim for damages had the same purpose and would have the same effect as the other reliefs claimed, namely injunction and setting aside. My Lords, this contention seems to me entirely without justification. The ostensible purpose of the claim for damages is clearly different from the purpose of the other claims, and for all that your Lordships can tell, the respondent may at this date prefer to receive a payment in cash rather than to have the enforcement notice set aside. It seems to me quite impossible to hold that the true purpose of the claim for damages is only to put pressure on the appellants not to enforce the notice. As regards the effect of the claim for damages being allowed to proceed, the suggestion was that the threat of the claim hanging over the head of the appellants would be likely to cause them to refrain from enforcing the notice, if the respondent has not complied with it when the three-year period expires in November 1983. I have some doubt whether it would be proper for the appellants to allow their decision to be influenced by such a threat, but, assuming that the threat would be a legitimate and proper consideration, it could only operate by affecting the exercise of the appellants' discretion in deciding whether to prosecute the respondent for failing to obey the enforcement notice, and it would in my opinion be something much less compelling than an injunction or an order to quash. I have no hesitation therefore in rejecting the appellants' third contention.

For these reasons I would dismiss this appeal.

LORD WILBERFORCE. My Lords, although, with one qualification which I shall state, I agree with the judgments in the Court of Appeal, I will make some observations upon this appeal both from respect to the

attractive argument of Mr. Sullivan Q.C. for the appellant and because this case may be of some general importance.

The issue as it reaches this House, after other matters have been disposed of without cross-appeal, is simply whether a common law action for damages against the appellant council arising from alleged negligence should be struck out as an abuse of the process of the court. There are two grounds on which this is sought to be done. The first is that the claim is precluded by section 243(1)(a) of the Local Government Act 1971 (as amended) which reads:

“(1) Subject to the provisions of this section—(a) the validity of an enforcement notice shall not, except by way of an appeal under Part V of this Act, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought; . . .”

I agree with the Court of Appeal that this section does not apply. In my opinion the enforcement notice is not questioned in the proposed action, and, even if it is, it is not questioned on the grounds specified. Although there may be some warrant for not giving to this subsection a restricted meaning (see *Square Meals Frozen Foods Ltd. v. Dunstable Corporation* [1974] 1 W.L.R. 59), to extend it so as to cover a claim such as that we are concerned with would amount to a reconstruction too radical to be contemplated. I need add no more on the point to what has been said by my noble and learned friend Lord Fraser of Tullybelton.

The second point is the substantial one. For proper appreciation it is necessary to define the claim to which it relates. As pleaded (and for the purpose of this appeal we are only concerned with the pleading and not with its substance or merits) it is that the appellant council owed to the respondent plaintiff a duty of care in, through its officers, advising him as to his planning application; that the council was negligent in so advising him; that by reason of this negligence he suffered damage, namely the loss of a chance of successfully appealing against the enforcement notice served upon him by the council. Though this was initially one of several claims, it now stands on its own, and should be judged as an independent and separate action.

To say that such a claim, so formulated, ought to be, or indeed can be, struck out as an abuse of the process of the court seems on the face of it a remarkable proposition. There is no doubt that, side by side with their statutory duties, local authorities may in certain limited circumstances become liable for negligence at common law in the performance of their duties: see for example *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, *Anns v. Merton London Borough Council* [1978] A.C. 728, 756, 788). In what circumstances then can it be said to be an abuse of process to sue them for negligence in the common law courts?

It is said that, in this case, the right should be denied because the claim involves consideration of a question not of “private law” but of “public law”—namely whether the respondent had or would have had a defence against the enforcement notice; that this consideration cannot take place in an ordinary action but can only take place in a proceeding of what is now called “judicial review” under the provisions of R.S.C., Ord. 53.

The expressions “private law” and “public law” have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country

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A they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression "public law" can be used to deny a subject a right of action B in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent C reforms to remove.

D The relevant statute to the present case is the Supreme Court Act 1981, section 31, and the relevant statutory rules those contained in R.S.C., Ord. 53 dating from 1977. These lay down the conditions under the procedure by which the courts can be asked to review the actions or omissions of (inter alia) statutory bodies, persons acting under statute, and inferior courts. Before a proceeding at common law can be said to be an abuse of process, it must, at least, be shown (1) that the claims in question *could* be brought by way of judicial review (2) that it *should* be brought by way of judicial review.

E *O'Reilly v. Mackman* [1983] 2 A.C. 237 illustrates this in the clearest manner, and goes no distance towards supporting the appellant's case in this appeal. It was not contested there that the appellants, seeking directly to attack the board's decisions, would have had a remedy by way of judicial review (p. 274c): indeed, as I understand the case, they would not have had a remedy in private law at all. The only question, which my noble and learned friend Lord Diplock was able to put in a single sentence (pp. 274H–275A), was whether it was an abuse of process to apply for declarations by using the procedure laid down in proceedings begun by writ or originating summons instead of using the procedure laid down by F R.S.C., Ord. 53. It was decided that it would be such an abuse of process. The statements of law laid down in the single opinion must be related to that issue, the foundation of which was that the claims in question could have been brought by way of judicial review. Even when this requirement was satisfied, Lord Diplock was careful to make it clear that he was stating no universal rule that such claims could only be brought by this procedure: G see pp. 284H–285A. And he expressly stated that though there should be a general rule of public policy against permitting a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action, there might be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, and in other instances on a case H to case basis. (The contemporaneous case of *Cocks v. Thanet District Council* [1983] 2 A.C. 286 may be regarded as one where a direct issue of public law arose at one remove.)

It is indeed plain enough that issues which could be characterised as issues of "public law" may arise in a number of contexts besides those where an attack upon, or review of, actions or omissions of public bodies is involved—cases, for example, where the invalidity of such action is set up by way of defence, or where the validity of such action arises

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collaterally in actions against third parties. The Law Commission in its recommendations of 1971 suggested that the procedure of judicial review should cover such cases, but this suggestion was not accepted and the reforms of 1977–1981 were of a more limited character. So we must judge a contention of “abuse of process” according to normal principle.

In fact neither of the requirements which I have mentioned above is met.

First (and it is here that I venture to differ to some extent from the judgment of Cumming-Bruce L.J. in the Court of Appeal), this claim, treated as it must be as a claim for damages for negligence, could not, in my opinion, be pursued by way of judicial review under R.S.C., Ord. 53.

This proposition can be established in two steps. First, the right to award damages conferred by Ord. 53, r. 7 is by its terms linked to an application for judicial review. Unless judicial review would lie, damages cannot be given. Secondly, an action for judicial review in respect of alleged negligence is not “appropriate” within the meaning of Ord. 53, r. 1. I quote the words of Lord Scarman:

“The application for judicial review was introduced by rule of court in 1977. The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not—indeed, cannot—either extend or diminish the substantive law. Its function is limited to ensuring ‘ubi jus, ibi remedium.’ The new procedure is more flexible than that which it supersedes. An applicant for relief will no longer be defeated merely because he has chosen to apply for the wrong remedy. Not only has the court a complete discretion to select and grant the appropriate remedy: but it now may grant remedies which were not previously available. Rule 1(2) enables the court to grant a declaration or injunction instead of, or in addition to, a prerogative order, where to do so would be just and convenient. This is a procedural innovation of great consequence: but it neither extends nor diminishes the substantive law. For the two remedies (borrowed from the private law) are put in harness with the prerogative remedies. They may be granted only in circumstances in which one or other of the prerogative orders can issue. I so interpret R.S.C., Ord. 53, r. 1(2) because to do otherwise would be to condemn the rule as *ultra vires*”: *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, 647–648 and similarly *per* Lord Diplock, at p. 639.

So, since no prerogative writ, or order, in relation to the present claim could be sought, since, consequently, no declaration or injunction could be asked for, no right to judicial review exists under rule 1, and no consequential claim for damages can be made under rule 7.

Secondly, and even assuming that this claim could in some way be brought under the procedure of judicial review, there is no ground, in my opinion, upon which it can be said that it should only be so brought. Order 53 does not state that the procedure which it authorised was the only procedure which could be followed in cases where it applied. (In this it followed the recommendation of the Law Commission.) So *prima facie* the rule applies that the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the defendant to show that in doing so he is abusing the court’s procedure. In *O’Reilly v. Mackman* [1983] 2 A.C. 237 it was possible to show that the plaintiffs were improperly and flagrantly seeking to evade the protection which the rule

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- A confers upon public authorities. There is nothing of that sort here. The only "public law" element involved in the present claim is that which may require the court, after it has decided the issue of duty of care and of negligence, in assessing damages to estimate, as best it can, the value of the chance which the plaintiff lost of resisting enforcement of the council's notice. The presence of this element is in my opinion quite insufficient to justify the court, on public policy grounds, from preventing the plaintiff
- B from proceeding by action in the ordinary way in the court of his choice, particularly when one has regard to the serious procedural obstacles which he would find if compelled to seek judicial review. If he had been suing his solicitor for negligent advice, exactly the same problem in assessing damages would have arisen and nobody could contend that the action would not proceed. I cannot see that it makes any difference that the
- C defendant is a public authority: the claim remains one the essence of which is a claim at common law: any "public law" element is peripheral. On the same line of reasoning, but a fortiori, I reject the appellant's argument that any award of damages against the council might inhibit it in the performance of its statutory duty or might have the same effect, in practice, as granting an injunction—an argument which logically would apply to any "private law" claim against public authorities.
- D In my opinion the decision of the Court of Appeal was right and I would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Fraser of Tullybelton. For the reasons he gives I too would dismiss this appeal.

- E LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I would dismiss the appeal.

- F LORD BRIGHTMAN. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Fraser of Tullybelton.

Appeal dismissed with costs.

- G Solicitors: *Sherwood & Co. for Secretary and Solicitor, Spelthorne Borough Council, Staines; Sharpe, Pritchard & Co. for Peter Fraser & Co., Weybridge.*

M. G.

H

[COURT OF APPEAL]

GOVERNORS OF THE PEABODY DONATION FUND v.
SIR LINDSAY PARKINSON & CO. LTD. AND OTHERS

[1979 G. No. 488]

1983 July 11, 12, 13; 29

Lawton, Fox and Slade L.JJ.

Negligence—Duty of care to whom?—Local authority—Control of drainage works—System of flexible drains for housing development approved by local authority—Local authority inspector becoming aware rigid drains being installed in breach of statute—Inspector taking no action—Drains proving unsatisfactory—Whether local authority owing duty of care to developer—London Government Act 1963 (c. 33), Sch. 9, Pt. III, paras. 13(1), 15(2)

Plans, submitted by architects acting for the plaintiffs, and approved by the local authority, an inner London borough, provided for the construction of a flexible system of drainage for a housing development on a site owned by the plaintiffs. The drainage system subsequently installed by the plaintiffs' building contractors was, on instructions from the architects, of a different, rigid design. The departure from the approved design came to the knowledge of the local authority drainage inspector while the installation was proceeding but he took no action. When the drains were tested two years later they were found to be unsatisfactory and had to be reconstructed, causing the development to be delayed with consequent substantial loss to the plaintiffs. In proceedings brought by the plaintiffs against, inter alia, the local authority, alleging negligence in the discharge of their functions under Schedule 9 to the London Government Act 1963,¹ the judge held that the local authority were liable to the plaintiffs in respect of the local authority's failure to ensure, on discovering that rigid drains were being constructed, that the drainage system being installed complied with the design already approved, and he made a declaration accordingly.

On appeal by the local authority:—

Held, allowing the appeal, that, in departing from the approved drainage scheme and installing a different and unsatisfactory system, the plaintiffs as building owners were in breach of their duty under paragraph 13(1) of Part III of Schedule 9 to the London Government Act 1963 to construct the drains to the satisfaction of the local authority; and that, in those circumstances, the local authority owed no duty of care to the plaintiffs to ensure that a defective system was not installed (post, pp. 760G–H, 763C–D, 767H–768A).

Anns v. Merton London Borough Council [1978] A.C. 728, H.L.(E.) and *Acrecrest Ltd. v. W. S. Hattrell & Partners* [1983] Q.B. 260, C.A. distinguished.

¹ London Government Act 1963, Sch. 9, Pt. III, para. 13: "(1) It shall not be lawful in an inner London borough—(a) to erect any house or other building . . . unless there are provided to the satisfaction of the borough council drains conforming with the requirements of this paragraph and all such drains . . . are constructed to the satisfaction of the council . . ."

Para. 15: "(2) If . . . any drain for draining directly or indirectly into a sewer under the control of the council of a London borough, or any connections to such a drain, or any works . . . in connection with such a drain, is or are begun, erected, made or provided in an inner London borough in contravention of the provisions of this Part of this Schedule . . . the council of the borough at their option may . . . (a) serve upon the owner . . . of the drain . . . a notice requiring him . . . to cause the drain or the connections or other works . . . to be relaid, remade, altered or added to, as the case may require . . ."

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Per curiam. It may be that, if the drainage system had not been put right, an occupier of the house^s when completed who suffered injury to health through the inspector's inaction could have sued the local authority for breach of duty in failing to require the plaintiffs to comply with the deposited plans (post, pp. 760H—761A, 762F—G, 766C—D).

The following cases are referred to in the judgments:

Acrecrest Ltd. v. W. S. Hattrell & Partners [1983] Q.B. 260; [1982] 3 W.L.R. 1076; [1983] 1 All E.R. 17, C.A.

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.).

Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373; [1972] 2 W.L.R. 299; [1972] 1 All E.R. 462, C.A.

The following additional cases were cited in argument:

Dennis v. Charnwood Borough Council [1983] Q.B. 409; [1982] 3 W.L.R. 1064; [1982] 3 All E.R. 486, C.A.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L. (Sc.).

McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.).

APPEAL from Judge Oddie, sitting on Official Referee's business.

The plaintiffs, the Governors of the Peabody Donation Fund, brought proceedings in 1979 for damages, inter alia, in relation to defects in the drainage of the plaintiffs' housing development at Knights Hill, Lambeth, for breach of contract by the first defendants, Sir Lindsay Parkinson & Co. Ltd., and/or negligence and/or breach of duty by the second defendants, Austin Vernon & Partners, and/or negligence by the third defendants, Lambeth London Borough Council. On January 24, 1983, the judge held, inter alia, that the defendant local authority owed a duty of care to the plaintiffs in discharging their functions under Schedule 9 to the London Government Act 1963 and were liable in negligence for the failure of their drainage inspector to exercise reasonable care in carrying out his duties, and on March 18, 1983, he granted a declaration to give effect to that finding.

By notice of appeal dated April 14, 1983, the local authority appealed on the grounds that the judge erred in law in holding that (1) under Schedule 9 to the Act of 1963 the local authority had power to ensure and/or to require that the drainage installed at Knights Hill complied with the original drainage system as approved by the council; and (2) the loss suffered by the plaintiffs in having to pay extra money to the first defendants caused by the failure to install drainage in accordance with the drainage scheme originally approved by the local authority was recoverable from the council by way of damages for negligence.

The facts are stated in the judgment of Lawton L.J.

John Owen Q.C. and *Richard Fernyhough* for the defendant local authority.

John Dyson Q.C. and *Stephen Furst* for the plaintiffs.

July 29. The following judgments were handed down.

LAWTON L.J. This is an appeal by the third defendants, Lambeth London Borough Council ("Lambeth") from part of a judgment given by Judge Oddie, sitting as a deputy official referee, on January 24, 1983, whereby he adjudged that Lambeth were liable to pay the plaintiffs ("Peabody") damages to be assessed, for breach of their statutory duty to Peabody under Schedule 9 to the London Government Act 1963. The damages may be very large. One estimate, which is not accepted by either Peabody or Lambeth, is that they will be about £1,000,000. The principal issue in the appeal is this: if an inner London borough council (and Lambeth is one) approves the design of a drainage system for a building development and through one of its inspectors, whom it has appointed to inspect the construction of that system, fails to notice that the developer's architect, acting as an independent contractor, without its approval, alters the design and instructs the developer's contractor to build one which, before the completion of the development, is found to be unsatisfactory, can the developer recover from the borough council the cost of redoing the drainage work plus any other reasonably foreseeable damages.

In or about 1972 Peabody decided to build 245 houses on a hillside site known as Knights Hill, Lambeth. The site was a difficult one on which to build. It had to be terraced and any drainage scheme for it had to take into account the fact that the subsoil was London clay which tends to expand and contract with the changes of the seasons. Peabody engaged the well known contractors, Sir Lindsay Parkinson and Co. Ltd., to do the building work and Messrs. Austin Vernon & Partners as the architects. It was their function to design a drainage system for the site and that of the contractors to construct drains in accordance with the architects' instructions.

By about 1972 architects and civil engineers had come to appreciate that the traditional drainage system, consisting of rigid pipes, was unsuitable for a housing development of this size and kind on a difficult subsoil like London clay. Movement in the subsoil was likely to cause breaks in the pipes. The architects knew this. They designed a flexible system which would allow for subsoil movements. Pursuant to drainage byelaws made by the Greater London Council under various statutory powers and applicable in Lambeth, on April 6, 1972, the architects applied, on behalf of Peabody, for leave to construct a flexible system on the site. They deposited plans. The application form which they completed stated that the drainage system would be constructed to the satisfaction of Lambeth and in accordance with statutory requirements and "byelaws regulations and other sanitary requirements." The byelaws contained detailed provisions for the construction of drains. Lambeth would have been unable to decide whether most of these provisions had been complied with once the drains had been covered. By testing it could find out whether when completed the drains were effective as such but not how they had been constructed. No doubt because of this problem, paragraph 15(1)(b) of Part III of Schedule 9 to the Act of 1963 provided that "No person shall (b) begin to make any drain . . . unless, at least seven days previously,

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A he has given to the borough council notice of his intention so to do . . .”
Soon after the plans had been deposited Lambeth’s civil engineering
department, the senior members of which had professional qualifications,
intimated that the suggested drainage design seemed to be satisfactory
but formal approval in writing was not given until February 14, 1973; it
was stated to be “in principle.”

B By the beginning of 1973 the contractors were ready to start construct-
ing the drainage system. The architects had on site, supervising for them,
a trainee architect named Mitchell. The contractors had a site engineer.
The drainage inspector appointed by Lambeth to inspect the drainage
work on site was a man named Marlow. He had no professional qualifi-
cations but he had had long experience in the building trade. On February
C 2, 1973, Mitchell and Marlow met and made an agreement. That agree-
ment is going to cost either Peabody or Lambeth a lot of money. This
appeal will decide who is going to pay. The reason is this: these two
professionally unqualified men decided that the drains should be con-
structed in the traditional way and not in the way set out in the design
plans deposited with Lambeth and which were to receive formal approval
D by Lambeth a few days later. In Mr. Owen’s words this change of design
was doomed to failure. The evidence about this meeting was confused.
The trial judge was not satisfied that Marlow had required Mitchell to
make the change; but that an agreement to which Marlow had been a
party had been made was clear beyond any doubt. The terms of it were
set out in a letter written by the architects to the contractors’ site engineer
E dated February 7, 1973. The judge found that Marlow had no authority
from Lambeth to be a party to this agreement. Thereafter the contractors
were instructed by the architects to construct the drainage system in the
traditional, unsuitable way. This they did. Shortly after the work on the
drainage system began, Marlow was succeeded as Lambeth’s drainage
F inspector for the site by a man named Toogood. Like Marlow he too had
no professional qualifications. He had only been a drainage inspector for
a short time before carrying out inspections on this site. His previous
occupation had been that of a plumber. Between the time when he started
working on this site and May 4, 1973, he carried out 20 inspections. There
was no evidence as to what he did or what he saw. On May 3, 1973, he
asked the contractors’ site agent for some information about the drains
G and what was being used for their construction. He was given the
information in a letter dated May 4, 1973. Peabody have based their case
against Lambeth upon this letter. It was admitted by Lambeth at the trial
that Toogood on reading this letter should have appreciated that the
contractors were constructing a drainage system which was different from
the approved design set out in the plans to which he had access. Toogood
H did not show this letter to his superiors. He let the contractors go on
constructing the drainage system in a way which was doomed to failure.
His inaction, submit Peabody, amounted to a breach of duty which caused
them great loss.

Although he did nothing to stop the contractors from departing from
the approved design, he went on inspecting their work. Peabody have not
suggested that he made his inspections negligently.

During 1975 and the early part of 1976 and before the development had been completed, testing of the drains revealed that a substantial number of them had failed.

As a result of the failures the drainage system had to be reconstructed by the contractors at a cost which they estimate to have been £118,139. The development was delayed for about three years. Peabody lost rents which they would have received if the delay had not occurred. The contractors have claimed that under their contract with Peabody they are entitled to be paid substantial additional sums because of the delay. Peabody started proceedings against the contractors, the architects and Lambeth claiming to be reimbursed by one or other or all of them for the losses they had sustained. The contractors issued a writ against Peabody for the sums they alleged were due to them under their contract. The two actions were consolidated. There was a lengthy trial on preliminary issues as to whether, first, the cause of the replacement of the original drains was the unsuitability of the architects' design or the contractors' defective workmanship and, secondly, the contractors were entitled to extra payments under their contract with Peabody. The judge found that the cause of the failure of the drains was their unsuitable design and not the contractors' workmanship and that the contractors were entitled to be paid various sums, to be assessed, under their contract with Peabody. His finding against Lambeth as set out in the order is that Peabody were entitled to payment of damages from Lambeth representing such part of the sums for which Peabody were liable to the contractors arising out of the failure of the rigid drainage system as would not have been incurred had Lambeth, following the receipt of the letter from the contractors dated May 4, 1973, taken steps to ensure that the system of drainage then being installed complied with the original drainage scheme approved by Lambeth. The judge made no finding against the architects because, before judgment, Peabody's claim against them had been settled. It is to be inferred from what the judge said in his judgment that he would have found the architects negligent had Peabody's claim against them not been settled. He assessed Lambeth's proportion of liability at 15 per cent. This could only have been relevant to a claim for contribution which Lambeth had made against the architects. In the event they had none because of the terms of compromise which Lambeth themselves had made with the architects.

If this judgment is right in so far as it affects Lambeth, that local authority have become liable to indemnify Peabody against a substantial part of a huge claim made against them by the contractors. This has come about because an inexperienced drainage inspector had taken no action following receipt of one letter from the experienced contractors who had done what the architects had told them to do. He may not have appreciated the significance of this letter; but if he did not, he should have done, as was admitted. Since the drainage inspector was acting in the course of his employment, Lambeth are vicariously responsible for any breach of duty he may have committed, however disastrous the consequences of the breach may have been, to anyone to whom the duty was owed, if they were reasonably foreseeable. The first question is whether he was in breach of duty to Peabody. If he was not, Peabody cannot recover their loss from Lambeth.

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Peabody alleged that Lambeth owed them a duty under Schedule 9 to the London Government Act 1963. That Schedule reproduced with modifications Part II of the Public Health (London) Act 1936. Its wording in matters relating to drainage was different from the drainage provisions of the Public Health Act 1936 which were more explicit as to what drainage authorities had to do. Both Acts empowered specified local authorities to control drainage works. The object was to safeguard the health of those occupying houses or other buildings whether as owners, tenants, employees or visitors. We were told by counsel that drainage byelaws made by the Greater London Council in December 1961 and applicable to Lambeth supplement the specific provisions of paragraphs 13 to 16 of Part III of Schedule 9 to the Act of 1963. Paragraph 2(1) of these byelaws provides

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“all drainage works and all materials, appliances and fittings used in the execution of any drainage work shall be—(a) of a suitable nature and quality for the purpose for which they are used . . .”

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This byelaw, together with paragraphs 13 and 15 of Part III of Schedule 9, imposed a duty on Peabody to ensure that the drainage works which they were proposing to construct and which their contractors did construct were suitable for draining the houses to be erected. For the reasons found by the judge they were not. Byelaw 14(1)(a) requires:

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“Every person about to construct, reconstruct or alter any drainage work [to deposit plans with] such detailed description and particulars of the proposed construction, reconstruction or alteration as may be necessary for the purpose of enabling such authority to ascertain whether such construction, reconstruction or alteration will be in accordance with the statutory provisions relative thereto and with these byelaws . . .”

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Byelaw 14(2) requires notice in writing to be given of the day and time at which any drainage work is to be started. This is an echo of what is enacted in paragraph 15(1)(a) of Part III of Schedule 9. Further, by paragraph 13(1) of Part III of Schedule 9:

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“It shall not be lawful in an inner London borough—(a) to erect any house or other building . . . unless there are provided to the satisfaction of the borough council drains conforming with the requirements of this paragraph and all such drains and all works and apparatus in connection therewith are constructed to the satisfaction of the council and, in particular, are constructed of such materials and size, at such level and with such fall, as are approved by the council and are provided with a water supply.”

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Since a house or building cannot be erected unless the drainage authority are satisfied that provision has been made for suitable drains constructed in the specified way and with the specified materials and it is an offence punishable by fine (paragraph 15(1)) to start drainage works without giving the authority an opportunity to inspect them, in my judgment, the statute does impose a duty on the authority to ensure, first, that the plans of houses and buildings intended to be erected provide for

satisfactory drains and, secondly, that suitable drains are constructed in accordance with those plans. If houses or buildings are erected without suitable drains there will be a potential danger to the health not only of any occupiers but also of the immediate neighbourhood. Local authorities in urban areas have been empowered since at least 1875 to ensure the proper drainage of houses: see the Public Health Act 1875, sections 23 to 25. In 1875 the health hazards likely to arise from faulty drains would not have been overlooked having regard to the fact that the Prince Consort's death in 1865 had been attributed to this cause. Paragraph 13(7) of Part III of Schedule 9 to the Act of 1963 envisages that the authority can give orders, directions, requirements or other decisions. The wording of this sub-paragraph is not clear. The only reference to a requirement is in sub-paragraph (6). An expression of dissatisfaction could be a decision given under the sub-paragraph (1). There is no specific reference to an order or direction. The byelaws, however, are replete with directions as to how drains are to be constructed. I would construe paragraph 13(7) as enabling the authority to do more than merely express satisfaction or dissatisfaction with proposed drainage work or with works in the course of construction. For these reasons I have been unable to accept Mr. Owen's submission on behalf of Lambeth that their only duty was to express satisfaction or dissatisfaction and that they had no power to direct the contractors to revert to the flexible design of the drawing of the drainage works which they had approved, when on May 4, 1973, through Toogood, they must be deemed to have learned that the design had been changed. Still less have I been able to accept his submission that Lambeth could express their satisfaction or dissatisfaction at any time before the completion of the development. The provisions of paragraph 15(1) of Part III of Schedule 9 when read with paragraph 13 go to show that drainage authorities should inspect drainage works as they progress.

It follows, in my judgment, that Lambeth had a public duty to ensure that Peabody's proposed housing development had a satisfactory drainage system. They had discharged their duty in part at least by requiring Peabody to deposit plans and they had given proper consideration to those plans which on their face provided for a satisfactory drainage system. The drains, however, had not only to be properly designed, they had to be constructed by Peabody as the building owners to Lambeth's satisfaction and in the manner specified in the statute and in the byelaws. The duty to comply with these statutory requirements rested upon Peabody. They did not discharge their duty in this respect because of their architects' departure from the drainage scheme set out in the deposited plans which Lambeth had approved.

The only relevant allegation of breach of duty against Lambeth in the re-amended statement of claim was that they had failed, through Toogood, to require Peabody to comply with the statutory requirements. In all other respects, as was admitted, Lambeth had performed their statutory duties. This being so, can Peabody rightly claim, as they have done, that Lambeth owed them a duty to require them to do that which they ought to have done anyway? The answer to this question is clearly "No." It may be that if the drainage system had not been put right, an occupier of the houses when completed who suffered injury to health through Toogood's inaction

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A could have sued Lambeth for breach of duty in failing to require Peabody to comply with the deposited plans.

I would allow the appeal.

Fox L.J. Paragraph 13(1) of Part III of Schedule 9 to the London Government Act 1963 provides:

B “(1) It shall not be lawful in an inner London borough—(a) to erect
any house or other building . . . unless there are provided to the
satisfaction of the borough council drains conforming with the require-
ments of this paragraph and all such drains and all works and
apparatus in connection therewith are constructed to the satisfaction
C of the council and, in particular, are constructed of such materials
and size, at such level and with such fall, as are approved by the
council . . .”

And paragraph 13(3) provides:

D “(3) In order to conform with the requirements of this paragraph a
drain must provide for the drainage of the house or building in
connection with which it is required—(a) into such sewer . . . as the
borough council may direct; or (b) if no sewer is or will be available
. . . into such covered cesspool . . . as the council may direct; and the
drains must secure efficient drainage by gravitation at all times and
under all conditions of all parts of the house or building . . .”

E The result of these provisions, in my view, is that there was an
obligation upon Peabody to install, to the satisfaction of the borough
council (Lambeth), drains which secured efficient drainage at all times
and under all conditions to all parts of the houses. The drains as installed
did not do that. They were fundamentally defective. The circumstances in
which that occurred were, briefly, these. A perfectly satisfactory drainage
F system, with flexible pipes, was devised by Peabody's advisers and
submitted to Lambeth. The proposed system was formally approved by
Lambeth on February 14, 1973; the approval was stated to be “in
principle” but it has not been suggested that anything turns on that. On
February 2, 1973, Young (the builders' site agent), Mitchell (a trainee
architect employed by Peabody's architects) and Marlow (Lambeth's
G drainage inspector) met on the site and agreed a quite different, and
unsatisfactory, system of rigid drains. Marlow had, the judge found, no
authority ostensible or otherwise to bind Lambeth. Shortly after the
drainage works began Marlow left the district and was succeeded by
Toogood. On May 3, 1973, Toogood asked the builders' site agent for
some information about the drains. On May 4, 1973, the site agent wrote
H to Lambeth's public health department (“for the attention of Mr. Too-
good”) giving the information which indicated that a flexible system was
not being installed. Toogood did not act on that letter and Peabody's
builders continued to construct rigid drains.

The allegations of negligence made against Lambeth as particularised
in the statement of claim are: “(7) The plaintiffs refer to and repeat (6)
above.” Paragraph (6), which related to the claim against the second
defendants was as follows:

"Instructing the [builders] to change the drainage specification when they knew or ought to have known that the ground comprised shrinkable clay which was subject to seasonal movement, so that it was necessary to provide for such movement in the design of the drains."

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Lambeth did not instruct the builders to change the drainage system. Marlow's actions on February 2, 1973, were made without authority and did not bind Lambeth (even if they purported to be directions at all).

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"(8) Knowing that rigid drains were being installed between the vertical stacks in the buildings and the manholes following receipt of the said letter of May 4, 1973, thereafter failing to require flexibly jointed drains wherever rigid drains had been or were to be installed."

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The allegation, in effect, therefore, is of failure by Lambeth to require the position to be remedied after May 4, 1973. There is no allegation that Lambeth, by anything done or omitted after the May 4 letter, impliedly expressed their satisfaction with or approval of the altered drainage system.

I would accept that Lambeth had power, under paragraph 15(2) of Part III of Schedule 9, to require the defective system to be remedied; and I accept that Lambeth did not do so. The question is whether Lambeth were in breach of a duty to Peabody in not doing so. Following *Anns v. Merton London Borough Council* [1978] A.C. 728, 751 the matter has to be approached in two stages. First, as between Peabody and Lambeth was there a sufficient relationship of proximity such that in the reasonable contemplation of Lambeth carelessness by them would be likely to cause damage to Peabody—in which case a prima facie duty of care exists. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty or the class of persons to whom it is owed.

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Now I can see that, in circumstances such as the present, there may be persons to whom Lambeth, prima facie, owe a duty of care in relation to the exercise of their powers to require compliance with the statute; and that there would be no reason to reduce or limit the scope of such duty. Thus if Lambeth, knowing that a defective drainage system had been installed, took no steps to direct that it be remedied and houses with defective drainage are then sold to members of the public who suffer damage in consequence, it may be that those purchasers would have a cause of action against Lambeth. The purpose of the statute is the protection of the health and safety of the public and the powers are given to the local authorities for that purpose.

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The present case, however, raises different problems. The statute requires the building owners to provide a drainage system, to the satisfaction of the borough council, conforming with the requirements of paragraph 13 of Part III of Schedule 9 to the Act of 1963. Suppose that an owner builder, without seeking the approval of the council, starts to put in a defective system, and suppose that the council became aware of that from some other source. I do not think that, in those circumstances, the

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council would be liable to the owner if they failed to exercise their power to require the drainage system to be altered. There may be a sufficiently proximate relationship to establish that the council could reasonably foresee damage to the owner. But it seems to me that considerations of policy negative the duty. It is not the purpose of the statute to protect owners who act negligently or irresponsibly and so cause themselves harm. That seems to be recognised in *Anns v. Merton London Borough Council* [1978] A.C. 728, 758.

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In the present case Peabody devised a satisfactory drainage system and obtained Lambeth's approval to it. But Peabody then proceeded to put in a quite different—and unsatisfactory—system for which they never sought approval at all. They have not established, and indeed do not seek to establish, that what they did was “to the satisfaction of the borough council.” Marlow may have approved it but we can disregard that because of the absence of authority.

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In installing the system Peabody were therefore in breach of the provisions of Schedule 9. They now say to Lambeth “You knew what we were doing; you should have required us to stop.” Let it be accepted for present purposes that Lambeth could reasonably foresee damage to Peabody if they did not intervene. It seems to me, nevertheless, that the circumstances negative any prima facie duty of care by Lambeth to Peabody to ensure that a faulty system was not installed. Lambeth had, by normal and formal processes, approved a satisfactory system. I think that the courts should view with caution the suggestion that the owner can, without seeking new approval from the council, throw that system to the winds in favour of a defective system, and then visit the consequences upon the council for not stopping him—even if some junior official of the council knew or ought to have known what was happening. Since Peabody had specifically sought and obtained approval for a satisfactory system it seems to me foolhardy to jettison that without precise and formal notice to Lambeth. Peabody itself may not have been negligent, but I do not think that is a sufficient answer in a case such as the present. Knights Hill was a very substantial development of some 245 houses. An application to alter the approved drainage was an important matter which would obviously have been considered at a level in the Lambeth administration where the defects of the new proposal would have been likely to be apparent. It seems to me in those circumstances to be placing an unreasonable burden upon a local authority who have actually approved a proper drainage system and who were never given the opportunity, at an appropriate level, of considering anything else, to impose upon them a duty to an owner to prevent him from acting unlawfully and contrary to that approval merely because notice of the owner's actions or intentions has come to the attention of an official of the authority. The owner, it seems to me, should give the authority the fullest opportunity, upon formal application, of reconsidering the position since very large amounts of money may be involved. I do not say that the mere fact that the owner is acting in breach of the statute will, by itself, necessarily be conclusive against him. But where the local authority have actually approved a satisfactory system and the owner, albeit on the advice of independent

contractors, then abandons that system and unlawfully installs an unsatisfactory one, I think it is material when considering whether a duty of care to that owner is negated, to have regard to the fact that the owner has acted unlawfully.

We were referred to the decision in *Acrecrest Ltd. v. W. S. Hattrell & Partners* [1983] Q.B. 260. In my view, that was a very different case. The site was such that there should have been uniform foundations five feet deep. The local authority's building inspector, however, gave directions that in part of the site the foundations should be five feet deep and in the remainder of the site three feet six inches deep. Thus the position was that the local authority gave a specific direction for the laying of inadequate foundations. I think that is far removed from this case.

I agree that the appeal should be allowed.

SLADE L.J. I have had the advantage of reading in draft the judgment of Lawton L.J. I gratefully adopt his statement of the facts and, as to them, wish to highlight only a few points. (1) On February 2, 1973, Marlow, the drainage inspector appointed by Lambeth to inspect the drainage work on site, agreed with Mitchell, the employee of Peabody's architects, that the drainage might be constructed by the traditional manner of rigid construction. The judge, however, found that Marlow had no express authority to agree to such departure from the plans which had been deposited by Peabody, that Lambeth had not held him out as having any ostensible authority of this nature, and that his action was never ratified by any person with knowledge or authority to do so. On this appeal, these findings of fact have not been challenged, so that it is not open to Peabody to rely in any way on this conversation of February 2, 1973, for the purpose of establishing liability against Lambeth; and they do not now seek to do so. It is thus clear that neither Mitchell nor his employers nor Peabody were entitled to rely on anything that had been said by Marlow as constituting permission by Lambeth to adopt a system of rigid construction.

(2) On February 14, 1973, the senior assistant director of Lambeth's civil engineering department wrote to the architects, stating that the drainage application and accompanying drawings, which had been deposited by them with Lambeth, were approved in principle. The application and drawings provided for a system of flexible construction. On this appeal it has not been suggested that the writer of this letter did not have the requisite authority from Lambeth to write it, or that the architects would not have been entitled to act on it (subject to supplying any further particulars which Lambeth might from time to time require) or that the system thus approved would not have satisfactorily performed its function. It is not claimed that Lambeth, in approving the application and plans, acted negligently or otherwise in breach of duty to anyone.

(3) Regrettably, however, the architects, instead of acting on the letter of February 14, 1973, on which they were entitled to rely, instructed the contractors to construct the drainage system by the traditional manner of rigid construction. During the weeks which followed the start of this work, Toogood, who had by then replaced Marlow as Lambeth's inspector

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A for the site, inspected it on some 20 occasions before May 4, 1973. There are, however, no findings as to what he saw or did and it is not claimed that he was negligent in any way in carrying out these inspections. On this appeal it has not been suggested that, before receipt of the contractors' letter of May 4, 1973, Lambeth either knew or ought to have known of the contractors' departure from the plans which had been approved by

B them on February 14, 1973, or that, before such receipt, Lambeth were guilty of any breach of any duty owed to Peabody or anyone else.

(4) But then, on May 4, 1973, in response to a request for clarification as to the type of drain which the contractors were using, their site agent wrote to Toogood a letter which, it is common ground, should have put him on notice that they were installing a drainage system of rigid

C construction, rather than the already approved system of flexible construction. On receipt of this letter, Toogood did nothing. His employers, who, according to the judge's findings, were not informed by him of the contents of this letter, likewise did nothing.

(5) Toogood continued to inspect the site from time to time after receipt of the letter of May 4, 1973. It has not been suggested on behalf

D of Peabody that he carried out these inspections negligently or that Lambeth during this period effected fewer inspections than they should have done. On the other hand, until the drains began to fail, neither Toogood nor anyone else on Lambeth's behalf, informed Peabody or the contractors that the method which had been adopted for the construction of the drains was unsatisfactory.

E In all the circumstances, I could have understood a submission on behalf of Peabody that Lambeth by their conduct had implicitly approved a departure from the deposited plans by the installation of a system of rigid drains. If, on the evidence, it had been established that such implicit approval had been given, and given negligently, it is possible that Peabody could have successfully relied on the decisions in *Anns v. Merton London Borough Council* [1978] A.C. 728 and *Acrecrest Ltd. v. W. S. Hattrell & Partners* [1983] Q.B. 260, to establish the breach of a duty owed to them

F by Lambeth. The latter case illustrates that a local authority, who do not take reasonable care in the approval of building works, may, on appropriate facts, be held liable in negligence at the suit of the building owner, who has contracted the building work to an independent contractor and

G has not himself been negligent.

This, however, is not the way in which Peabody have pleaded or argued their case. Their claim rests on the propositions that (a) on receipt by Toogood of the letter of May 4, 1973, Lambeth, through him, must be deemed to have acquired knowledge that the contractors employed by Peabody were proceeding with the construction of the drainage system

H otherwise than in compliance with the plans which had been approved by Lambeth; (b) Lambeth, on acquiring such knowledge, were under a duty owed to Peabody to require flexibly jointed drains to be installed on the site in the place of rigid drains; and (c) Lambeth have been in breach of this duty, because they took no steps to enforce such compliance.

The striking feature of this claim is that it is made by plaintiffs who, on the facts as found by the judge, carried out the building development on the site in a manner quite contrary to the requirements of Lambeth (of

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which architects, duly authorised to act on their behalf, had been duly notified in Lambeth's letter of February 14, 1973) and thus in breach of paragraph 13(1) of Part III of Schedule 9 to the London Government Act 1963. In general terms I accept Mr. Dyson's submission that it is the duty of a local authority, in carrying out their functions under paragraph 13, to make known to the building owner their requirements in relation to drainage from time to time. Lambeth's letter of February 14, 1973, however, had, in my opinion, constituted a notification of this nature.

Paragraph 15(2) of Part III of Schedule 9 confers on a borough council a sanction designed to enable them to enforce compliance with their requirements in relation to drainage, against the owner of the relevant site. I accept that Lambeth could have availed themselves of this sanction against Peabody after May 4, 1973. Though it is not necessary to decide the point, I also accept that certain persons other than Peabody (falling within a class of persons to whom damage might reasonably have been foreseen) might have had a good cause of action against Lambeth if, with knowledge of the relevant breaches of their requirements, Lambeth had failed, within a reasonable time, to exercise their powers under paragraph 15(2) to secure compliance by Peabody with their requirements, and those other persons had thereby suffered damage. I cannot accept Mr. Owen's submission that no relevant duty is owed by Lambeth to anyone until the building is ready for occupation.

However, as sufficiently appears from Lord Wilberforce's speech in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 the mere fact that Lambeth might reasonably have foreseen the likelihood of damage being suffered by Peabody, among other persons, in the event of Lambeth's failure to enforce compliance with their requirements, would not by itself suffice to establish the existence of a relevant duty of care owed by Lambeth to Peabody; it would still be

"necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . ."

In the present case I think that the ultimate question for decision is: to whom is the relevant duty owed? Do a local authority, who discover that an owner of a site is acting in breach of specific requirements duly made by them under paragraph 13 of Part III of Schedule 9, owe a duty to *that owner* to exercise their powers to enforce compliance with such requirements *by the offending owner*? The answer to this question must, in my judgment, be "No." I think that none of the authorities which have been cited to us cover the point. The House of Lords in the *Anns* case affirmed in general terms the duty of a local authority to enforce compliance with their byelaws in regard to the foundations of a building, and held that this duty was owed to owners or occupiers of the building other than a "negligent building owner, the source of his own loss": see *per* Lord Wilberforce, at p. 758. The Court of Appeal followed this decision in *Acrecrest Ltd. v. W. S. Hattrell & Partners* [1983] Q.B. 260 and in addition held that a building owner, who has contracted the

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A building work to an independent contractor and has not himself been negligent, is included in the class of persons to whom a local authority owe a duty to take reasonable care in the inspection and approval of building works.

The *Acrecrest* decision may provide grounds for saying that Peabody are not a “negligent building owner,” within Lord Wilberforce’s phraseology. Nevertheless, the facts of the present case are, in my opinion, far removed from those of *Anns v. Merton London Borough Council* [1978] A.C. 728 and *Acrecrest Ltd. v. W. S. Hattrell & Partners* [1983] Q.B. 260 in at least two material respects. First, as Mr. Dyson made clear at the start of his address, Peabody are not relying on any alleged breach of byelaws or building regulations; the relevant obligations of Peabody are to be found simply in paragraphs 13 and 15(1) of Part III of Schedule 9. Secondly, on the facts in the *Acrecrest* case it was clear that the foundations were laid *in accordance with* the requirements of the building inspector and because of his requirements: see *per* Sir David Cairns, at p. 283. It seems that in the *Anns* case also the council’s specified requirements were duly complied with. In neither of these two cases was the court considering the situation, such as that in the present case, where the plaintiff has been acting in disobedience to the specific and proper requirements of the local authority, made in accordance with the functions imposed on them by paragraph 13. Neither these two decisions, nor any other case which has been cited to us, oblige or entitle us to conclude that a local authority owe a duty *to such a person* to compel compliance with their requirements.

The question whether the alleged duty is owed to Peabody thus has to be considered in the absence of direct authority. Lord Wilberforce, in analysing the nature of the duty to enforce compliance with the byelaws, which was under consideration in the *Anns* case [1978] A.C. 728, 758, said that it must be related closely to the purpose for which the relevant powers of inspection had been granted. Similarly, in *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 408, Sachs L.J., in considering the measure of damages, asked himself the question “What range of damage is the proper exercise of the relevant power designed to prevent?”

Can it have been the intention of the legislature, in conferring on a borough council power to enforce against a defaulting site owner requirements made by it in accordance with paragraph 13 of Part III of Schedule 9, to protect such owner against damage which he himself might suffer through his own failure to comply with such requirements? In my opinion, this question can only be answered in the negative. This particular power exists for the protection of other persons—not for that of the person in default. I say nothing about the case where a local authority have failed to make known their requirements or where they have made requirements of an inadequate or defective nature. However, I can see no justification for extending the law of negligence by imposing on a local authority, over and above their public law powers and duties under paragraphs 13 and 15, a duty to exercise their powers of enforcement under paragraph 15(2), owed in private law towards a site owner, who, whether with or without personal negligence, disregards the proper requirements of the local authority, duly made under paragraph 13 and duly communicated to him

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or persons authorised to receive them on his behalf. The practical implications of giving the defaulting owner a right to sue the local authority for damages in such circumstances need consideration, but no elaboration.

For these reasons, I conclude that Peabody have not established the breach of any relevant duty of care owed to them by Lambeth. Accordingly, I too would allow this appeal.

*Appeal allowed with costs.
Leave to appeal refused.*

Solicitors: *Barlow Lyde & Gilbert; Bridges Sawtell & Adams.*

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[COURT OF APPEAL]

P. PERL (EXPORTERS) LTD. v. CAMDEN LONDON BOROUGH COUNCIL

[1970 P. No. 3490]

1983 June 13, 14; 30

Waller, Oliver and
Robert Goff L.JJ.

B

Negligence—Duty of care to whom?—Occupiers of adjoining premises—Defendants failing to secure their premises—Thieves gaining access through defendants' premises to neighbours' premises—Theft of goods from neighbours' premises—Whether defendants liable for acts of independent third party

C

The plaintiffs who were retailers of knitwear carried on business at premises which they occupied as tenants of the defendants. With the knowledge of the defendants and pursuant to the terms of the tenancy, the plaintiffs used the basement of the premises for the storage of garments. The defendants were the owners of the adjoining premises which had a broken lock on the front door. Unauthorised persons were often seen on those premises and burglaries had also taken place there but the defendants had done nothing about complaints regarding the lack of security. During a weekend intruders entered the defendants' premises, knocked a hole through the common wall in the basement and stole garments from the plaintiffs' basement. The plaintiffs brought an action against the defendants claiming damages for negligence. The judge held that there was an absence of reasonable care on the part of the defendants and awarded the plaintiffs damages of £12,338.93 in respect of the theft.

E

On appeal by the defendants:—

Held, allowing the appeal, that there could be exceptions to the general rule at common law that a person was not liable for the acts of an independent third party but (*per* Waller and Oliver L.JJ.) even in circumstances where it was recognised that a defendant was liable for the acts of a third party because of a special relationship which imposed a duty on the defendant to exercise control over the third party causing the damage, there could be no exception to the rule unless there was a high degree of foreseeability that damage would occur as a result of the act or omission of the defendant; that, although it was a foreseeable possibility that thieves might gain access through the defendants' property to the plaintiffs' property, it was not reasonably foreseeable to the defendants that the natural and probable consequence of their omission to secure their premises would be the cause of persons over whom they had no control stealing the plaintiffs' goods (post, pp. 773E–F, 775F–H, 776G–777A, D–G, H–778A, G, 780F–H, 781B–D, 782A–H).

F

G

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, H.L.(E.) applied.

Lamb v. Camden London Borough Council [1981] Q.B. 625, C.A. and *Hosie v. Arbroath Football Club Ltd.*, 1978 S.L.T. 122 considered.

H

Evans v. Glasgow District Council, 1978 S.L.T. 17 doubted.

Per Waller L.J. The absence of control must make the court approach with caution the suggestion that there is liability for a third party who was not under the control of the defendants (post, p. 773F).

Per Oliver L.J. The questions of the existence of a duty to control the acts of a third party and whether the damage brought about by the act of the third party is too remote are simply two

facets of the same problem. Essentially the answer to both questions is to be found in answering the question, in what circumstances is a defendant to be held responsible at common law for the independent act of a third person which he knows or ought to know may injure his neighbour (post, pp. 776H—777A).

Per Robert Goff L.J. There is no case where it has been held, in the absence of a special relationship, that a defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff. There is no duty of care upon occupiers of property to prevent persons from entering their property who might thereby obtain access to neighbouring property (post, p. 783A–C).

Decision of Barry Chedlow Q.C. sitting as a deputy High Court judge in the Queen's Bench Division reversed.

The following cases are referred to in the judgments:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.).

Attorney-General v. Corke [1933] Ch. 89.

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.).

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.).

Evans v. Glasgow District Council, 1978 S.L.T. 17.

Hosie v. Arbroath Football Club Ltd., 1978 S.L.T. 122.

Lamb v. Camden London Borough Council [1981] Q.B. 625; [1981] 2 W.L.R. 1038; [1981] 2 All E.R. 408, C.A.

Ontario Hospital Services Commission v. Borsoski (1975) 54 D.L.R. 3d 339.

Paterson Zochonis Ltd. v. Merfarken Packaging Ltd. [1983] F.S.R. 273.

Rylands v. Fletcher (1868) L.R. 3 H.L. 330, H.L.(E.).

Scott's Trustees v. Moss (1889) 17 R. (Ct. of Sess.) 32.

Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880; [1940] 3 All E.R. 349, H.L.(E.).

Smith v. Leurs (1945) 70 C.L.R. 256.

Stansbie v. Troman [1948] 2 K.B. 48; [1948] 1 All E.R. 599, C.A.

The following additional cases were cited in argument:

Bradburn v. Lindsay [1983] 2 All E.R. 408.

Doughty v. Turner Manufacturing Co. Ltd. [1964] 1 Q.B. 518; [1964] 2 W.L.R. 240; [1964] 1 All E.R. 98, C.A.

Hughes v. Lord Advocate [1963] A.C. 837; [1963] 2 W.L.R. 779; [1963] 1 All E.R. 705, H.L.(Sc.).

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.

APPEAL from Barry Chedlow Q.C. sitting as a deputy High Court judge in the Queen's Bench Division.

The plaintiffs, P. Perl (Exporters) Ltd., as the occupiers of premises at 142, Southampton Row, London W.C.2, claimed damages for negligence against the defendants, Camden London Borough Council as the owners of adjoining premises at 144, Southampton Row, London W.C.2 in respect of the loss arising from the theft on May 22, 1977, of goods stored at the plaintiffs' premises, when intruders gained admission to those premises by entering the defendants' unsecured premises and knocking a hole through a common wall. On March 25, 1982, Barry Chedlow Q.C., sitting as a deputy High Court judge gave judgment for the plaintiffs in the sum of £7,950 with interest at the rate of 12½ per cent. per annum over the period November 1, 1977, to April 1, 1982, together

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A with costs, holding that there was an absence of reasonable care on the part of the defendants in failing to provide a secure structure.

B The defendants appealed on the grounds, inter alia, that the judge erred in law in holding that on the facts as found by him the damage which was caused to the plaintiffs was reasonably foreseeable by the defendants or alternatively, was the type of damage which the defendants ought to have foreseen; (2) that the judge erred in law in holding that the theft of the plaintiffs' property was not a new intervening cause and/or was caused by the defendants' negligence; (3) that the judge erred in law in holding that the breaching of the common wall between nos. 142, and 144, Southampton Row, London W.C.1 by the thieves was not damage different in kind from that which could have been reasonably foreseen by the defendants; (4) alternatively, that the judge erred in law in applying the tests of reasonable foreseeability and should have applied the tests set out in the speech of Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004.

C The facts are stated in the judgment of Waller L.J.

Desmond Browne for the plaintiffs.

D *Michael Turner Q.C.* and *John Trench* for the defendants.

Cur. adv. vult.

June 30. The following judgments were handed down.

E WALLER L.J. This is an appeal from a decision of Mr. Barry Chedlow Q.C., sitting as a deputy High Court judge and given on March 25, 1982. He awarded damages to the plaintiffs of £12,338·93, arising out of a theft by unknown third parties at their premises at 142, Southampton Row. The defendants own 142, Southampton Row and also 144, Southampton Row, 144 being premises divided into flats. The plaintiff company is the tenant of 142. As part of the premises let to the plaintiffs there is a basement which was used by the plaintiffs for the storage of clothing in connection with their business and at the relevant time was used for the storage of a quantity of Scottish sweaters. As part of 144 one of the flats was an unoccupied basement flat adjoining the basement of 142 separated by an 18 inch wall and with no direct communication with it. The entrance to 144 was through a double doorway into a lobby with another double door at the other side, then a short distance across the ground floor and then down some stairs into a light well the floor of which was at basement level. The access to the basement flat was up some steps at the opposite end of the light well into a corridor branching off the main corridor. There were two windows from part of the plaintiffs' premises which looked on to the light well but these windows were barred and wired with a burglar alarm.

H The evidence was that there were no locks on the front door at the time of the burglary, that there had been no catch on the door at the top of the stairs leading to the bottom of the light well and that the door leading into the basement flat was off its hinges. Furthermore, tramps and vagrants had been seen in the light well. There had been a number of complaints to the defendants about the lack of security at the flats and there had also been several burglaries but little or nothing had been done about this up to May 22, 1977. Over the week-end of May 22, 1977, thieves knocked a hole into the common wall between the vacant flat in

the basement of 144 and the basement of 142, the wall being an 18 inch thick brick wall, and through this hole a slim person was able to climb and over 700 garments were stolen. The judge held that there was an absence of reasonable care on the part of the defendants in that they had continuously neglected to supply a secure structure and should have known that vandals, tramps and undesirables were continuously on their structure and therefore it should have been foreseen that damage to property would ensue. He held that the simplest inspection would have revealed a situation which any prudent landowner should not have allowed to have continued. The judge accordingly held that there was an absence of reasonable care and awarded damages to the plaintiffs.

Mr. Turner, on behalf of the defendants, submitted that the judge had applied the wrong test in that he had considered the landlord's duty towards those lawfully in their own premises and had not distinguished that duty from the duty of the occupier of one set of premises to the occupier of adjoining premises. He submitted that the defendants were not under any duty to occupiers of adjoining property or alternatively if they were under a duty it would be to refrain from doing acts which could be foreseen to be very likely to cause damage and they were not in breach of such duty.

Mr. Browne, on behalf of the plaintiffs, submitted that there was a duty of care and that the defendants owed such duty even though the immediate cause of the damage was the act of third parties. He submitted that the defendants' knowledge of the valuable goods held by the plaintiffs in their storeroom, the presence of unauthorised persons in no. 144 and the state of the doors and locks upon the doors were such that the breaking in and stealing was foreseeable and accordingly the defendants were liable.

The facts of this case raise certain questions of principle. If the judgment is right the defendants are liable for the acts of third parties whose identity is unknown. Furthermore although on the facts of this case there was very considerable carelessness on the part of the defendants' staff, if the defendants are liable to the plaintiffs it would follow that in many cases the duty of care imposed upon householders to their neighbours would be very different from that which they have always been understood to be.

The first question to consider is in what circumstances a defendant will be responsible for the acts of a third party. In *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, Lord Pearson considering this problem in relation to the facts of that case, the case being one where Borstal boys escaped from their supervisors, said, at p. 1055:

"Act of third party: In *Weld-Blundell v. Stephens* [1920] A.C. 956, 986, Lord Sumner said: 'In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do.' In *Smith v. Leurs*, 70 C.L.R. 256, 261-262, Dixon J. said: '... apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may

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A even be a duty of care with reference to the control of actions or
conduct of the third person. It is, however, exceptional to find in the
law a duty to control another's actions to prevent harm to strangers.
The general rule is that one man is under no duty of controlling
another man to prevent his doing damage to a third. There are,
B however, special relations which are the source of a duty of this
nature. It appears now to be recognised that it is incumbent upon a
parent who maintains control over a young child to take reasonable
care so to exercise that control as to avoid conduct on his part
exposing the person or property of others to unreasonable danger.
Parental control, where it exists, must be exercised with due care to
prevent the child inflicting intentional damage on others or causing
C damage by conduct involving unreasonable risk of injury to others.'

C "In my opinion, this case falls under the exception and not the
rule, because there was a special relation. The Borstal boys were
under the control of the defendants' officers, and control imports
responsibility. The boys' interference with the boats appears to have
been a direct result of the defendants' officers' failure to exercise
proper control and supervision. Problems may arise in other cases as
D to the responsibility of the defendants' officers for acts done by
Borstal boys when they have completed their escape from control
and are fully at large and acting independently. No such problem
faces the plaintiffs in this case."

We were also referred to *Hosie v. Arbroath Football Club Ltd.*, 1978
S.L.T. 122, where the football club were held liable for injuries caused
when spectators broke through a defective gate and caused injury to one
E man. Thus parents may be responsible for the acts of their children, the
relationship of Borstal staff to Borstal boys on an exercise on an island
may make the staff responsible, or a football club may be responsible for
the actions of spectators whom they have invited to their premises. But
no case has been cited to us where a party has been held liable for the
acts of a third party when there was no element of control over the third
F party. While I do not take the view that there can never be such a case I
do take the view that the absence of control must make the court approach
the suggestion that there is liability for a third party who was not under
the control of the defendants with caution.

The next question to consider is the nature of the duty of the
defendants as occupier of no. 144 to the plaintiffs as occupiers of the
adjoining property no. 142. In *Dorset Yacht Co. Ltd. v. Home Office*
G [1970] A.C. 1004, the case to which I have already referred, the House of
Lords held that the Home Office were liable when seven Borstal young
offenders escaped and damaged a yacht in trying to escape from Brownsea
Island where they were. Lord Reid said, at p. 1030:

H "These cases show that, where human action forms one of the links
between the original wrongdoing of the defendant and the loss
suffered by the plaintiff, that action must at least have been something
very likely to happen if it is not to be regarded as novus actus
interveniens breaking the chain of causation. I do not think that a
mere foreseeable possibility is or should be sufficient, for then the
intervening human action can more properly be regarded as a new
cause than as a consequence of the original wrongdoing. But if the
intervening action was likely to happen I do not think that it can
matter whether that action was innocent or tortious or criminal.

Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely."

It is not altogether clear from that passage what kind of possibility or probability Lord Reid had in mind, but Lord Morris of Borth-y-Gest said, at p. 1034:

"On these facts a normal or even modest measure of prescience and prevision must have led any ordinary person, but rather specially an officer in charge, to realise that the boys might wish to escape and might use a yacht if one was near at hand to help them do so. That is exactly what it is said that seven boys did. In my view, the officers must have appreciated that either in an escape attempt or by reason of some other prompting the boys might interfere with one of the yachts with consequent likelihood of doing some injury to it. The risk of such a happening was glaringly obvious. The possibilities of damage being done to one of the nearby yachts (assuming that they were nearby) were many and apparent. In that situation and in those circumstances I consider that a duty of care was owed by the officers to the owners of the nearby yachts. The principle expressed in Lord Atkin's classic words in his speech in *Donoghue v. Stevenson* [1932] A.C. 562, 580, would seem to be directly applicable. If the principle applied, then it was incumbent on the officers to avoid acts or omissions which they could reasonably foresee would be likely to injure the owners of yachts. They were persons so closely and directly affected by what the officers did or failed to do that they ought reasonably to have been in the contemplation of the officers."

And Lord Diplock said, at p. 1070:

"I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped."

Lord Diplock, in the passage I have quoted, restricts the foreseeability and Lord Morris of Borth-y-Gest describes the risk as glaringly obvious. These quotations do indicate that in circumstances in which it is sought to make somebody liable for the actions of a third party it would appear to require a fairly high degree of foreseeability.

This question was considered by the Court of Appeal in *Lamb v. Camden London Borough Council* [1981] Q.B. 625. In that case the local council had broken a water main and as a result the plaintiffs' house subsided and the walls cracked. Sometime after the house had become empty, squatters went into the house and did serious damage to the

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A house. The Court of Appeal had to consider whether or not that damage was too remote and unanimously came to the conclusion that it was too remote. The reasoning of each of the judges differed somewhat. I prefer that of Oliver L.J., who after quoting the passage which I have already quoted from Lord Reid's speech, when considering precisely what Lord Reid meant, said, at p. 642:

B "But the question is not what is foreseeable merely as a possibility but what would the reasonable man actually foresee if he thought about it, and all that Lord Reid seems to me to be saying is that the hypothetical reasonable man in the position of the tortfeasor cannot be said to foresee the behaviour of another person unless that behaviour is such as would, viewed objectively, be very likely to occur."

C And then, at p. 643:

D "The test of remoteness is said to be the same as the test of duty in negligence: see *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388. If the instant case is approached as a case of negligence and one asks the question, did the defendants owe a duty not to break a waterpipe so as to cause the plaintiffs' house to be invaded by squatters a year later, the tenuousness of the linkage between act and result becomes apparent. I confess that I find it inconceivable that the reasonable man wielding his pick in the road in 1973 could be said reasonably to foresee that his puncturing of a water main would fill the plaintiffs' house with uninvited guests in 1974. Whilst, therefore, I am not altogether in accord with the official referee's reasoning, I think that he came to the right conclusion in the light of his finding of fact, which has not been challenged. Accordingly, the appeal should, in my judgment, be dismissed."

E And Oliver L.J. finishes, at p. 644:

F "There may, for instance, be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it fixes a defendant with responsibility for the act of a third party over whom he has and can have no control."

I agree with Oliver L.J. that the foreseeability required to impose a liability for the acts of some independent third parties requires a very high degree of foreseeability. Adapting the words of Lord Atkin, "ought the defendants to have had the plaintiffs, as occupiers of no. 142, in contemplation as being affected when directing their minds to the question of repairing the doors and locks of no. 144?" It is not sought here to make the defendants liable for any act, it is sought to make the defendants liable for an omission to act. Can it be said that the defendants ought reasonably to have had in contemplation the fact that third parties would go into the empty basement of 144, make a hole in an 18 inch wall large enough for somebody to climb through and steal a large number of articles of clothing from within? I would unhesitatingly answer "No." Whether or not an occupier of a house can ever be liable to a neighbour for an omission to act is doubtful. I do not however have to consider whether such a case may possibly arise. It is sufficient to say that in this case I am satisfied that there was no breach of duty by the defendants to the plaintiffs and accordingly I would allow this appeal.

OLIVER L.J. The question raised by this appeal is solely one of the defendants' common law liability to the plaintiffs for the tort of negligence. No contractual duty is alleged and the fact that, in addition to having the control of the common parts and the basement flat in no. 144 Southampton Row, the defendants were also the plaintiffs' landlords in respect of the premises at no. 142 is irrelevant save in so far as it supports the suggestion that the defendants were familiar with the geographical features of both premises and that they were or should have been aware of the possible risk of intrusion into no. 142 by trespassers who had first entered no. 144. Thus the question posed is a perfectly general one—does a landowner owe any, and if so what, duty to an adjoining occupier to secure his land against the entry of trespassers who may damage his neighbour's property? The deputy judge held that there was, in the circumstances of this case, a duty in the defendants to take reasonable care to ensure that their premises were secured against trespassers and the basis of his decision was that since it would be reasonably foreseen that trespassers entering the defendants' premises might include (as they evidently did in fact) thieves interested in securing illegal access to the adjoining premises, the case fell squarely within the classic statement of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

The defendants have, of course, done nothing; so the case is one, not of an act, but of an omission. They simply omitted to keep and maintain an effective lock on the front door giving access to no. 144 and they similarly omitted to keep and maintain effective internal barriers such as would or might have prevented trespassers obtaining access to the rear wall of the plaintiffs' store-room. It cannot be asserted that those omissions, by themselves, caused any injury to anyone. They merely enabled some unknown third party over whom the defendants had no control to effect an unlawful entry upon the defendants' premises and thence to effect an equally unlawful entry upon the plaintiffs' premises. It would, in fact, be more accurate to say that the omissions failed to impede such an entry rather than that they enabled it to take place, for it is by no means certain that even an effective lock on the outer door would have prevented an incursion by a really determined gang of thieves. Thus the assertion that the defendants are liable for the damage which the plaintiffs sustained rests upon the proposition that the breaking into the plaintiffs' premises was the natural and probable consequence of the defendants' failure to secure their own premises from invasion.

Mr. Turner Q.C., on behalf of the defendants, has forcefully submitted that the judge was wrong in two essential respects. First, he submits that there was no foundation in law for the duty attributed to the defendants—in broad terms a general common law duty to control the acts of an independent third party cannot exist apart from some special relationship with the third party, which does not exist here. Secondly, in the absence of such a relationship, damage arising from the act of an independent third party is, in any event, too remote.

Speaking for myself, I think that the question of the existence of a duty and that of whether the damage brought about by the act of a third party is too remote are simply two facets of the same problem; for if there be a duty to take reasonable care to prevent damage being caused by a third party then I find it difficult to see how damage caused by the third party consequent upon the failure to take such care can be too remote a

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A consequence of the breach of duty. Essentially the answer to both questions is to be found in answering the question, in what circumstances is a defendant to be held responsible at common law for the independent act of a third person which he knows or ought to know may injure his neighbour? The deputy judge, as I read his judgment, deduced from the authorities the general proposition that where the act of the third person of which A complains is something which is likely to occur if B does or omits to do a particular act then B owes a duty to A to refrain from or to do that act. The foundation for the plaintiffs' case and for the deputy judge's conclusion is the speech of Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 and, in particular, this passage, at p. 1030:

C "These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. D Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant."

E In *Lamb v. Camden London Borough Council* [1981] 1 Q.B. 625, I ventured to suggest that in this passage Lord Reid was seeking to do no more than to place a qualification or limitation, in cases of third party intervention, on the more general proposition that he who does or omits to do something is responsible for the reasonably foreseeable consequences of his act or omission, the suggestion (as I thought) being that in such a case a consequence should not be regarded as reasonably foreseeable unless it was something which was either likely or very likely to happen. Whether, however, that be right or wrong, the passage quoted does not appear to me, when read in its full context, to be authority for the more general proposition that wherever particular conduct of a third person is likely to take place if something is done or omitted there arises from that likelihood alone a duty to refrain from or to do (as the case may be) the relevant act. That is, as it seems to me, the general proposition which the deputy judge deduced from the authorities to which G he referred and which led him to the conclusion that the defendants were liable for the damage which the plaintiffs suffered in this case. He observed:

H "I think that if the defendants continuously neglect to supply a secure structure and know, or should know, that vandals, tramps and undesirables are continuously on their structure it can be fairly be foreseen that damage to property will ensue."

It can be seen from this that the deputy judge is presupposing a duty "to supply a secure structure"; and when the judgment is analysed it is found that there is, in fact, no support for the existence of the duty apart from the knowledge that the structure is frequented by trespassers. The foreseeability of damage to property is, by itself, being treated as the foundation of the duty. Thus the first question to be answered is whether

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004 is authority for the proposition. In my judgment, it clearly is not. All of their Lordships who constituted the majority recognised that there was, apart from special relationships, no general duty to avoid or inhibit conduct of third parties which foreseeably may lead to damage. Lord Reid observed, at p. 1027:

“when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person’s assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty.”

Lord Morris of Borth-y-Gest observed, at p. 1034:

“It cannot be, therefore, that in all circumstances where certain consequences can reasonably be foreseen a duty of care arises. A failure to take some preventive action or rescue operation does not of and by itself necessarily betoken any breach of a legal duty of care.”

(See also Lord Pearson at pp. 1054F–G and 1055F and Lord Diplock at p. 1060E–H).

What gave rise to the duty in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 was the special relationship which existed between the defendants and the third person who inflicted the damage, inasmuch as the defendants had both the statutory right and the statutory duty to exercise control over those persons. This was I think, implicit in the speech of Lord Reid, and it was expressed in the speeches of Lord Morris, Lord Pearson and Lord Diplock, all of whom quoted and relied upon the judgment of Dixon J. in *Smith v. Leurs* (1945) 70 C.L.R. 256, where he said, at p. 262:

“It is, however, exceptional to find in the law a duty to control another’s action to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.”

Lord Diplock, indeed, went further, in that he envisaged—at any rate on the facts of that case—a special relation also between the defendants and the person injured arising from the particular susceptibility of that person to risk of injury: see p. 1070D–E.

The *Dorset Yacht* case does not, therefore, in my judgment support the conclusion at which the deputy judge arrived, unless it can be said that there was here some special relation taking the case out of the general rule which excludes liability for the acts of independent third parties. Mr. Browne has submitted that that special relation is to be found from a number of factors combined that is to say (a) geographical propinquity; (b) the defendants’ knowledge that the plaintiffs used their premises to store goods which might be attractive to thieves; (c) the defendants’ knowledge or means of knowledge that there had been frequent incursions by trespassers (including burglaries in some of the flats in no. 144) and (d) the relatively simple steps required to impede the entry of trespassers by fitting an effective lock on the front door. These factors, however, whilst they are, no doubt, relevant as regards remoteness of damage and may possibly be said to give rise to a relation between the defendants and the plaintiffs, go nowhere towards establishing the sort of relation referred to

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A by the majority in the *Dorset Yacht* case and clearly envisaged by Dixon J. in the passage from his judgment in *Smith v. Leurs*, 70 C.L.R. 256 referred to above, namely a relation between the defendant and the third party for whose act he is said to be responsible. If, therefore, support is to be found for the deputy judge's broad proposition it must, in my judgment, be looked for elsewhere. He relied, in addition to the *Dorset Yacht* case, on *Hosie v. Arbroath Football Club Ltd.*, 1978 S.L.T. 122 and

B *Evans v. Glasgow District Council*, 1978 S.L.T. 17. I do not, for my part, find the former of these of very much assistance. It was a claim under the Occupiers' Liability (Scotland) Act 1960 and there was no question but that the defendants there owed a duty to the plaintiff to take reasonable care to keep their football ground and its entry and exit facilities safe, by inter alia, ensuring that the gates were sufficiently strong to withstand

C pressure from crowds. The question at issue was whether that duty extended to deliberate interference by unruly elements, the occurrence of which was clearly not only foreseeable but, having regard to the known habits of football crowds, likely. The case does not, however, help in the present context because there clearly was there a special relation both between the defendants and those who damaged the plaintiff and between the defendants and the plaintiff, himself, inasmuch as both the plaintiff

D and his assailants were the defendants' invitees for whom as occupiers of the ground the defendants had to assume responsibility. The same may I think be said of *Scott's Trustees v. Moss* (1889) 17 R. (Ct. of Sess.) 32, referred to by Lord Reid in the *Dorset Yacht* case. If, for your own commercial purpose, you invite or entice a crowd to assemble in circumstances where you can reasonably foresee that they are likely to damage

E the plaintiff, it is not difficult to infer that the circumstances of the enticement or invitation create the special relation which grounds responsibility. That however is a far cry from a case where the defendant does nothing in the way of issuing an invitation but merely takes insufficient steps to protect himself from invasion of his own rights. The proposition that because I have failed adequately to protect myself against X's wrongdoing I therefore become responsible for the further wrong which

F X chooses to do to Y is one which is, on the face of it, startling. Mr. Browne, however, submits that this consequence flows from the other case relied on by the judge—*Evans v. Glasgow District Council*, 1978 S.L.T. 17. There the defenders had demolished premises which adjoined the pursuer's premises (also leased from the defenders) and in doing so had damaged the locks securing the pursuer's doors, which they replaced

G with inadequate locks. The pursuer suffered loss by reason of (a) theft of goods by persons who broke the new and inadequate locks, (b) fire caused by vandals dropping lighted material through gaps left in the floorboards above the pursuer's premises and (c) escape of water from the defenders' premises caused by vandals interfering with the plumbing thereon. The question (expressed in terms of English law) was whether the allegation to this effect in the pleading were demurrable. In fact the action was

H dismissed on other grounds, which turned upon an exclusion clause in the pursuer's lease, but the defenders' claim that the allegations were irrelevant failed, Lord Wylie, the Lord Ordinary, observing, at p. 19:

"... I accept the submission of senior counsel for the defenders that there is accordingly a very strong presumption that no such duty exists in law. On the other hand, in such a situation, I think that the court is thrown back on first principles, and it cannot be ignored that,

in the words of Lord Macmillan in *Donoghue v. Stevenson*, 1932 S.L.T. at p. 339: 'the categories of negligence are never closed.' In the circumstances of the present case, on averment, there is the all-important factor that the defenders were well aware that both the premises occupied by the pursuer were located in areas where vandalism was likely to take place. . . . In these circumstances . . . it seems to me that it would be entirely in accordance with principle to hold that in such circumstances there was a general duty on owners or occupiers of property, particularly property of the tenement type, where they chose to leave it vacant for any material length of time, to take reasonable care to see that it was proof against the kind of vandalism which was calculated to affect adjoining property."

The duty thus stated is, of course, extremely wide, but quite apart from the fact that the case is not binding upon this court, I find some difficulty in following it. In the first place, it was decided before *Lamb's* case, with which, as I think, it is in conflict. Moreover, perhaps somewhat surprisingly, it seems to have been decided without reference to the *Dorset Yacht* case. Quite apart from this, however, the facts were very different. The defenders had actually altered the state of their adjoining premises in a way which had rendered the pursuer's premises more vulnerable than they would normally have been; they had done damage to the pursuer's premises which had not been properly repaired, and the fire and water damage, albeit created by trespassers, would (at any rate in English law) have prima facie given rise to a liability in nuisance in any event (*Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880). Furthermore, it has to be borne in mind that the application was, effectively, a striking-out application and the only question which the court had to decide was whether the case was sufficiently arguable to justify its going to trial. This indeed appears a little later in Lord Wylie's judgment where he said, at p. 19:

"Notwithstanding two substantial amendments, counsel for the pursuer did not seek to argue more than that enough had been averred to justify an inquiry into the facts and in my view the pleadings qualify for that."

In the circumstances, therefore, I do not find in this case any substantial support for the wide proposition for which Mr. Browne contends and upon which the deputy judge appears to have relied. There are, of course, circumstances where, without any special relation between the defendant and the third party tortfeasor, a duty of care in relation to the acts of independent third parties may arise as a result of a relationship between the plaintiff and the defendant. Such a duty may be and frequently is assumed as a matter of contract, see for instance *Stansbie v. Troman* [1948] 2 K.B. 48, where the duty of care was an implied term of the defendant's engagement to decorate the plaintiff's house.

There are, however, no such circumstances that I can see in this case. Mr. Browne, in a final attempt to bring himself within the *Dorset Yacht* case, has submitted that there was indeed, in this case, the necessary special relationship arising from control and he arrives at this as I understand his submission by this process. A lock on the front door of 144 would make entry by trespassers more difficult. The defendants could have fitted such a lock. If they had done, trespassers could not have entered without breaking the lock. Therefore the thieves who entered the

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A plaintiffs' premises could not have so entered without breaking the defendants' lock. Therefore the thieves were under the defendants' "control." The proposition has only to be thus stated to be seen to be fallacious and would ultimately lead to the further proposition that the Borstal boys in the *Dorset Yacht* case were under the control of Dorset Yacht Co. because the yacht could have been made more secure against theft than in fact it was.

B Speaking for myself, I am unable to see here any circumstances from which there could properly be inferred any duty upon the defendants so to protect their own premises as to prevent trespassers from entering the plaintiffs' premises beyond the fact that such entry was, as it plainly was, a foreseeable possibility. In my judgment that is not, by itself, sufficient to raise the duty for which the plaintiffs contend. Indeed the contrary
C proposition would, I think, lead to the most startling and far-reaching consequences. Not only would every owner of a semi-detached or terrace house have a duty to every adjoining owner to secure his premises against entry but the extent of the duty would depend upon the use that the adjoining owner chose to make of his premises. The more valuable the contents, the greater the temptation and the greater the risk of entry. The greater the risk of entry, the higher the standard of reasonable care.
D In fairness to the deputy judge he was, I think, put in a difficult position by a concession made in the court below and to which he refers in his judgment, for it was, as I understand it, conceded that if the thieves had entered the plaintiffs' store-room through the windows overlooking the light well on the defendants' premises or through a door hypothetically supposed to open onto that light-well, the defendants would have been
E liable. If that concession stood, then for my part I would find it difficult to say that the mere fact that entry was effected in a different and perhaps more unusual way could render the damage too remote; and with that concession before him I regard it as not altogether surprising that the deputy judge reached the conclusion that he did. Mr. Turner, however, makes (and in my judgment rightly makes) no such concession in this court.

F For the reasons which I have endeavoured to state, I too would allow this appeal.

ROBERT GOFF L.J. The facts of the present case, and the submissions of counsel, have been set out by Waller L.J. in his judgment; and I need not repeat them. The crucial question in the case, as it seems to me, is
G whether an occupier of property owes a duty of care to owners and users of neighbouring property to prevent third persons from entering his property who might thereby obtain access to the neighbouring property and there commit theft.

Nowadays, following the statement of principle by Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751–752, the question has to be approached in two stages:
H

"First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to

negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . .”

There may well be cases in which it can be said that the occupier of property can reasonably foresee that, if he leaves his property unprotected, thieves may enter and thereby gain access to neighbouring property. For example, it may be notorious that burglars are operating in a certain part of a town; and an occupier of premises may reasonably foresee that, if he goes away for a weekend and leaves his house unprotected—perhaps if it is empty or, to take an example considered in argument, if he always leaves a window open for his cat—a burglar may enter and thereby work unmolested over the weekend to gain access to the house next door where there is a valuable collection of pictures. Even so, in my judgment, there are considerations in such circumstances which ought to negative the broad duty of care for which the plaintiffs’ counsel contended.

The vital feature in the type of case under consideration is, as I see it, that the plaintiffs are seeking to render the defendants liable in negligence for the wrongdoing of a third party. Now there may indeed be circumstances where a person may be liable for a third party’s wrongdoing. He may of course be liable in contract (see *Stansbie v. Troman* [1948] 2 K.B. 48); he may be liable under the Occupiers’ Liability Act 1957—for example, where he invites a crowd of persons onto his land and part of his premises, designed to control the crowd, are unfit for that purpose and collapse, with the result that the plaintiff is injured (see *Hosie v. Arbroath Football Club Ltd.*, 1978 S.L.T. 122); he may be liable in nuisance, if he causes or permits persons to gather on his land, and they impair his neighbour’s enjoyment of his land (cf. *Attorney-General v. Corke* [1933] 1 Ch. 89, though that case was expressed to be decided on the principle in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330); and he may be vicariously liable for the third party’s wrongdoing. He may even be liable in negligence, when the wrongdoer is a person who, by virtue of a special relationship, is under his control: see *Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004. Speaking for myself, I do not rule out the possibility that there are other circumstances in which a person may be liable in negligence for the wrongdoing of a third party. This is a matter which this court considered recently in *Paterson Zochonis Ltd. v. Merfarken Packaging Ltd.* [1983] F.S.R. 273, and which I need not therefore dwell upon in this judgment. In particular, I have in mind certain cases where the defendant presents the wrongdoer with the means to commit the wrong, in circumstances where it is obvious or very likely that he will do so—as, for example, where he hands over a car to be driven by a person who is drunk, or plainly incompetent, who then runs over the plaintiff (cf. *Ontario Hospital Services Commission v. Borsoski* (1975) 54 D.L.R. 3d. 339). But such cases are very different from the present case, where the allegation is that the defendants failed to exercise reasonable care to prevent a third party from causing damage to the plaintiffs. In *Smith v. Leurs*, 70 C.L.R. 256, in a passage which was cited with approval in *Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004, 1038, 1055, 1063, Dixon J. said, at p. 262:

“The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.”

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A It is of course true that in the present case the plaintiffs do not allege that the defendants should have controlled the thieves who broke into their storeroom. But they do allege that the defendants should have exercised reasonable care to prevent them from gaining access through their own premises; and in my judgment the statement of principle by Dixon J. is equally apposite in such a case. I know of no case where it has been held, in the absence of a special relationship, that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff. If the Scottish case of *Evans v. Glasgow District Council*, 1978 S.L.T. 17 is to be understood as reaching any such conclusion, then I (associating myself with the observations of Oliver L.J. on that case) would, with all respect, not be prepared to follow it. Indeed, the consequences of accepting the plaintiffs' submission in the present case are so startling, that I have no hesitation in rejecting the suggestion that there is a duty of care upon occupiers of property to prevent persons from entering their property who might thereby obtain access to neighbouring property. Is every occupier of a terraced house under a duty to his neighbours to shut his windows or lock his door when he goes out, or to keep access to his cellars secure, or even to remove his fire escape, at the risk of being held liable in damages if thieves thereby obtain access to his own house and thence to his neighbour's house? I cannot think that the law imposes any such duty.

For these reasons, I too would allow the appeal.

*Appeal allowed with costs.
Leave to appeal refused.*

Solicitors: *David Alterman & Co.; Barlow Lyde & Gilbert.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

[COURT OF APPEAL]

BANK MELLAT v. HELLINIKI TECHNIKI S.A.

[1983 H. No. 730]

1983 June 8, 9; 28

Waller, Kerr and Robert Goff L.JJ.

Arbitration—Costs—Security for—Claimants resident abroad—Agreement to arbitrate according to rules of International Chamber of Commerce—Arbitration to be held in London—Respondents' application for security for costs on ground that claimants ordinarily resident abroad—Whether appropriate to make order—Whether I.C.C. Rules intended to be self-sufficient—Whether application inconsistent with scheme and spirit of Rules—Arbitration Act 1950 (14 & 15 Geo. 6, c. 27), s. 12(6)(a)¹—R.S.C., Ord. 23, r. 1(1)(a)²

A contract between an Iranian bank, the defendants and a Danish company concerning a joint venture for development of

¹ Arbitration Act 1950, s. 12(6)(a): see post, p. 789F–G.

² R.S.C., Ord. 23, r. 1(1)(a): see post, p. 788G.

land near Teheran stated that it was to be governed by the laws of Iran and that disputes arising under it should be settled by arbitration "in accordance with the rules of the International Chamber of Commerce, Paris ("I.C.C."), the venue to be the City of London and the proceedings to be conducted in English. None of the parties carried on business in England or had any other connection with England. Subsequently, the defendants took over all the rights and liabilities of the Danish company, and in 1979 the Iranian bank was merged into the plaintiffs, who took over all their rights and liabilities under the contract. The plaintiffs were incorporated in Iran but were registered in England under Part X of the Companies Act 1948 and held a full licence under the Banking Act 1979 to carry on banking business in England. By 1980, serious disputes had arisen between the plaintiffs and the defendants, and by request to the I.C.C. dated November 20, 1980, the defendants commenced arbitration proceedings against the plaintiffs. Pursuant to the rules of the I.C.C., each party paid U.S.\$95,000 (half of a total of U.S.\$190,000) towards the I.C.C.'s administration expenses and the arbitrators' fees. On February 18, 1983, the plaintiffs issued a summons for an order that the defendants should provide security for the plaintiffs' costs in the arbitration in a total sum of U.S.\$118,850, including the U.S.\$95,000 paid by the plaintiffs to the I.C.C., on the grounds that the defendants were ordinarily resident outside the jurisdiction and that there was reason to believe that they would be unable to pay the plaintiffs' costs if the plaintiffs were successful in the arbitration. Bingham J. declined to make the order sought.

On appeal by the plaintiffs:—

Held, dismissing the appeal, that (*per* Waller and Kerr L.JJ.) the I.C.C. Rules did not, on their true construction, expressly or by necessary implication exclude all applications to the local courts other than for interim or conservatory measures, but that they did provide a code that was intended to be self-sufficient in the sense that it was capable of covering all aspects of arbitration under the rules without the need for recourse to any municipal system of law or any application to the courts of the forum; that, while the grant or refusal of an order for security in international arbitrations must depend on all the circumstances of each case, particular regard would be given to the degree of connection that the parties had with England and its legal system and the English courts should be slow in applying the jurisdiction to order security for costs in international arbitration unless, in the particular circumstances of each case, there was some more specific connection with England than the mere fact that the parties had agreed that any arbitration was to take place there; and that the plaintiffs' application for security for costs was sufficiently inconsistent with the scheme and spirit of the I.C.C. Rules to make it inappropriate in principle for the court to exercise its statutory discretion in favour of the order sought (post, pp. 790G, 791D–G, 795H—796C, 804E); (*per* Robert Goff L.J.) in the case of international commercial arbitrations of the kind in question the court should as a general rule decline to order security for costs against a foreign claimant unless there were special circumstances warranting it (post, p. 802D–E).

Per Waller and Kerr L.JJ. Since in an arbitration under the I.C.C. Rules that has no connection with this country other than that it had been agreed between foreign parties that any such arbitration was to take place here it would be inappropriate in principle to make an order for security for costs on the ground that the claimant is ordinarily resident abroad, it would also be wrong in principle to make any such order on the ground that the

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- A claimant may be unable to pay the other party's costs if the award requires him to do so (post, pp. 797A-B, 804E).
Decision of Bingham J. affirmed.

The following cases are referred to in the judgments:

Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co. Ltd. [1962] 2 Q.B. 581; [1962] 3 W.L.R. 758; [1962] 3 All E.R. 460.

- B *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468; [1973] 1 All E.R. 555.
Parkinson (Sir Lindsay) & Co. Ltd. v. Triplan Ltd. [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273, C.A.
Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583; [1970] 2 W.L.R. 728; [1970] 1 All E.R. 796, H.L.(E.).

The following additional cases were cited in argument:

- C *Aeronave S.p.A. v. Westland Charters Ltd.* [1971] 1 W.L.R. 1445; [1971] 3 All E.R. 531, C.A.
Bilcon Ltd. v. Fegmay Investments Ltd. [1966] 2 Q.B. 221; [1966] 3 W.L.R. 118; [1966] 2 All E.R. 513.
Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.).
D *Compagnie Française de Télévision v. Thorn Consumer Electronics Ltd.* (1981) 7 F.S.R. 306.
Hyundai Construction Co. Ltd. v. Enterprise A. Dodin S.A. (unreported); January 29, 1982 (Bingham J.).

INTERLOCUTORY APPEAL from Bingham J.

- E By originating summons dated February 18, 1983, the plaintiffs, Bank Mellat, a company incorporated according to the laws of Iran, sought an order that pursuant to section 12(6) of the Arbitration Act 1950 the defendants, Helliniki Techniki S.A., give security for the plaintiffs' costs in an arbitration between the parties before the International Chamber of Commerce ("I.C.C.") Court of Arbitration, TM de H Case No. 3997/RP,
F on the grounds that the defendants, the claimants in the arbitration, were (a) a limited company and there was reason to believe that they would be unable to pay the plaintiffs' costs if the plaintiffs were successful in their defence in the arbitration and (b) ordinarily resident outside the jurisdiction.

On March 25, 1983, Bingham J. in chambers in the Commercial Court dismissed the plaintiffs' application, giving them leave to appeal.

- G The plaintiffs appealed, on the grounds that Bingham J. had erred in law in holding that the rules of the I.C.C. formed a comprehensive code for the conduct of arbitrations referred to that body; that he had erred in law and in the exercise of his discretion in holding that it was generally necessary for a party seeking security in an I.C.C. arbitration to show that, whether expressly or by implication, the parties to the arbitration had agreed that they would submit to the procedural provisions of the English courts; that he had erred in law and been wrong in fact in failing to find that the parties to the arbitration in question had intended to subject or avail themselves in any way to or of the facilities of the English courts; that he had erred in the exercise of his discretion by placing too great a weight on his failure to find that the parties had agreed to subject themselves to or avail themselves in any way of the facilities of the English courts and placing insufficient weight on the defendants' lack of solvency and their foreign residence; and that, without prejudice to the preceding

grounds, he had failed to treat the application as one permitted by the rules of the I.C.C. and, if necessary, article 8.5 thereof.

By a respondents' notice, the defendants contended that Bingham J.'s decision should be affirmed on the additional grounds that by submitting to the rules of the I.C.C. Court of Arbitration the parties had agreed, by necessary implication, not to apply to the court for security for costs, notwithstanding that they had agreed on the City of London as the place of arbitration; that by submitting to those rules, and in particular article 8.5 thereof, the parties had expressly agreed not to apply to the court, save in exceptional circumstances (of which there were none in the present case), for security for costs after transmission of the file to the arbitrators; and that, in a case where the parties had expressly submitted to the rules, it could be inferred from the fact that they had chosen London as the place of arbitration, whether at the time of making the arbitration agreement or subsequently, that they had agreed to vary or waive the contractual obligation that would otherwise lie on them not to apply to the court for security for costs. They further contended by way of cross-appeal that the plaintiffs' claim for security was excessive and sought an order that the defendants give security for the plaintiffs' costs in the arbitration for the period to March 4, 1983, in the sum of U.S.\$9,367 (or the sterling equivalent at the time when the security was provided) and that in the meantime all further proceedings in the arbitration be stayed.

The facts are stated in the judgment of Kerr L.J.

Mark Littman Q.C. and Nicholas Chambers for the plaintiffs.

Ian Glick for the defendants.

Cur. adv. vult.

June 28. The following judgments were handed down.

KERR L.J. This is an appeal from a judgment of Bingham J., given on March 25, 1983, which raises an important question on orders for security for costs in relation to international arbitrations held in this country. In the present case this question arises in the context of the Rules of the Court of Arbitration of the International Chamber of Commerce in Paris, to which I will refer generally as "the I.C.C. Rules."

The facts

The arbitration arises out of a contract in the form of a tripartite "participation agreement" concluded on September 29, 1974, between Bank Omran of Teheran, the defendants, Helliniki Techniki S.A. of Athens, and a Danish company, Larsen and Nielsen. The contract concerned a joint venture for the development of certain land near Teheran. The land was to be provided by Bank Omran, and the defendants and the Danish company were to provide the necessary design and construction services for its development. The contract stated that it was to be governed by the laws of Iran and contained an arbitration clause of which the following terms are material:

"Any dispute arising between the parties hereto in any way related to or connected with the interpretation or implementation of this agreement shall be finally settled by arbitration, by an arbitral tribunal composed of three arbitrators, in accordance with the Rules of

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A Conciliation and Arbitration of the International Chamber of Commerce, Paris. . . . The venue shall be the City of London, and the arbitration proceedings shall be conducted in the English language."

B None of the parties carried on business in England or had any other connection with this country. Subsequently the defendants took over all rights and liabilities of the Danish company, which disappears from the scene for present purposes. In June 1979 Bank Omran was merged, together with other banks, into the plaintiffs, Bank Mellat, which took over all the rights and liabilities of Bank Omran under the contract. The plaintiffs are registered here under Part X of the Companies Act 1948 and hold a full licence under the Banking Act 1979 to carry on banking business in this country, but their place of incorporation is Iran.

C By 1980 serious disputes had arisen between the plaintiffs and the defendants under the contract. On July 26, 1980, the defendants served a notice of default and commenced the present arbitration proceedings against the plaintiffs by a request addressed to the I.C.C. dated November 20, 1980. Three arbitrators were thereupon appointed: an English barrister by the defendants, an Iranian lawyer by the plaintiffs and a Swedish lawyer appointed by the Swedish National Committee of the I.C.C. I shall have to deal with the I.C.C. Rules in some detail hereafter, but meanwhile it is convenient to refer to certain payments made by both parties to the I.C.C. under the I.C.C. Rules at the request of the Court of Arbitration in Paris. Initially each party paid U.S.\$500 by way of an advance towards the I.C.C.'s administrative expenses. Thereafter each party paid a further sum of \$95,000 following a request from the I.C.C. dated July 28, 1981, in the following terms:

E "The deposit to cover the administrative expenses and the arbitrators' fees has been fixed at U.S.\$190,000. In accordance with the spirit of arbitration and the customs of the court, each party is therefore requested to forward to us within 30 days one half of this sum, i.e. U.S.\$95,000 in the manner set out in the enclosed circular (in deducting the sum of U.S.\$500 when already paid to the court)."

F The matter was then referred to the three arbitrators who drew up the necessary terms of reference pursuant to the I.C.C. Rules on October 6, 1982, in agreement with the parties. These defined the issues in dispute. The defendants claim damages in the sum of \$6,753,200 and reimbursement of a further sum alleged to be in excess of \$1,000,000, and the plaintiffs counterclaim damages of about \$30,000,000. As regards the conduct of the arbitration, the terms of reference merely recite the provisions of the contract concerning the application of the I.C.C. Rules, as set out above, and that the contract is governed by the law of Iran.

G Having considered the terms of reference and the amounts in dispute, the I.C.C. increased the deposit by a letter of October 22, 1982, requiring each of the parties to pay a further sum of \$50,000 within 30 days. Since the letter also stated that "failure to effectuate payment in a timely manner may result in the halting of the instruction of this case," it appears that these payments have also been made, but, since the increase was largely attributable to the plaintiffs' counterclaim, nothing turns on this further deposit for present purposes.

H The arbitration is at present listed to commence on September 5, 1983, and the hearing is estimated to take about four weeks. Meanwhile, however, the plaintiffs issued a summons on February 18, 1983, for an

order that the defendants should provide security for the plaintiffs' costs in a total sum of \$118,850. By far the largest item of this amount is the deposit of \$95,000 paid by the plaintiffs to the I.C.C.; the remainder relates to legal fees and other costs that have so far been incurred. For present purposes it is unnecessary to consider these in detail, although some of them have also been challenged by the defendants on particular grounds, save to say that they appear to be reasonable, and indeed modest, since each of these items other than the deposit of \$95,000 has been reduced to take account of the counterclaim. There is no cross-application by the defendants for security for costs in relation to the counterclaim, which we understand to raise substantially the same issues as the defendants' claim. The grounds of the plaintiffs' application are that the defendants are ordinarily resident outside the jurisdiction and also that there is reason to believe that they will be unable to pay the costs of the plaintiffs if the latter are successful in the arbitration. The submission of the defendants is that any order for security would be inappropriate under the I.C.C. Rules and generally in relation to an arbitration of this kind. Bingham J. declined to make any order, and the plaintiffs are now appealing against this decision. I will deal first with the ground that the defendants are resident outside the jurisdiction, the I.C.C. Rules and the problems concerning international arbitrations generally, which appear to me to raise questions of principle, and then at the end with the additional factor of the defendants' financial position.

The applicable law

It is convenient to begin by summarising the general law which provides the background to the issues, even though there is substantially no controversy about it between the parties. Before the Arbitration Act 1934, the power to order security for costs in favour of a defendant (or a plaintiff as defendant to a counterclaim) only existed in relation to actions in the courts, but since 1934 this power has been extended to arbitrations, as explained below. Although always discretionary, such orders have been the norm if a defendant to an action is resident here and the plaintiff is a non-resident with no assets within the jurisdiction. The reason, obviously, is that, in the event of the English defendant winning the action and being awarded his costs, he should not be exposed to the difficulties, expense and delay of seeking to enforce the order for costs against the plaintiff somewhere abroad. The fact that the grant or refusal of an order for security for costs against non-resident plaintiffs is discretionary has been made explicit by a change in the wording of the present R.S.C., Ord. 23 in comparison with the former Order 65. Order 23 provides expressly that the court may make an order for security for costs against (inter alios) plaintiffs who are ordinarily resident outside the jurisdiction "if, having regard to all the circumstances of the case, the court thinks it just to do so." But the recent decisions do not suggest that there has been any change in the normal practice of making such orders in favour of English defendants against foreign plaintiffs who are outside the jurisdiction and have no assets in this country.

This is the position in relation to actions in the courts. However, the problem in the present case—if one has regard to the position of the original contracting party, Bank Omran, which had no connection with, or assets in, this country—is unlikely to arise in litigation. Defendants in this position are unlikely to be sued here in practice, even though leave

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A to serve them out of the jurisdiction may be given pursuant to R.S.C.,
 Ord. 11. However, such situations frequently arise in relation to arbitra-
 tions, since foreign parties frequently contract on the basis that any
 disputes arising out of their contracts should be resolved by arbitration in
 this country, as in the present case. Such agreements may take different
 forms, to which I turn in a moment. First, it is necessary to summarise the
 position concerning the procedural law applicable to arbitrations held in
 B this country.

The fundamental principle in this connection is that under our rules of
 private international law, in the absence of any contractual provision to
 the contrary, the procedural (or curial) law governing arbitrations is that
 of the forum of the arbitration, whether this be England, Scotland or
 some foreign country, since this is the system of law with which the
 C agreement to arbitrate in the particular forum will have its closest
 connections: see *Whitworth Street Estates (Manchester) Ltd. v. James
 Miller & Partners Ltd.* [1970] A.C. 583. Despite suggestions to the
 contrary by some learned writers under other systems, our jurisprudence
 does not recognise the concept of arbitral procedures floating in the
 transnational firmament, unconnected with any municipal system of law:
 see, e.g., Dr. F. A. Mann, "Lex Facit Arbitrum," *International Arbitration
 (Liber Amicorum for Martin Domke)* (ed. Sanders) (1967), p. 157, pp. 167
 D et seq. A particular feature of English law, however, is the relationship
 between the courts and arbitrations, which is well known to be consider-
 ably closer than in most civil law jurisdictions, as well as in the United
 States. This involves a measure of control or supervision by the courts
 over arbitrations, as well as various means whereby the courts assist
 E references to arbitration and the conduct of arbitrations. Thus, our courts
 exercise a measure of control over the awards of arbitrators on questions
 of law, although this aspect has been deliberately and significantly curtailed
 by the Arbitration Act 1979 and we are not concerned with it here. The
 relevant aspect of the relationship between the courts and arbitral tribu-
 nals, proceeding on parallel lines, is that the courts are empowered by
 statute to lend their assistance to arbitrations in different ways. For
 F present purposes the relevant powers are those listed in section 12(6) of
 the Arbitration Act 1950. This provides that in respect of certain matters,
 as referred to below:

"The High Court shall have, for the purpose of and in relation to a
 reference [to arbitration], the same power of making orders in respect
 of—(a) security for costs . . . as it has for the purpose of and in
 G relation to an action or matter in the High Court: Provided that
 nothing in this subsection shall be taken to prejudice any power
 which may be vested in an arbitrator or umpire of making orders
 with respect to any of the matters aforesaid."

For present purposes the only such relevant power is in paragraph (a)
 which simply contains the words "security for costs," re-enacting a
 H provision of the Act of 1934. However, the other powers in this connection
 should also briefly be noted. Paragraph (f) of subsection (6) relates to
 "securing the amount in dispute in the reference," and paragraph (h)
 provides for "interim injunctions or the appointment of a receiver";
 indeed, it is now settled law that *Mareva* injunctions may issue in aid of
 arbitrations. The other powers, in summary form, concern orders for
 discovery of documents and interrogatories, the giving of evidence by
 affidavit, the examination of witnesses in England or before an examiner

abroad and the preservation or sale of any goods, or the detention, preservation or inspection of any property; and other measures concerning the subject matter of the dispute.

Most of the reported cases on the exercise of these powers by the courts have arisen, as here, in connection with applications for security for costs. However, before dealing with the main situations that fall to be considered in this regard, it is convenient to state or re-state certain general propositions in the context of section 12(6).

First, as already mentioned, by agreeing to arbitrate in England the parties will, in the absence of any express or implied agreement to the contrary, be deemed to have subjected themselves to the English rules of procedure as those of the forum that they have selected, including the jurisdictions conferred on the English courts by section 12(6). Secondly, while some of the powers mentioned in section 12(6) can clearly only be exercised by the courts, such as the summoning of witnesses or the grant of injunctions, others may also be conferred upon the arbitral tribunal by agreement between the parties. These include the power to make orders for security for costs: see *Mustill & Boyd, Commercial Arbitration* (1983), p. 296. Thirdly, however, and of overriding importance, it must be borne in mind that all the powers of the courts under section 12(6) are wholly discretionary, and that their grant or refusal will take account of the applicable contractual provisions and of the requirements of justice in the circumstances of each particular case. Thus, although the parties to an English arbitration cannot exclude the statutory jurisdiction of the court, they may agree in advance that neither will apply for an order for security for costs against the other. In such cases no security will be ordered, because it would clearly be unjust to do so: *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468. For present purposes it is unnecessary to go further by considering whether the same conclusion would necessarily also apply to other powers of the court under section 12(6), for instance to make orders for discovery when the parties have agreed to a procedure that does not provide for this, if the court is nevertheless convinced that such orders have become necessary to do justice between the parties. All that needs to be said in this connection for present purposes is that the decision whether or not to make one of the various discretionary orders will always take account of the terms of the parties' contract, since the basis of arbitration rests upon consensus.

The exercise of the discretion concerning orders for security for costs

Leaving aside cases of express or clearly implied agreement between the parties that neither should apply for security, the grant or refusal of an order for security in international arbitrations must depend upon all the circumstances of each case. However, particular regard would, I think, be given to the degree of connection that the parties or the arbitration have with this country and its legal system. Thus, if the respondent is English and the claimant is foreign, and there is no agreement that any particular rules are to apply, then an order for security is likely to be the norm, in the same way as in actions: cf. *Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co. Ltd.* [1962] 2 Q.B. 581. On the other hand, if the parties have agreed that a particular set of rules is to apply, then the choice of rules may well be relevant in deciding how the court's discretion is to be exercised. Thus, an agreement to arbitrate here under some English arbitral rules, such as those of an English trade association, or

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A under the terms of an English standard form of contract, with the consequence that the substantive law will also be English, may well carry weight in favour of the exercise of the discretion, even if both parties are foreign and the contract has no other connection with this country. This was the position in *Mavani v. Ralli Bros Ltd.* [1973] 1 W.L.R. 468. Per contra, if foreign parties have agreed to arbitrate in this country under some foreign or international set of rules, such as those of the I.C.C., the case for the exercise of a purely English discretionary jurisdiction must inevitably be weakened.

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All such situations involve questions of degree, depending on the circumstances of each case, which will be relevant to the exercise of the discretion. The particular combination of circumstances in the present case is that the contract provided that the arbitration should take place in the City of London, albeit that the substantive law was to be foreign, that the original contracting parties and the subject matter of the contract had no connection with this country and that the arbitration was to be conducted under the I.C.C. Rules. It is the latter factor, the parties' agreement to subject themselves to the I.C.C. Rules, that is in my view ultimately the most important one in considering the exercise of the court's discretion in this combination of circumstances, and I therefore now turn to these rules.

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The I.C.C. Rules

On behalf of the defendants, Mr. Glick submitted that the I.C.C. Rules are an exhaustive code covering every aspect of arbitrations conducted under their terms, and that, on their true construction, they expressly or by necessary implication exclude all applications to the local courts other than "for interim or conservatory measures," as explained below. For the reasons discussed later I cannot accept these submissions, and I do not think that they were accepted by Bingham J. A less extreme submission, however, which was—I think—accepted by the judge, is that the rules provide a code that is intended to be self-sufficient, in the sense that it is capable of covering all aspects of arbitrations conducted under the rules, without the need for any recourse to any municipal system of law or any application to the courts of the forum. On this basis Mr. Glick submitted that the scheme of the rules, broadly speaking, is inconsistent with the application for security for costs made by the plaintiffs against the defendants in the present case and with the exercise of the court's discretion in favour of the order which is sought. It is this submission that in my view requires careful examination.

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I think that it is true that the rules provide a code that is intended to be self-sufficient in the sense explained above. The detailed provisions of the rules are designed to cover every step in an arbitration conducted under their terms, from the inception of the arbitration to the issue of a final award that is designed to be enforceable against the unsuccessful party. If one traces these steps through the rules, they proceed (though not always in numerical order) from the original request for arbitration and the answer to the request to the appointment of the tribunal; then to the pleadings, including counterclaims; then to the conduct of the proceedings and the procedural rules to be applied; and finally to all aspects of the award. They also deal with the costs of the arbitration in two distinct respects. First, there is that part of the costs that is payable to the I.C.C. In the terminology current in relation to English arbitrations, these

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costs can broadly be described as “the costs of the award,” i.e. those that are secured to the I.C.C., and through the I.C.C. to the arbitral tribunal and its experts, by advance deposit. Secondly, there are the respective legal costs of the parties arising out of the arbitration apart from the costs of the award. In relation to the latter there is no provision for the giving of any security in advance, and this is clearly significant. However, it is also significant that, in the same way as under section 18 of the Act of 1950, the arbitrators are expressly required by the rules to deal with these costs in their final award; and I return to this aspect later.

This is the general picture. However, in order to analyse the scheme of the rules in the context of the courts’ discretion to make orders for security for costs pursuant to section 12(6)(a) of the Act of 1950, it is necessary to set out a number of their provisions and to discuss these in some detail:

“Article 8. *Effect of the agreement to arbitrate.* (1) Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted ipso facto to the present Rules.”

This requires no further comment.

“(5) Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator. Any such application and any such measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of the Arbitration. The Secretariat shall inform the arbitrator thereof.”

This is the provision upon which Mr. Glick mainly relies for the submission that the present application for security for costs is excluded under the I.C.C. Rules, either expressly or by necessary implication. He submits that an application for security for costs is not one “for interim or conservatory measures.” Alternatively, if such an application is covered by these words, then he submits that there were no “exceptional circumstances” in the present case that justified such an application as late as February 1983, since the file had been transmitted to the tribunal many months previously and the terms of reference had been settled and agreed in October 1982. As regards the financial position of the defendants, to which I refer later in this judgment, he submitted in this connection—and Bingham J. rightly accepted—that there had been no relevant change, and therefore no exceptional circumstances, to justify the lateness of the application.

For the plaintiffs, Mr. Littman Q.C. was inclined to agree that an application for security for costs is not one “for interim or conservatory measures.” Similar words appear in sections 25 and 27 of the Civil Jurisdiction and Judgments Act 1982, and in particular in article 24 of the E.E.C. Judgments Convention that is scheduled to it. I share both parties’ doubts as to whether the peculiarly English procedure of providing for security for costs is intended to be covered by these words, which stem from the context of other systems of law. However, I find it unnecessary to express any concluded view on this point, since I agree with Mr. Littman’s submission that article 8(5) cannot in any event be construed as

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A excluding such applications by necessary implication; and it clearly does
 not exclude any such application expressly. Thus, depending on the law
 of the forum, there are no doubt various kinds of application that may be
 made by one of the parties to the courts of the forum in connection with
 an arbitration that would go beyond applications for "interim or conserva-
 tory measures." In England, for instance, applications may be made to
 remove an arbitrator for misconduct by virtue of section 23 of the Act of
 B 1950, and similar—though perhaps less far-reaching—powers of interven-
 tion no doubt exist in other systems. These can hardly have been intended
 to be excluded by article 8(5) as a matter of necessary implication.

C Nevertheless, since article 8(5) is the only provision in the rules that
 expressly refers to applications to the courts of the forum, and since the
 present application does not fall within its scope for one or other of the
 reasons put forward by Mr. Glick, it seems to me that this provision must
 on balance weigh against the exercise of the court's discretion in the
 present case.

There then follows article 9, the first of the provisions dealing with
 costs, which is in the following terms:

D "*Deposit to cover costs of arbitration.* (1) The court" i.e., the I.C.C.
 Court of Arbitration "shall fix the amount of the deposit in a sum
 likely to cover the costs of arbitration of the claims which have been
 referred to it. Where, apart from the principal claim, one or more
 counterclaims are submitted, the court may fix separate deposits for
 the principal claim and the counterclaim or counterclaims. (2) As a
 general rule, the deposits shall be paid in equal shares by the claimant
 or claimants and the defendant or defendants. However, any one
 E party shall be free to pay the whole deposit in respect of the claim or
 the counterclaims should the other party fail to pay a share. (3) The
 Secretariat may make the transmission of the file to the arbitrator
 conditional upon the payment by the parties or one of them of the
 whole or part of the deposit to the International Chamber of Com-
 merce. (4) . . . The terms of reference shall only become operative
 F and the arbitrator shall only proceed in respect of those claims for
 which the deposit has been duly paid to the International Chamber
 of Commerce."

G These provisions of course only deal with those aspects of the costs to
 which I have referred compendiously as the costs of the award. They do
 not deal with the ordinary legal costs of the parties. Nevertheless, I think
 that these provisions weigh against the exercise of the court's discretion
 to make an order for security for costs for at least two reasons.

H First, article 9 envisages that the costs of the award will in the first
 place be borne equally between the parties, even though—as appears later
 on in the rules—the ultimate award of costs in favour of one of the parties
 should include the amount deposited by it. In the present case, however,
 the main item claimed by the plaintiffs by way of advance security is the
 deposit of \$95,000 which it has paid to the I.C.C. pursuant to article 9.
 This, as it seems to me, is clearly inconsistent with the even-handed
 scheme that the rules envisage in this regard. An order for security for
 costs against the defendants would have the effect of compelling them to
 make a double deposit of this sum, first to the I.C.C., and secondly by
 way of security in favour of the plaintiffs.

Secondly, though perhaps of lesser significance, there is the fact that
 article 9 makes provision for the giving of security in advance in relation

to one part of the costs, albeit only the costs of the award, in favour of the I.C.C. and the arbitral tribunal. It makes no provision for any security in favour of either of the parties. This express provision for a prepayment of part of the costs of the arbitration by way of security appears to me to militate against any intention, in the scheme of the rules, concerning the provision of security in relation to any party's own legal costs, even though these may ultimately turn out to be considerably greater.

The next relevant provision is article 11.

"Rules governing the proceedings. The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to any municipal procedural law to be applied to the arbitration."

Since this provision refers expressly to the possibility of the proceedings being governed by some municipal system of law, and primarily no doubt that of the forum, and since English law, the *lex fori* in the present case, provides for application to the court under section 12(6) of the Act of 1950, it appears to me that for present purposes this provision is neutral in its effect. It is also neutral because, in the present case, the arbitrators and parties have not gone further in the terms of reference than to recite the relevant provision of the contract as already set out, which in its turn merely takes one back to the I.C.C. Rules. However, I think that article 11 is of some significance in showing that the rules were intended to be, if not exhaustive, at any rate self-sufficient in the sense indicated above, viz. in the same sense that they do not envisage the necessity for any recourse to any municipal system of law, or to the courts of the forum, in order to enable all aspects of an arbitration conducted under the I.C.C. Rules to be dealt with under the terms of the rules themselves.

Article 12, headed "*Place of Arbitration*," provides that the place of arbitration "shall be fixed by the court, unless agreed upon by the parties." The only comment that I would make on this is that, where England has been selected by the parties as the contractual forum in advance, as in the present case, there would no doubt be a substantially stronger case for exercising the statutory discretion to make an order for security for costs than if this selection had been made subsequently by the I.C.C.

Next, article 20 deals with costs generally and is of considerable importance:

"Decision as to costs of arbitration. (1) The arbitrator's award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties. (2) The costs of the arbitration shall include the arbitrator's fees and the administrative costs fixed by the court in accordance with the scale annexed to the present Rules, the expenses, if any, of the arbitrator, the fees and expenses of any experts, and the normal legal costs incurred by the parties."

Appendix III to the rules contains a schedule of costs, but it is unnecessary to refer to it further for present purposes. The importance of article 20 is, as already mentioned, that it expressly requires the arbitral tribunal to deal with both aspects of the costs of the arbitration in its awards, viz. the costs to which I have referred as the costs of the award,

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A which will have been secured by way of deposit to the I.C.C., as well as
the parties' other legal costs.

Lastly, it is perhaps appropriate to quote article 26, the final provision:

"*General rule.* In all matters not expressly provided for in these
Rules, the Court of Arbitration and the arbitrator shall act in the
spirit of these Rules and shall make every effort to make sure that
the award is enforceable at law."

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The significance of articles 20 and 26 for present purposes, in addition
to the matters already mentioned when article 20 is read in the context of
article 9, is that these provisions require all costs to be dealt with by the
arbitral tribunal in their award, and that they expressly envisage that the
award should, so far as possible, be made enforceable at law in favour of
the successful party. I think that this is significant, not only in the context
of the I.C.C. Rules but also in the context of international arbitrations
generally, where questions of enforcement are always a primary preoc-
cupation of all the participants. Most of the important trading nations are
now parties to the New York Convention on the Recognition and
Enforcement of Foreign Arbitral Awards (1958), and many of those that
are not remain parties to the Convention on the Execution of Foreign
Arbitral Awards concluded at Geneva in 1927. It is to this international
network of enforceability of arbitral awards that parties mainly have
regard when they enter into arbitration under international contracts. I
do not think that they differentiate in this respect between the enforce-
ability of the substantive award and that of the award as to costs. The
parties hope that, if an arbitration should ensue, they will be successful,
and that the ultimate award, dealing both with the claim or counterclaim
and the legal costs, will prove to be enforceable. However, I do not think
that they envisage any advance provision being made by way of security,
whether for or against them, in relation to any of the matters to be dealt
with in the award, unless they agree to arbitrate under rules that make
express provision in this regard or possibly under rules governed by some
municipal system of law which expressly provides for such security.

In this connection there is the additional factor that the power of the
English courts under section 12(6)(a) of the Act of 1950 is a somewhat
exceptional procedure in comparison with most systems of law. There was
evidence on the present appeal that no similar power exists either in Iran
or in Greece, and also indirect evidence that in the experience of a well
known Swiss international lawyer "such a security is not given by the court
in any Western European jurisdiction or in the United States." Mr.
Littman understandably challenged this statement as being too generalised
to constitute any reliable evidence. It may well be too wide, particularly
in relation to other common law jurisdictions. However, I do not think
that there can be any doubt that, broadly speaking, the power of our
courts under section 12(6)(a) of the Act of 1950 is exceptional on the
international arbitral scene.

Conclusion in principle

As it seems to me, the English courts should be slow in applying the
jurisdiction to order security for costs in international arbitration unless,
in the particular circumstances of each case, there is some more specific
connection with this country, as discussed earlier in this judgment, than
the mere fact that the parties have agreed that any arbitration is to take
place in England. In the present case we are concerned with such an

arbitration under the I.C.C. Rules. The judge's conclusion in this connection is mainly contained in the following passages of his judgment:

"But what is quite clear is that the detailed provisions of the Rules with respect to the giving of deposits, the payment of costs and the question of applications to local courts contain no express permission for the parties to make such application and probably by implication envisage that applications of that kind will not be made."

This language may not be very precise, but I am wholly in agreement with the thought that underlies it. As I see it, the application for security for costs in the present case is one that is inconsistent with the scheme and spirit of the I.C.C. Rules: not literally inconsistent, either expressly or even by necessary implication, but sufficiently inconsistent, for the reasons explained above, to make it inappropriate in principle for the court to exercise its statutory discretion in favour of the order sought in this case.

The financial position of the defendants

The final question that remains is whether the evidence as to the defendants' financial position should affect the foregoing conclusion. The plaintiffs allege, as one of their grounds for the application, that there is reason to believe that the defendants will be unable to pay the plaintiffs' costs if the plaintiffs are successful in their defence of the arbitration. By virtue of section 447 of the Companies Act 1948 this is a ground for ordering an English limited company to give security for costs. The court's jurisdiction under this section is discretionary, in the same way as under R.S.C., Ord. 23, and its exercise will depend on all the circumstances of the particular case: see *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609. However, since the defendants are a foreign company, it is common ground that the plaintiff cannot rely on this provision directly but only by way of analogy. In effect their reliance on this ground can only constitute a makeweight to the exercise of the court's discretionary power that is derived from the defendants being resident outside the jurisdiction.

The evidence before Bingham J. indicated that the defendants appeared to be in a parlous financial position and that they might well be insolvent. He considered that this evidence was relevant to the exercise of the discretion, but he nevertheless declined to make the order. On this appeal a good deal of further evidence was adduced on behalf of the defendants by way of riposte and admitted by consent. This strongly denies that the defendants are insolvent and shows that they are engaged upon a number of important contracts in the Middle East. It also claims that part of the defendants' past financial difficulties were due to the plaintiffs' alleged repudiation of the present contract. On the other hand, the evidence before the judge also indicated that, in effect, the defendants may be in the hands of the National Bank of Greece, to which they are heavily indebted, and this picture has not been changed by the evidence admitted on appeal to this court.

I agree with the judge that in considering whether or not to make an order for security for costs, in circumstances where, as here, the court has jurisdiction to do so, it is relevant to take account of the financial position of the party against whom the order is sought. But I equally agree with him that in the present case this is not a sufficient factor to outweigh the considerations that led him to the conclusion that no such order should be

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A made. Indeed, I would go further. Since I consider that in an arbitration under the I.C.C. Rules that has no connection with this country other than that it had been agreed between foreign parties that any such arbitration was to take place here it would be inappropriate in principle to make an order for security for costs on the ground that the claimant is ordinarily resident abroad, I would also regard it as wrong in principle to make any such order on the ground that the claimant may be unable to pay the other party's costs if the award requires him to do so.

B For all these reasons I would dismiss this appeal.

C ROBERT GOFF L.J. In this case the plaintiffs are appealing against a decision of Bingham J. by which, in the exercise of his discretion, he refused to make an order under section 12(6)(a) of the Arbitration Act 1950 that the defendants, Helliniki Techniki S.A., furnish security for costs in an arbitration pending between the parties in London. The application for security was made on two grounds: (1) that the defendants, who are the claimants in the arbitration, are a company resident outside the jurisdiction (in Greece) and have no assets within the jurisdiction, and (2) that there is reason to believe that the defendants, whose solvency is said to be in question, will be unable to pay the plaintiffs' costs if they are successful in their defence in the arbitration.

D The background of the matter has been set out in detail in the judgment of Kerr L.J., and I am therefore relieved of the burden of setting it out myself. As regards the applicable principles, there is a considerable amount of common ground between the parties. First, the curial law of the arbitration is English: see *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583. Secondly, the court has, by virtue of section 12(6)(a) of the Act of 1950, the same power to make an order in respect of security for costs in the arbitration as it has for the purpose of and in relation to an action or matter in the High Court. Thirdly, having regard to the provision of R.S.C., Ord. 23, r. 1 and to *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, the power to make an order for security for costs is discretionary. Fourthly, the court's discretion to exercise that power cannot (having regard to the provisions of section 12 of the Act of 1950) be ousted by agreement; but any agreement between the parties not to apply for security for costs will be a matter that can properly be taken into account by the court in exercising its discretion whether to make an order for security, and indeed will constitute a powerful argument against the making of any such order since in such circumstances it may be unjust to do so: *Mavani v. Ralli Bros. Ltd.* [1973] 1 W.L.R. 468.

G Before the judge, the plaintiffs' application for security was based, as I have stated, on two very common grounds, the first being founded on R.S.C., Ord. 23, r. 1(1)(a) and the second on section 447 of the Companies Act 1948—not directly, because the defendants are not an English company, but by analogy. I shall refer later in this judgment to the evidence relating to the alleged insolvency of the defendants. The submission of the defendants was that, since the parties had by their contract agreed to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the I.C.C. Rules"), they had thereby agreed, expressly or impliedly, that there should be no order for security for costs. The express agreement was said to be derived from article 8(5) of the I.C.C. Rules, and the implied agreement from the I.C.C. Rules as a whole, though primarily from

article 9 and also, I understand, from article 20. The judge accepted the latter submission. He said:

"what is quite clear is that the detailed provisions of the Rules with respect to the giving of deposits, the payment of costs and the question of applications to local courts contains no express permission for the parties to make such application and probably by implication envisages that applications of that kind will not be made. That being so, there seems to me to be in such a case very great force in the submission made by Mr. Glick, in reliance both on the express terms of the Rules and on the implications to be drawn from them, that the court should be very slow to exercise its discretion in favour of making an order for security."

Later, he said:

"the question is, I think, one of balancing the argument based by Helliniki Techniki on the language of the Rules against the grounds advanced by Mr. Chambers both on the grounds of foreign residence and insolvency, but I find that on weighing these matters up as best I can the balance comes down in favour of what I take to have been the intention of the parties as expressed in their express subjection to or choice of the rules of the I.C.C. Accordingly, and despite the arguments advanced by Mr. Chambers, I think that the proper course in this case is not to make the order for security which is sought."

In his argument before this court, Mr. Glick (in my judgment rightly) abandoned the argument that the parties had, by virtue of article 8(5) of the I.C.C. Rules, expressly agreed that no order should be made. He however maintained his submission that it was implicit in the I.C.C. Rules that no such order should be made; alternatively, as he put it before this court, it was inconsistent with the rules that any such order should be made. His argument ran as follows. The I.C.C. Rules provide a complete code of conduct for the arbitration. In the I.C.C. Rules, there is to be found in article 9 provision for a deposit in a sum likely to cover the costs of the arbitration, and for a separate deposit where there is a counterclaim, such deposit to be paid as a general rule by both parties in equal shares. From paragraph 2 of Appendix III to the I.C.C. Rules it appears that the costs of the arbitration in this context comprise what may broadly be called the costs of the award, viz. the arbitrator's fees, administrative expenses, the arbitrator's personal expenses and costs of "expertise" (i.e., costs of experts appointed by the arbitrators). Furthermore, although by article 20 the arbitrators' award shall fix the costs of the arbitration (which in this context includes not only the matters in respect of which the deposit has been made but also the normal legal costs incurred by the parties) and decide which of the parties shall bear such costs, and in what proportion, nevertheless there is no provision in the rules for ordering either party to furnish security for the other party's costs. It is therefore, submitted Mr. Glick, a clear implication that neither party's costs are to be secured.

In support of this submission, Mr. Glick also relied upon article 8(5) of the I.C.C. Rules, which provides:

"Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the

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A agreement to arbitrate or to affect the relevant powers reserved to the arbitrator. . . .”

B It was on this provision that Mr. Glick had founded his argument before the judge that the parties had expressly agreed that neither should make an application for security for costs. The argument had been to the effect that (1) an application for security for costs was an application for an interim measure; (2) such an application was only authorised under article 8(5) before the file had been transmitted to the arbitrator, or in exceptional circumstances thereafter; (3) the defendants' application was made after the file had been transmitted to the arbitrator and there were no exceptional circumstances justifying the application; therefore (4) the application was contrary to the provisions of article 8(5). This argument was abandoned, it being accepted that an application for security for costs was not an application for an interim measure within the meaning of those words in article 8(5). Nevertheless, submitted Mr. Glick, article 8(5) at least indicated the circumstances in which an application to the court was contemplated by the rules; and these did not include an application for security for costs.

D Unlike the judge, I find myself unable to accept this submission. It is of course true that the I.C.C. Rules, while providing for deposits to be made in equal shares covering the costs of the award, are silent on the question of either party providing security for the other party's legal costs. I cannot infer from that, or indeed from the I.C.C. Rules as a whole, any implicit agreement that neither party should be free to take advantage of any provision of the curial law of the arbitration under which security for costs may be applied for. In truth, the silence of the I.C.C. Rules on that matter in all probability reflects no more than that the experience of those who drew up the rules was of systems of law under which security of that kind is not ordered. The fact that the I.C.C. Rules provide for deposits to cover the costs of the award reflects only the intention that those persons for whom the I.C.C. is responsible shall have their remuneration and expenses secured; and, since the outcome of the arbitration is unknown, it is obviously sensible and just that such deposits should in general be furnished by both parties in equal shares. But the fact that security in the form of deposits for costs of that kind is required by the rules is, in my judgment, in no way inconsistent with either party taking advantage of a provision of the curial law under which security for a party's legal costs may be ordered. Indeed, the readiness of the I.C.C., as envisaged in their own rules, to extract from the parties security (in the onerous form of a deposit) for their own costs can arguably be regarded as entirely consistent with a party taking advantage of an opportunity available to him under the curial law to obtain, where appropriate, an order for security for his own legal costs. I was equally unimpressed by a submission by Mr. Glick that an award for security of costs embracing the plaintiffs' deposit to the I.C.C. was inconsistent with the “even-handed” approach to such deposits demonstrated in the I.C.C. Rules. Obviously, the rules are “even-handed” in relation to such deposits: it is only right that security given by the parties to the I.C.C. for the costs of the award should prima facie be borne by them in equal shares. But I can see no inconsistency between that requirement and the possibility that, if under the curial law one party is ordered to provide security for the other's legal costs (which obviously, in relation to those different costs, may very well not be an “even-handed” order), such security should include security for

the other party's deposit with the I.C.C. There is of course no question of the party who furnishes such security having to duplicate his security: he simply makes his own deposit to the I.C.C., and secures the other party's costs including the amount of that party's deposit. Nor can I see any force in the argument founded upon article 8(5). The mere fact that reference is made in that article to a particular form of application to the court (which is in fact a form of application well known under continental systems of law) cannot impliedly exclude other forms of application available under the curial law; indeed, if that argument were right, it could likewise be argued that an application under section 12(6)(b) of the Act of 1950 for an order for discovery of documents should be inhibited by reason of the implied agreement of the parties not to make any such application.

I do not consider that the argument can be made any more persuasive by advancing it not on the basis of an implication but on the basis of "inconsistency with the rules." Indeed there is a certain imprecision in this submission which demands that the submission itself should be analysed and defined. As I see it, the submission can only mean one of two things. It can mean first that an application for security for costs is inconsistent with the rules in the sense that it would be inconsistent with the agreement of the parties, as contained in the rules as incorporated in their contract, to make any such application: but that is no more than saying that the parties have, by incorporating the rules in their contract, expressly or impliedly agreed not to make any such application—which is precisely the same as the argument that I have already considered and rejected. Alternatively, it can mean that the rules, being silent on the matter, do not envisage any such application being made. That however cannot of itself inhibit any application for security for costs. As I have already indicated, the reason for this silence is in all likelihood to be found in the simple historical fact that those who framed the I.C.C. Rules were familiar only with systems of law under which such security is not ordered. At the most, this silence in the I.C.C. Rules may be regarded as a factor (though, in my judgment, taken by itself a very minor factor) to be taken into account when the court considers whether to exercise its discretion to make an order for security for costs. It is important, however, that the court should not be tempted to elide the two separate meanings that may be attributed to this submission, with the effect that the one derives, illegitimately, colour from the other. Either the parties have, by incorporating the I.C.C. Rules in their contract, expressly or impliedly agreed not to apply for security for costs, or they have not. In my judgment, plainly they have not.

It follows that, in my view, the judge erred in the exercise of his discretion, since he proceeded on the basis of a construction of the I.C.C. Rules, as incorporated in the contract between the parties, that I am unable to accept. I therefore proceed to consider how, in my judgment, the discretion should be exercised. I shall consider first the application for security on the basis that the defendants—the claimants in the arbitration—are resident outside the jurisdiction and have no assets within the jurisdiction.

Now I wish to say at once that I do not consider it right that nowadays a court, in considering such an application, should always approach the matter in the same way as it approaches an application by a defendant in an action in the High Court. Historically, the basis of an application by such a defendant has been that if he were not provided with security for

A his costs by a plaintiff resident outside the jurisdiction who had no assets here, he might if successful in his defence be unable to recover his costs from the plaintiff; the order for security for costs is intended to prevent the occurrence of any such injustice and so put him in at least as strong a position in that respect as if he had been sued by a party who was resident within the jurisdiction. But it by no means follows that the same practice should invariably be followed in international arbitrations which, because held in England, are subject to English law as the curial law. I appreciate that in the case of many arbitrations held in this country the practice is at present to award security for costs; but these are in general commercial arbitrations of a type that are regularly held in London under standard English forms of contract generally governed by English law, and so have a very close connection with the English jurisdiction. Since the war, however, we have seen the development of a different type of commercial arbitration. A typical example is an arbitration arising out of a substantial construction or civil engineering contract, under which the contractor undertakes to carry out works in a foreign country. Such contracts commonly contain an arbitration clause providing for arbitration in a neutral forum (i.e., in a country other than the country of either contracting party), and for a neutral arbitrator or chairman of the arbitral tribunal. Such contracts may incorporate arbitration rules of a body such as the I.C.C. to govern the conduct of the arbitration. If the contract is silent on the forum, that body may itself select a neutral forum where the arbitration will be held.

Side by side with the growth of this type of international arbitration, there have been developments in the provisions made for enforceability of awards in international arbitrations. Before the war, there was the Geneva Convention of 1927. Now there is the New York Convention of 1958. The latter convention provides, in article III, that each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the convention. Many important states are now parties to the New York Convention; and in this country the Arbitration Act 1975 was enacted to give effect to the convention, to which this country is a party. Parties to international arbitrations must nowadays frequently rely upon the convention for the purpose of enforcing awards; and when the award contains (as it will, for example, where the arbitration is conducted in accordance with the I.C.C. Rules) an order for costs, the enforcement of the award will include enforcement of an order for costs comprised in the award.

Parties to such an arbitration may well choose London as a convenient neutral forum. There are now excellent, and rapidly developing, services available in London for the conduct of such arbitrations. The English language is frequently a language familiar to both parties, and often too the language of the contract: for that reason, too, London may be a suitable forum. The services of very experienced solicitors, counsel, experts and arbitrators are readily available here. So London may be chosen as a convenient neutral forum; or it may be nominated as such by a body such as the I.C.C.

The holding of such an arbitration in London appears to me to be a far cry from litigation where a foreign litigant comes to this country to sue an English resident in the English courts. Even in such litigation, the case for the exercise of the discretionary power to award security for costs is perhaps weakening, as judgments and orders become more readily

enforceable overseas. But if parties simply choose to arbitrate here as a matter of convenience, in the circumstances that I have described, the policy that historically underlies an order for security for costs by a foreign litigant appears to me to be, in most cases, inapplicable. It is of course true that English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law, which confers upon them the right to invoke the discretionary power of the court to award security for costs. But it does not follow that, in such cases as I have described, it would be right for the court to exercise its discretion to award security in any particular case. It is not only that the choice of England as a forum is a mutual, not a unilateral, choice. In addition, the parties will in most cases both be resident outside the jurisdiction; England will generally have been chosen as a neutral forum on pure grounds of convenience; in some cases it may be pure accident which party is claimant and which respondent; and it may very readily be inferred in most cases that the parties will be proceeding in reliance upon the ordinary procedure for enforcement of awards (including awards as to costs), often under the provisions of the New York Convention. The force of these points must be even greater where it is not the parties who have selected England as a forum but a body such as the I.C.C. acting on the parties' behalf.

Of course, in considering whether to exercise its discretion to make an order for the provision of security for costs by a foreign claimant in an international arbitration, the court must consider all the circumstances of the particular case. But in the case of international arbitrations of the kind that I have described the court should, in my judgment, as a general rule decline to make an order for security for costs against a foreign claimant unless there are special circumstances that warrant it; because the policy underlying an order for the provision of security for costs by a foreign claimant is not generally applicable in such cases.

In reaching this conclusion, I wish to state first that I should not be understood to be expressing any view about awards of security for costs in the case of ordinary commercial arbitrations of the type that have for many years been regularly held in this country, in particular arbitrations on maritime disputes and in the commodity trades. I mention in parenthesis that a comparable distinction has been drawn between different types of arbitration, for the purposes of appeals to the court, in the Arbitration Act 1979. Nor should I be understood as suggesting that there is any special barrier against parties in international arbitrations taking advantage of other provisions of English law as the curial law relating, for example, to the conduct of the arbitrations (including discovery of documents) or to interim measures and orders. My observations should be understood as concerned only with the exercise of the court's discretion to award security for costs.

It follows from what I have said that, in my judgment, this being a typical international arbitration of the kind I have described, *prima facie* no order for security for costs should be made against the defendants as foreign claimants unless there are special circumstances justifying such an order. I add in parenthesis that, since Greece is a party to the New York Convention, there seems to be no reason why an award in the arbitration in favour of the plaintiffs, including any award as to costs, should not be enforceable by them against the defendants in Greece under the provisions of that convention. I also add that, in reaching this conclusion, I do not attach any particular weight to the fact that the parties have agreed to

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A arbitration in accordance with the I.C.C. Rules, save that that fact serves to emphasise the character of the international arbitration with which we are here concerned. A similar conclusion could well have been reached in this case if the parties had agreed to incorporate some other set of rules, or indeed no rules at all. The solution to the present problem must, I consider, lie in a realistic appreciation of the character of the relevant arbitrations and the circumstances in which England comes to be chosen as the forum, rather than in squeezing indications, often with great difficulty, out of rules the draftsman of which in all probability never even addressed his mind to the question of security for costs. Indeed, it is theoretically possible that there could be arbitrations under the I.C.C. Rules that are not of the character that I have described, in which it might be proper to make an award for security. But in practical terms, having regard to the character of arbitrations conducted under the I.C.C. Rules, I cannot myself conceive of any such case.

C For the plaintiffs, however, it is submitted that there are in the present case special circumstances arising from the suspected insolvency of the defendants. In my judgment, if a claimant in an international arbitration held in this country is an English or foreign company as to which it appears by credible testimony that there is reason to believe that it will be unable to pay the costs of the respondent if successful in his defence, then it would be proper for the court, in an appropriate case, by virtue of section 447 of the Companies Act 1948 or by analogy with that section, to exercise its discretion to order the claimant to furnish security for the respondent's costs. The policy underlying an order for security in such a case is untouched by the considerations that I have mentioned, which in my judgment negative the policy of ordering security for costs on the ground only that the claimant is resident outside the jurisdiction. It follows that I am unable to accept the view expressed by the judge that the insolvency of a claimant company (if such be the case) is a matter to be weighed in the balance with the effect of incorporation of the I.C.C. Rules. Such matters are not, I consider, comparable. It is necessary to decide, as a matter of policy, whether in an international arbitration of the kind that I have described it may be proper for the court to exercise its discretion to order an insolvent claimant company to furnish security. In my judgment, it may be proper to do so. It must, however, be borne in mind that the making of an order for security for costs under section 447, directly or by analogy, is discretionary and that security will not be ordered as a matter of course: see *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, 626, where various matters that may be taken into consideration are listed by Lord Denning M.R.

G I turn, then, to consider the evidence about the financial state of the defendants. The plaintiffs relied upon a Dun & Bradstreet report that referred (on the basis of reports by informants) to many protested bills, payment orders and seizures, and some bankruptcy petitions, in the years 1978-82, and to information that "due to the political situation in Iran (the construction work there has ceased) and delay in payment from the Greek Government for public works" the defendants had experienced severe difficulties, and further stated that the defendants were now under the management of the National Bank of Greece, due to debts owed to the bank reported to amount to approximately 2.5 billion drachmas. In answer to this evidence, the defendants submitted evidence before the judge (1) identifying petitions for bankruptcy that had been made, and stating that all had been settled; (2) stating that "it is usual and standard

practice for lawyers in Greece to file petitions for bankruptcy against debtors even for very small and insignificant amounts," and that "the same procedure is also adopted for short time delays of payment which may arise from temporary cash flow difficulties," the procedure being adopted by Greek lawyers in order to exercise maximum pressure on debtors to settle debts immediately as a declaration of bankruptcy involves serious consequences; (3) further stating that the Dun & Bradstreet report was wrong in referring to the defendants as being under the management of the National Bank of Greece, though the shares of the defendants had been pledged to the bank—we were told, to secure a debt of 3.5 billion drachmas owed by the defendants to the bank. The evidence also showed the defendants to be involved in a number of substantial construction projects in Greece and Iraq, which were progressing towards completion, and stated that the net worth of the defendants in 1981 was about 2.25 billion drachmas, excluding the value of the defendants' claim against the plaintiffs. This evidence was supplemented by further evidence before this court, including financial statements relating to the affairs of the defendants. The overall picture to be derived from this evidence is of a substantial construction company which has indeed experienced financial difficulties, primarily in relation to its work in Iran under its contract with the plaintiffs, no doubt due to the political difficulties in that country; but which is very much a going concern, apparently with financial support from the National Bank of Greece. This evidence, in my judgment, falls short of evidence necessary to establish the basis for an order for security for costs under section 447 of the Act of 1948, directly or by analogy.

In all the circumstances, therefore, I do not consider this to be an appropriate case for the court to exercise its discretion to order security for costs. For these reasons, I would dismiss the appeal.

WALLER L.J. I would dismiss this appeal for the reasons given by Kerr L.J.

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: *Stephenson Harwood; Denton Hall & Burgin.*

M. G.

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A

[QUEEN'S BENCH DIVISION]

PETROFINA (U.K.) LTD. AND OTHERS v. MAGNALOAD LTD. AND
ANOTHER

[1980 P. No. 2589]

B

1983 Feb. 15, 16, 17;
March 1

Lloyd J.

C

Insurance—Subrogation—Contractors all risk policy—Property damaged through negligence of sub-contractors—Insurers' indemnity for loss—Action brought on behalf of insurers against sub-contractors for loss—Whether sub-contractors' insurable interest covered by policy—Whether action brought by co-insured maintainable

D

E

F

The main contractors for the construction of an extension at an oil refinery took out a contractors all risks insurance policy. Under section 1 of the policy the insurers agreed to indemnify the insured against loss and damage to the property. The insured were defined as the main contractors, sub-contractors, the fourth plaintiffs, who held a lease of the refinery, and the third plaintiffs, a company holding the freehold and managing the refinery on behalf of the first and second plaintiffs. The main contractors employed sub-contractors for the heavy lifting operations involved in the work and they in turn agreed with the two defendants that the defendants should supply specialist heavy lifting equipment and services. The second defendant, a Dutch company, was to be responsible for the operation but the contract was made with the first defendant, its associated English company. During the dismantling of the equipment provided by the defendants, the gantry became displaced and fell to the ground causing much damage to the work in progress. The third plaintiff made a claim against the insurers under the policy, which was duly settled. The insurers thereupon brought an action in the name of the plaintiffs against the defendants, claiming damages for negligence. By their defence the defendants denied that the insurers were entitled to exercise any right of subrogation against the defendants, since the defendants were fully insured under the same policy in respect of the same property.

On the preliminary issue whether the insurers had a right of subrogation:—

G

Held, (1) that both defendants were sub-contractors within the meaning of the contractors all risks insurance policy (post, p. 810D–G, H).

H

(2) That section 1 of the contractors all risks insurance policy was not a liability insurance but an insurance on property comprising the works and temporary works on the site and all the insured, including sub-contractors, were, on the true construction of the policy, insured for loss and damage in respect of the whole of that property; that, it was commercially convenient for all parties concerned in building and engineering contracts that a single policy should be taken out to cover all the contractors and sub-contractors working on the site for any loss or damage to the works, and that there was nothing in law to prevent the main contractors taking out such a policy; but that, since a sub-contractor was entitled to insure the whole of the contract works and not merely that part for which he was responsible, and since the defendants had so insured, the insurers had no right of subrogation against the defendants in the name of the plaintiffs,

who were co-insured with the defendants under the same policy (post, pp. 811D-E, 813A, c, F-G, 815G, 816F-G).

Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd. (1977) 69 D.L.R. (3d) 558 applied.

Waters v. Monarch Fire and Life Assurance Co. (1856) 5 E. & B. 870; *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1966] A.C. 451, H.L.(E.) and *The Yasin* [1979] 2 Lloyd's Rep. 45 considered.

The following cases are referred to in the judgment:

Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd. (1977) 69 D.L.R. (3d) 558.

North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co. (1877) 5 Ch.D. 569, C.A.

Simpson and Co. v. Thomson (1877) 3 App.Cas. 279, H.L.(Sc.).

Tomlinson (A.) (Hauliers) Ltd. v. Hepburn [1966] A.C. 451; [1966] 2 W.L.R. 453; [1966] 1 All E.R. 418, H.L.(E.).

Waters v. Monarch Fire and Life Assurance Co. (1856) 5 E. & B. 870.

Yasin, The [1979] 2 Lloyd's Rep. 45.

The following additional cases were cited in argument:

American Surety Co. of New York v. Wrightson (1910) 16 Com.Cas. 37.

Care Shipping Corporation v. Latin American Shipping Corporation [1983] 2 W.L.R. 829; [1983] 1 All E.R. 1121.

General Insurance Co. of America v. Stoddard Wendle Ford Motors (1966) 410 P. 2d 904.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)

Louisiana Fire Insurance Co. v. Royal Indemnity Co. (1949) 38 So. 2d 807.

McBroome-Bennett Plumbing Inc. v. Villa France Inc. (1974) 515 S.W. 2d 32.

New Amsterdam Casualty Co. v. Homans-Kohler Inc. (1969) 305 F.Supp. 1017.

Portavon Cinema Co. Ltd. v. Price and Century Insurance Co. Ltd. [1939] 4 All E.R. 601.

Transamerica Insurance Co. v. Gage Plumbing and Heating Co. Inc. (1970) 433 F. 2d 1051.

United States Fire Insurance Co. v. Beach (1973) 275 So. 2d 473.

PRELIMINARY ISSUE

The first and second plaintiffs, Petrofina (U.K.) Ltd. and Total Oil Great Britain Ltd., owned all the shares in the third plaintiffs, Lindsey Oil Refinery Ltd., and that company owned the freehold of land at Killingholme, South Humberside, where they operated an oil refinery. To finance an extension to the refinery and the construction of a catalytic cracking unit (a "cat-cracker") they leased the land to the fourth plaintiffs, a consortium of companies carrying on business in the name of Omnium Leasing Co.

The main contractor employed for the construction works was Foster Wheeler Ltd. and they insured the work with the second third party, New Hampshire Insurance Co., under a contractors all risks insurance policy for £50,000,000, later increased to £92,000,000. The insured under the policy were the main contractor, the third and fourth plaintiffs and sub-contractors.

The main contractors sub-contracted the heavy lifting operations to the first third party, Greenham (Plant Hire) Ltd., and they in turn entered into an agreement with the first defendant, Magnaload Ltd., for their associate company, the second defendant Mammoet Stoof B.V., to

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A provide a Hydjack system for the lifting of very heavy loads. During the dismantling of the Hydjack, the gantry fell to the ground causing damage to the work being undertaken on the site. The plaintiffs claimed against the defendants damages on the ground of their negligence.

By their defence, the defendants pleaded in paragraph 8:

B “The claim brought by the plaintiffs for damage to the contract works is a purported subrogated claim brought at the instance of and for the benefit of the New Hampshire Insurance Co., who insured, inter alios, the third and fourth plaintiffs and have indemnified them in respect of such damage under the terms and provisions of policy no. 5JX 0087 . . . The first and second defendants were and are co-assured with the third and fourth plaintiffs under the said policy in respect of such damage. In the premises the plaintiffs’ claim . . . fails as a matter of law and/or on grounds of circuitry of action (in that the first and second defendants would be entitled to recover from the New Hampshire Insurance Co. any sums otherwise recoverable herein by the plaintiffs for the benefit of such insurance company) . . .”

D By paragraph 9 (a) the defendants denied that, in the premises set out in paragraph 8, they owed any duty of care to the plaintiffs in respect of damage to the contract works. The same issues were raised in third party proceedings brought by the defendants against the New Hampshire Insurance Co.

On February 5, 1982, Parker J. ordered:

E “That the issues arising under paragraphs 8 and 9 (a) of the points of defence herein be tried together with the issues arising in the third party proceedings against the New Hampshire Insurance Co. as second third party and prior to all other issues.”

The facts are stated in the judgment.

Michael Wright Q.C. and Crawford Lindsay for the plaintiffs.

Adrian Hamilton Q.C. and Robert Glancy for the defendants.

Cur. adv. vult.

G March 1. LLOYD J. read the following judgment. This is a preliminary issue tried by order of Parker J. dated February 5, 1982. The claim arises out of an accident which occurred on September 2, 1978, in the course of carrying out a major extension to an oil refinery at Killingholme, South Humberside. Two men lost their lives in the accident, and there was extensive damage to property. Lindsey Oil Refinery Ltd., the third plaintiffs, are the owners of the refinery. They operate it for the benefit of the first and second plaintiffs. The fourth plaintiffs are a consortium of companies carrying on business under the name Omnium Leasing Co. They have put up the money for the extension, including the manufacture and installation of a new catalytic cracking unit. The fourth plaintiffs are the owners of the unit. There is a contract under which the unit is leased by the fourth plaintiffs to the third plaintiffs.

H The head contractors, Foster Wheeler Ltd., were appointed under a contract which was eventually reduced to writing on January 31, 1979. Foster Wheeler sub-contracted the heavy lifting operation to Greenham (Plant Hire) Ltd. The catalytic cracking unit or “cat-cracker” consists of or includes eight large cylindrical vessels, weighing up to 380 tons. The

lifting of the two heaviest vessels required specialist lifting equipment, which was provided by a Dutch company, Mammoet Stoof B.V., the second defendants. The equipment, known as the Hydrijack system, comprises two vertical masts, 67 metres high and 30 metres apart, with a gantry beam across the top. In the course of dismantling the Hydrijack, after the lifting had been successfully completed, the gantry became displaced. It crashed to the ground, bringing the masts with it, and causing much damage to the works below.

The first defendants, Magnaload Ltd., are an English company which is owned as to 50 per cent. by the second defendants. The part played in these events by the employees of the first defendants, the second defendants and Greenhams Ltd. who have been joined as the first third parties in the proceedings, will have to be investigated at the trial. For the purposes of the preliminary issue I have to assume in favour of the plaintiffs that the first and second defendants were both negligent, and that their negligence caused the accident. The contract works were insured with the second third party, New Hampshire Insurance Co. for £50,000,000, subsequently increased to £92,000,000. There was a claim on the policy for physical damage to the contract works brought by Lindsey. I was not told the amount of the claim, but I understand it has been settled for about £1,250,000. Having paid that claim, the insurers now seek to exercise their right of subrogation by suing the defendants. The defendants' answer, put very briefly, is that the insurers have no right of subrogation, because the defendants are themselves fully insured under the same policy. The question I have to determine on this preliminary issue is whether that contention is correct.

Mr. Hamilton, for the defendants, told me that it is a question of great importance for the construction industry generally; for policies such as the one I have to consider are in common use. I am sure he is right. The answer in the present case turns on the construction of this particular policy, and on general principles of law. The policy is a contractors all risks insurance policy. By section 1 it provides:

"The insurers will indemnify the insured against loss of or damage to the insured property whilst at the contract site from any cause not hereinafter excluded occurring during the period of insurance."

"The insured" are defined in the schedule as: "Omnium Leasing (Owner) and/or Lindsey Oil Refinery and/or Foster Wheeler Ltd. and/or Contractors and/or Sub-contractors." "The insured property" is defined as:

"Item No. 1.

"The works and temporary works erected . . . in performance of the insured contract and the materials . . . for use in connection therewith belonging to the insured or for which they are responsible brought on to the contract site for the purpose of the said contract . . .

"Item No. 2.

"Constructional plant comprising plant and equipment . . . if and in so far as not otherwise insured belonging to the insured and for which they are responsible brought on to the contract site for the purpose of the insured contract."

"The insured contract" is defined: "Construction erection and testing of an extension to the Lindsey Oil Refinery at South Humberside."

By an endorsement dated April 23, 1978, the policy was extended to include:

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- A "The erection operation and subsequent dismantlement of the following items of plant which are being*used on the Greenham (Plant Hire) Ltd. sub-contract for the erection of eight large vessels:
- | | |
|------------------------------|-------------|
| (1) Manitowoc Ringer crane | £600,000 |
| (2) Manitowoc 4,000 W. crane | £250,000 |
| (3) Hydrajack system | £2,150,000" |

B

giving a total of £3,000,000. The minimum premium was increased by £9,000. The policy also provides third party liability cover in standard terms, whereby the insurers agree to indemnify the insured:

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"Against all sums for which the insured shall become legally liable to pay as damages consequent upon (a) accidental bodily injury to or illness or disease of any person (b) accidental loss of or damage to property occurring . . . as a result of and solely due to the performance of the insured contract happening on or in the immediate vicinity of the contract site."

D

There is an exception to the third party liability cover which excludes property forming the subject of the insured contract.

E

The first point taken by the insurers is that the defendants are not "sub-contractors" within the meaning of the policy, and are therefore not insured at all. If they are right about that, then none of the other points arise. At an early stage of the argument Mr. Wright very properly accepted, though he never formally conceded, that the first defendants, Magnaload, must be sub-contractors; but he maintained the argument in relation to the second defendants, Mammoet.

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The facts are that in the initial stages of the negotiations it was contemplated that Mammoet would enter into a contract with Greenhams for carrying out the specialist lifting operation with their Hydrajack. At the end of June there was a change of direction. At a meeting which took place between Magnaload and Mammoet on June 27, 1978, it was agreed that, for administrative reasons, the contract would be in the name of Magnaload, not Mammoet. Mammoet would, however, remain responsible for the operation itself. The reasons for this change do not matter. The sub-contract price had already been agreed between Greenhams and Mammoet at £185,000. It was agreed that Mammoet would reimburse Magnaload out of that sum for any services which Magnaload performed or any costs which they incurred. On July 13, 1978, there was a meeting between Magnaload, Mammoet and Greenhams at which Greenhams agreed that the contract would be with Magnaload provided they received "100 per cent. support" from Mammoet. On July 24, 1978, Greenhams sent a telex to Magnaload as follows:

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"Please find the draft of the purchase order for Foster Wheeler job at Immingham. Could we have your comments as soon as possible.

"Order on Magnaload

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"For supply of lifting equipment and services in order to carry out the erection of heavy vessels at the Lindsey Oil Refinery expansion project, Killingholme, South Humberside. All as more fully described in the attached scope of work and conditions of order. For the lump sum price of £185,000."

Then under the heading scope of work and conditions of order I will quote two paragraphs:

"Erection of vessels at Lindsey Oil Refinery expansion project, Killingholme, South Humberside. Main contractor. Foster Wheeler Ltd. heavy lifting sub-contractor Greenham Plant Hire Ltd. specialist lifting contractor Magnaload Ltd. General conditions of contract in line with those which Greenham Plant Hire have accepted from Foster Wheeler are understood to apply to this order."

That telex is signed by Greenham Plant Hire. The same day a copy of that telex was sent on by Magnaload to Mammoet. Mammoet came back with certain comments, which were sent on to Greenhams. According to Mr. Wignall, who gave evidence at the hearing, and who had taken an active part in the negotiations as commercial director of Magnaload, all three parties reached agreement on all points of substance.

The term "sub-contractor" is defined in the head contract as meaning:

"Any person to whom the preparation of any design the supply of any plant or the execution of any part of the works is sub-contracted, irrespective of whether the contractor is in direct contract with such person."

There is a similar definition in the sub-contract between Foster Wheeler and Greenhams.

On the facts which I have set out, there was clearly a contract between Greenhams and Magnaload, as, indeed, Mr. Wright accepted. Strictly speaking Magnaload were not sub-contractors but sub-sub-contractors. But I would hold that they were nevertheless sub-contractors within the definition contained in the contracts and within the ordinary meaning of the word "sub-contractors" as contained in the policy. To my mind the word "sub-contractors" in the context of the policy, must include sub-sub-contractors as well as sub-contractors.

Turning to Mammoet, Mr. Wright argued that there is nothing in the documents to show that Mammoet, as distinct from Magnaload, were contractors at all; if so they could not be sub-contractors. I cannot accept that argument. It frequently happens that businessmen do not tie up their contracts in ways which seem satisfactory to lawyers; particularly where the parties are companies which, though not members of the same group in the strict sense, are nevertheless as closely associated as these were. I would require a great deal of persuasion before holding that Mammoet had no contractual claim to remuneration from anyone. It seems to me that a contract must be implied between Magnaload and Mammoet, under which Mammoet became sub-contractors of Greenhams, on terms that Mammoet would carry out the operation for the agreed price.

In passing I may mention the parallel proceedings which have been brought by Magnaload and Mammoet against the insurers under this very policy. By their points of claim, they claimed just under D.fl. 1,200,000 for damage to the Hydjack and various other items of equipment. I understand that the insurers have settled that claim for D.fl. 800,000. If the defendants are not sub-contractors within the meaning of the policy, the insurers would have had a complete defence. On the true construction of the policy I would hold that Magnaload and Mammoet were both sub-contractors and both insured under the policy.

The next question relates to the property insured. Mr. Hamilton submits that a contractors all risk policy in this form is an insurance on property, namely, the works and temporary works belonging to the insured, or for which the insured are responsible. Mr. Wright accepts that

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A it is an insurance on property, but submits that the property insured must be read distributively, in other words, each insured is only insured in respect of his own property, or property for which he is responsible. I do not accept that construction. It seems to me that on the ordinary meaning of the words which I have quoted, each of the named insured, including all the sub-contractors, are insured in respect of the whole of the contract works. There are no words of severance, if I may use that term in this connection, to require me to hold that each of the named insured is only insured in respect of his own property. Nor is there any business necessity to imply words of severance. On the contrary, as I shall mention later, business convenience, if not business necessity, would require me to reach the opposite conclusion. I would hold, as a matter of construction, that each of the named insured is insured in respect of the entire contract works, including property belonging to any other of the insured, or for which any other of the insured were responsible.

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But then comes the question: what is the nature of the interest insured? Mr. Wright submits that the only possible insurable interest which one insured could have in property belonging to another, is in respect of his potential liability for loss of or damage to that property. Accordingly section 1 of the present policy is, he submits, a composite insurance. It is an insurance on property so far as it relates to property belonging to any particular insured: it is a liability insurance so far as it relates to all other property comprised in "contract works." Mr. Hamilton on the other hand, submits that section 1 of the policy is a policy on property, pure and simple.

D

In my judgment Mr. Hamilton's submission is correct. A very similar question arose in *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1966] A.C. 451. In that case a firm of carriers took out a policy of insurance of goods in transit, on a form known as Form J. A quantity of cigarettes were stolen while the goods were still in transit, by reason of the negligence of the owners, Imperial Tobacco Co. It was common ground that the carriers were not liable to the owners. On the carriers making a claim under the policy, for the benefit of the owners, it was argued that the policy was a liability policy, and since the carriers were not liable to the owners, they could not recover from the insurers. The argument was rejected by Roskill J., and his judgment was upheld by the Court of Appeal and the House of Lords. It appears that underwriters had always regarded an insurance on Form J as being a liability policy, and not a policy on goods. But Lord Reid said that the language of the policy showed conclusively that the policy was a policy on goods. I can find no relevant distinction between the language of the present policy and the language in *A. Tomlinson (Hauliers) Ltd. v. Hepburn*. Section 1 of the present policy covers "all risks of loss or damage to the insured property." It excludes the cost of replacing or rectifying insured property which is defective in material or workmanship, and so on. There is nothing in section 1 of the policy which is appropriate to an insurance against liability, whereas, everything is appropriate to a policy on property. Section 2 of the policy covers the contractual liability of the contractors to maintain the contract works during the maintenance period. Section 3 covers third party liability. The very fact that third party liability is covered in a separate section, which expressly excludes liability for damage to property forming part of the contract works, shows to my mind that section 1 of the policy is an insurance on property, and not an insurance against liability.

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There is a passage in Sir George Jessel M.R.'s judgment in *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* (1877) 5 Ch.D. 569, 578 which points in the other direction. For he refers to a wharfinger's insurance on goods held in trust, or for which they are responsible, as being in terms an insurance against liability. But that dictum (for it was not more) cannot now stand against the decision of the House of Lords in *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1966] A.C. 451.

That brings me to the central question in the case. In *A. Tomlinson (Hauliers) Ltd. v. Hepburn* it was held, indeed it was conceded, that if the policy was an insurance on goods, then the carriers could, as bailees, insure for their full value, holding the proceeds in trust for the owners. In the present case the defendants could not be regarded as being in any sense bailees of the property insured under the policy. Does that make any difference? Can the defendants recover the full value of the property insured, even though they are not bailees? It is here that one leaves the construction of the policy, and enters, hesitatingly, the realm of legal principle.

What are the reasons why it has been held ever since *Waters v. Monarch Fire and Life Assurance Co.* (1856) 5 E. & B. 870 that a bailee is entitled to insure and recover the full value of goods bailed? Do those reasons apply in the case of the sub-contractor? One reason is historical. The bailee could always sue a wrongdoer in trover. If his possessory interest in the goods was sufficient to enable him to recover the full value of the goods in trover, why should he not be able to insure that interest? Another reason was that, as bailee, he was "responsible" for the goods. Responsibility is here used in a different sense from legal liability. A bailee might by contract exclude his legal liability for loss of or damage to the goods in particular circumstances, e.g. by fire. But he would still be "responsible" for the goods in a more general sense, sufficient, at any rate, to entitle him to insure the full value.

It is clear that neither of these reasons apply in the case of a sub-contractor. But there is a third reason which is frequently mentioned in connection with a bailee's right to insure the full value of the goods: From a commercial point of view it was always regarded as highly convenient. Thus in *Waters v. Monarch Fire and Life Assurance Co.*, 5 E. & B. 870 itself Lord Campbell C.J. said, at p. 880:

"What is meant in those policies by the words 'goods in trust?' I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense . . . but goods with which they were entrusted in the ordinary sense of the word. They were so entrusted with the goods deposited on their wharfs; I cannot doubt the policy was intended to protect such goods; and it would be very inconvenient if wharfingers could not protect such goods by a floating policy."

Similarly Lord Pearce in *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1966] A.C. 451, 481:

"A bailee or mortgagee, therefore (or others in analogous positions), has, by virtue of his position and his interest in the property, a right to insure for the whole of its value, holding in trust for the owner or mortgagor the amount attributable to their interest. To hold otherwise would be commercially inconvenient and would have no justification in common sense."

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- A In the case of a building or engineering contract, where numerous different sub-contractors may be engaged, there can be no doubt about the convenience from everybody's point of view, including, I would think, the insurers, of allowing the head contractor to take out a single policy covering the whole risk, that is to say covering all contractors and sub-contractors in respect of loss of or damage to the entire contract works. Otherwise each sub-contractor would be compelled to take out his own separate policy. This would mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross-claims in the event of an accident. Furthermore, as Mr. Wignall pointed out in the course of his evidence, the cost of insuring his liability might, in the case of a small sub-contractor, be uneconomic. The premium might be out of all proportion to the value of the sub-contract. If the sub-contractor had to insure his liability in respect of the entire works, he might well have to decline the contract.

For all these reasons I would hold that a head contractor ought to be able to insure the entire contract works in his own name and the name of all his sub-contractors, just like a bailee or mortgagee, and that a sub-contractor ought to be able to recover the whole of the loss insured, holding the excess over his own interest in trust for the others.

- D If that is the result which convenience dictates is there anything which makes it illegal for a sub-contractor to insure the entire contract works in his own name? This was a question which was much discussed in the early cases on bailment. But it was never illegal at common law for a bailee to insure goods in excess of his interest. As for statute, the Marine Insurance Acts obviously do not apply. It is true that the Life Assurance Act 1774 by section 3 prohibited an insured from recovering more than his interest on the happening of an insured event. But policies on goods were specifically excluded by section 4 of the Act. Accordingly it was held that neither at common law nor by statute was there anything to prevent the bailee from insuring in excess of his interest.

- F What about a sub-contractor? "Goods" in section 4 of the Life Assurance Act 1774 has always been given a wide interpretation, and would clearly cover contract works until they became part of the realty. Whether the works would remain "goods" thereafter, and if so for how long, may be more difficult. But it was not suggested that the insurers would have any defence here under the Life Assurance Act 1774, so I say no more about it. I would hold that the position of a sub-contractor in relation to contract works as a whole is sufficiently similar to that of a bailee in relation to goods bailed to enable me to hold, by analogy, that he is entitled to insure the entire contract works, and in the event of a loss to recover the full value of those works in his own name.

- H Turning from principle to authority, there is, so far as I know, no English decision covering the present case. But there is an important decision of the Supreme Court of Canada. In *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.* (1977) 69 D.L.R. (3d) 558, the facts were that Imperial Oil Ltd. entered into a building contract for the construction of a fertiliser plant with Wellman Lord Ltd. as main contractor. Wellman Lord Ltd. entered into a sub-contract with Commonwealth Construction Co. Ltd. for the construction of the pipework. Imperial took out a policy known as a "Course of Construction Policy." The policy was in the name of Imperial, together with their contractors and sub-contractors. It covered:

"all materials . . . and all other property of any nature whatsoever owned by the insured or in which the insured may have an interest or responsibility or for which the insured may be liable or assume liability prior to loss or damage . . ."

A

There was a fire at the site which was said to have been due to the negligence of Commonwealth. The insurers paid the loss to Imperial, and then sought to recover in the name of Imperial from Commonwealth under their right of subrogation. It will be seen that the facts are thus almost identical to those in the present case.

B

The matter came before the court on a preliminary issue. The court at first instance rejected the claim on the ground that Commonwealth were fully insured under the policy. The Court of Appeal reversed the trial judge, holding that Commonwealth could only claim to be indemnified under the policy to the extent of that part of the work performed under the sub-contract, i.e. property belonging to Commonwealth and property for which it was responsible before the loss occurred. The Supreme Court, consisting of the Chief Justice and eight judges, restored the judgment of the trial judge. The Supreme Court stated the main issue, at p. 560:

C

"Did Commonwealth, in addition to its obvious interest in its own work, have an insurable interest in the entire project so that in principle the insurers were not entitled to subrogation against that firm for the reason that it was an assured with a pervasive interest in the whole of the works."

D

There was a preliminary question whether the policy was to be regarded as an insurance on property at all or whether it was an insurance against liability. The Supreme Court held that it was property insurance. Indeed there seems to have been no real argument to the contrary. At the beginning of their judgment the court described the policy as a "multi-peril subscription policy stated to be property insurance, which it clearly is." Later the court said:

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"given the fact that the policy is property insurance and not liability coverage, the reasoning of the Court of Appeal may be summarised thus: . . ."

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Having decided that preliminary question in favour of Commonwealth, the court went on to consider whether Commonwealth had a "pervasive interest" in the entire property. The court referred to *Waters v. Monarch Fire and Life Assurance Co.*, 5 E. & B. 870; *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1966] A.C. 451 and other bailment cases, including a number of American cases, and then said, at p. 560:

G

"In all these cases, there existed an underlying contract whereby the owner of the goods had given possession thereof to the party claiming full insurable interest in them based on the special relationship therewith. Although in the case at Bar Commonwealth was not given the possession of the works as a whole, does the concept apply here? I believe so. On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in court. By recognising in all tradesmen an insurable interest based on that very real possi-

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A bility, which itself has its source in the contractual arrangements
opening the doors of the job site to the tradesman, the courts would
apply to the construction field the principle expressed so long ago in
the area of bailment. Thus all the parties whose joint efforts have
one common goal, e.g. the completion of the construction, would be
spared the necessity of fighting between themselves should an accident
occur involving the possible responsibility of one of them."

B The *Commonwealth Construction Co.* case is, in my view, indistinguishable
from the present case, and is high persuasive authority. Even if I had
thought it wrongly decided, which I do not, I should have hesitated long
before declining to follow it.

Mr. Wright sought to extract comfort from a passage, at p. 563:

C "In the description of the property insured, the words 'assume liability
prior to loss' are sufficient to define the interest of the general
contractor. The words 'may be liable' add another dimension and are
wide enough, in my eyes, to recognise in all contractors (which term,
I underline again, includes sub-contractors) an insurable interest
having its source in the very real possibility ('may') of liability,
D considering the close inter-relationship of the labour performed by
the various trades under their respective agreements. Of course, that
very real possibility exists prior to the loss."

Mr. Wright argued that there are no equivalent words to "assume liability
prior to loss" in the present case, and that the words show that the policy
was in truth a liability policy. Alternatively he argued that while Foster
E Wheeler and Greenhams "assumed liability" in the present case under
clause 31 of their respective contracts, the defendants did not. There is
nothing in either of these points. I have already drawn attention to the
passages in which the Supreme Court quite clearly decided or assumed
that the policy was a policy on property, and not a liability policy. As for
the words "assume liability," I would myself have doubted whether they
added anything to the word "responsibility." They are not, I think,
F intended to refer to legal liability towards others taking part in the joint
project, and they are certainly not confined to contractual assumption of
liability, a question which, as the court said, "may well remain unan-
swered." There is therefore no ground of distinction, either between the
present case and the *Commonwealth Construction Co.* case, or between
Foster Wheeler and Greenhams on the one hand and the defendants on
G the other.

For the reasons which I have mentioned, I would hold, both on
principle and on the authority of the *Commonwealth Construction Co.*
case, that a sub-contractor who is engaged on contract works may insure
the entire contract works as well as his own property, and that the
defendants in this case were each so insured.

H That brings me to the last question: does the fact that the defendants
are fully insured under the present policy defeat the insurer's right of
subrogation? In the *Commonwealth Construction Co.* case and in the
American cases there referred to, it was assumed that it followed auto-
matically that the insurers could have no right of subrogation. In the
Commonwealth Construction Co. case it was described as being a "basic
principle." In one of the American cases it was said that the rule was too
well established to require citation. In none of the cases is there any
discussion as to the reason for the rule, except for a brief reference in the

Commonwealth Construction Co. case to Simpson and Co. v. Thomson (1877) 3 App.Cas. 279 as follows, at p. 561:

"The starting point of that submission is the basic principle that subrogation cannot be obtained against the insured himself. The classic example is, of course, to be found in *Simpson and Co. v. Thomson*, 3 App.Cas. 279. In the case of true joint insurance, there is, of course, no problem; the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and that no subrogation is possible."

The question whether there is a fundamental principle of the law of insurance that insurers can never sue one co-insured in the name of another came up in *The Yasin* [1979] 2 Lloyd's Rep. 45. In that case I said that I was not satisfied that there was any such fundamental principle as had been suggested: the reason for the rule seemed to me to rest on ordinary principles of circuity. This idea has since been adopted by the current editors of *MacGillivray & Parkington on Insurance Law*, 7th ed. (1981), para. 1214. In paragraph 1215 the editors say:

"The crucial question, therefore, in any case involving joint assured is whether the liability of one co-assured to the other is one of the matters covered by the policy."

Thus where a bailee is insured against liability to the bailor, and the bailor is insured under the same insurance, it is obvious that the insurer could not exercise a right of subrogation against the bailee: circuity would be a complete answer. But in *The Yasin* I went on to contrast the position where the bailee had insured, not his liability to the bailor, but the goods themselves. Now that the matter has been argued again, I have come to the conclusion that the contrast I was seeking to draw is fallacious. Whatever be the reason why an insurer cannot sue one co-insured in the name of another, and I am still inclined to think that the reason is circuity, it seems to me now that it must apply equally in every case of bailment, whether it is the goods which the bailee has insured, or his liability in respect of the goods. The same would also apply in the case of contractors and sub-contractors engaged on a common enterprise under a building or engineering contract. Even if I still had reservations of the kind which I tried to voice in *The Yasin*, I would feel obliged to bury them in the light of the decision of the Supreme Court of Canada in the *Commonwealth Construction Co. case*, a decision which was not cited in *The Yasin* and for the reference to which in the present case I am very grateful to counsel.

Lastly I come to a point which was raised by a late amendment to the points of reply. The policy provides by general exception (2):

"The insurer shall not be liable in respect of loss damage or liability which at the time of happening of such loss damage or liability is insured by or would but for the existence of this policy be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected."

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Petrofina Ltd. v. Magnaload Ltd. (Q.B.D.)

Lloyd J.

A The defendants admit that at all material times they had in force liability policies with the Royal Insurance and other insurers. Some at least of these other policies have a provision similar in effect to general exception (2). Mr. Wright submits that the existence of these other liability policies brings exception (2) into effect, with the result that the insurers are either not liable at all, or only for the excess over the amounts covered by the other policies.

B Mr. Hamilton submits that general exception (2) is, on its true construction, intended to take effect only in the case of true double insurance. There cannot be double insurance unless the same insured is covered in respect of the same property against the same risks. Thus if in the present case there were, in addition to the New Hampshire policy, another policy on the contract works, covering the same risks, then that would be a true case of double insurance. But here the other policies, so Mr. Hamilton submits, are not policies on property, but liability policies. Mr. Hamilton argues that there cannot be double insurance in those circumstances.

C I agree with Mr. Hamilton's argument. It is true that general exception (2) refers to "liability" as well as "loss and damage." But that is because the general exceptions are intended to apply to section 3 of the policy, which covers third party liability, as well as sections 1 and 2. Since I agree with Mr. Hamilton's submission it is unnecessary to investigate the terms of the Royal Insurance policy and the other policies in any detail, or indeed at all, for they are admittedly liability policies, whereas the insurance under section 1 is, as I have already held, an insurance on property. The insurances are not therefore insurances on the same property and against the same risk and it follows that there is here no possibility of double insurance in the true sense, and general exception (2) does not apply.

D Mr. Hamilton had an alternative argument, should he be wrong on everything else. He submitted that having regard to Foster Wheeler's obligation under clause 32 of the main contract to take out insurance in the joint names of all parties, including the sub-contractors, and having regard in particular to the endorsement under which the policy was specifically extended to include the erection operation and subsequent dismantlement of the Hydrijack system, a contract is to be implied between the plaintiffs and the defendants that the plaintiffs would not hold the defendants liable in the event of loss or damage to the contract works resulting from the defendants' negligence. There is much to be said for that argument but having already decided in favour of the defendants on the main ground, I need say no more about it.

G It follows from all I have said, that the issue directed by Parker J. will be decided in favour of the defendants.

Order accordingly.

Defendants to have their costs.

Leave to appeal.

Solicitors: *Herbert Smith & Co.; Elborne Mitchell & Co.*

H. J.

[COURT OF APPEAL]

SIMMONS v. SIMMONS

1983 March 2; 23;
April 12

Eveleigh and Purchas L.JJ.

Legal Aid—Costs—Charge on property—Divorce—Property adjustment order—Legally aided wife to receive sum from proceeds of sale of matrimonial home—Whether sum subject to statutory charge—Whether legal aid fund's costs payable forthwith—Whether charge on total amount recovered—Legal Aid Act 1974 (c. 4), s. 9(6)—Legal Aid (General) Regulations 1980 (S.I. 1980 No. 1894), regs. 88, 91, 96(d) (as amended by Legal Aid (General) (Amendment) Regulations 1981 (S.I. 1981 No. 173))

The parties were married in 1964 and had two children, born in 1974 and 1977. The matrimonial home was purchased in joint names. In 1980 the wife presented a divorce petition and a decree nisi was pronounced in 1981. She remained with the children in the house, which was worth £49,000 and there was an outstanding mortgage of £10,500. The husband went to live in a flat owned by the woman he intended to marry. The parties were granted legal aid certificates for proceedings in relation to custody and financial matters. After awarding custody of the two children to the wife Sir John Arnold P. ordered that the house should be sold and that the wife should receive £26,750 from the proceeds of sale, the husband retaining the balance. Sir John Arnold P. intended the wife to have a sum which together with a mortgage would enable her to purchase another home for herself and the children, but he did not take into account her liability under section 9(6) of the Legal Aid Act 1974¹ and regulations 88, 91 and 96 of the Legal Aid (General) Regulations 1980² for her legal aid costs, which were subsequently estimated at £8,000.

On appeal by the wife:—

Held, (1) that the charge for the benefit of the legal aid fund created by section 9(6) of the Legal Aid Act 1974 on any property recovered for a legally aided person in the proceedings applied to a fund of money as well as to real property (post, p. 824E–F); that the duty of an assisted person's solicitor under regulation 91 of the Legal Aid (General) Regulations 1980 to pay forthwith to The Law Society all moneys received by him by virtue of an order or agreement made in the assisted person's favour applied to the full amount of such moneys unless the rights of the legal aid fund would be safeguarded by payment of part only of the moneys recovered, and that regulation 96(d) did not exempt from that duty the first £2,500 of the moneys received by each of the parties from the proceeds of sale of the matrimonial home (post, p. 825A–B, D–F).

(2) Allowing the appeal, that since there would be a charge upon the sum of £26,750 received by the wife from the sale of the matrimonial home and the sum would have to be paid over forthwith to The Law Society under regulation 91 subject only to the balance left after her solicitors had given an undertaking that their costs would not exceed a certain amount, the sum thereby released to her would almost certainly be insufficient for her to

¹ Legal Aid Act 1974, s. 9(6): see post, p. 823H.

² Legal Aid (General) Regulations 1980, reg. 88: see post, p. 826G–H.

Reg. 91: see post, p. 824G–H.

Reg. 96: see post, p. 825C–D.

3 W.L.R.

Simmons v. Simmons (C.A.)

A rehouse herself and the children; and that, accordingly, upon the wife consenting to dismissal of her application for periodical payments and a lump sum the husband should transfer his interest in the matrimonial home to her subject to a charge for £12,000 in his favour enforceable upon the house being sold (post, pp. 826A–D, 829B).

B *Per curiam.* Amendments to section 9(6) of the Legal Aid Act 1974 and to regulations 88 and 91 of the Legal Aid (General) Regulations 1980 to exclude the proceeds of the sale of the matrimonial home or funds allocated for the purchase of a primary home for either of the parties to the marriage or a child of the marriage to whom section 41 of the Matrimonial Causes Act 1973 applies would avoid the hardship in this case (post, p. 829C–D).

C Decision of Sir John Arnold P. reversed.

The following cases are referred to in the judgment:

- D *Carson v. Carson* [1983] 1 W.L.R. 285; [1983] 1 All E.R. 478, C.A.
Hanlon v. Hanlon [1978] 1 W.L.R. 592; [1978] 2 All E.R. 889, C.A.
Hanlon v. The Law Society [1981] A.C. 124; [1980] 2 W.L.R. 756; [1980] 2 All E.R. 199, H.L.(E.).
Harvey v. Harvey [1982] Fam. 83; [1982] 2 W.L.R. 283; [1983] 1 All E.R. 693, C.A.
Jones v. The Law Society, *The Times*, January 27 and 28, 1983.
Martin (B. H.) v. Martin (D.) [1978] Fam. 12; [1977] 3 W.L.R. 101; [1977] 3 All E.R. 762, C.A.
Mesher v. Mesher, *The Times*, February 13, 1973; (Note) [1980] 1 All E.R. 126, C.A.

E The following additional case was cited in argument:

- Manley v. The Law Society* [1981] 1 W.L.R. 335; [1981] 1 All E.R. 401, Bristow J. and C.A.

INTERLOCUTORY APPEAL from Sir John Arnold P.

F By notice of appeal dated January 18, 1983, the wife appealed, with leave of Sir John Arnold P. granted on February 2, 1983, against his order dated October 22, 1982, that the former matrimonial home be sold and the husband pay to the wife a lump sum of £26,750 out of the net proceeds of sale, the husband to retain the balance. The wife appealed on the grounds that Sir John Arnold P. was wrong and misdirected himself in so ordering in that (1) the purpose of the litigation was to make adequate provision for the children of the family by providing them and their mother with a home; (2) the result of the order was that after payment of The Law Society's charges estimated to be in excess of £6,000 the wife would be unable to do so; (3) the proper course would be to allow her and the children to remain in the matrimonial home bearing in mind the husband's income and assets and all the circumstances of the case, and the fact that in so ordering the court would enable The Law Society's costs to be met by means of a statutory charge registered in its favour in relation to the matrimonial home in lieu of immediate payment of legal aid costs by the wife; and (4) the court made no order regulating payments of the outgoings in respect of the matrimonial home.

H By a respondent's notice dated February 20, 1983, the husband, while seeking to uphold the judgment and order of Sir John Arnold P. on the grounds upon which they were given, contended that they should be affirmed on, inter alia, the following additional grounds. (1) Although Sir

John Arnold P. made an order committing the custody of the children to the wife he clearly considered that the question of the children's future (including custody) might have to be reviewed and also that the husband should continue to play a full part in the lives of the children by means of extensive staying access in the school holidays and other access, in his judgment in the custody proceedings Sir John Arnold P. indicated that the husband needed better accommodation for himself and his intended wife in which to house the children during staying access; having dealt with custody it was an important consideration in the ancillary relief proceedings which followed that there should be released to the husband a sum of money to enable him to purchase a small house with the assistance of a mortgage and some modest financial help from his intended wife; the order of Sir John Arnold P. achieved that object while giving to the wife the bulk of the net proceeds of sale of the matrimonial home; and the husband would have to pay his legal aid costs of some £6,000 (not including any costs in the Court of Appeal) out of his share of £9,750 so that he would be left with only £3,750 to go towards a house. (2) The matrimonial home ought not to be retained in any event because it was too large for the wife's needs; it was too expensive to run now that two homes had to be kept; it was in need of decorating and repair, the cost of which would be about £3,000; and if it was not sold and the existing mortgage was retained the husband would be prejudiced in raising a new mortgage with which to purchase a property for himself. (3) The wife's earnings were only about £2,648 per annum gross but the husband believed that she was capable of earning £5,000 per annum. (4) As to the question of a legal aid charge in respect of the wife's costs the husband was not satisfied that she had fully explained her position to The Law Society Legal Aid Area Committee with a view to that committee agreeing to take a charge on the property to be purchased by her and not on the lump sum or to accept only a proportion of the sum due to The Law Society in respect of her costs while allowing the balance to be released to her, and the husband believed that the area committee would accept a charge on the property to be purchased by her or would allow her to retain the bulk of the sum due in respect of her costs (subject possibly to the charge), if the whole position was fully explained to it. (5) The wife could buy a good house, in the area in which she lived, for between £31,000 and £32,000, and she had a mortgage capacity of about £10,000. (6) The order made by Sir John Arnold P. was fair and his order as to costs was also fair. (7) If, which was not admitted, there was no way of avoiding the legal aid charge in respect of the wife's costs (or a substantial part thereof) under the existing order, the husband wished to put forward a proposal which he believed would result in her receiving a property and not a lump sum so that the charge would not then apply or would apply to the property or could be transferred to the property; under the proposal he would have the matrimonial home transferred to him, he would borrow £38,000 thereon from Barclays Bank, he would discharge the existing mortgage and he would purchase a house for her in her name contributing thereto £26,750 from the money borrowed from the bank while she would contribute about £5,000 to enable the house to be purchased for about £31,750; and the proposal would have three advantages: (i) there would be no lump sum upon which the charge in respect of her costs could bite; (ii) the husband would be able to have the house decorated after she moved out so as to make it more readily saleable and to obtain the best

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A price; (iii) no problem would arise over the needs for or a deposit for a house before the present house was sold.

The facts are stated in the judgment of Purchas L.J.

Peter Archer Q.C. and *Jennie Horne* for the wife.

Thomas Coningsby and *J. A. Hodgson* for the husband.

B

Cur. adv. vult

March 23. The following judgment was handed down.

PURCHAS L.J. This is an appeal by June Patricia Simmons ("the wife") from part of an order made by Sir John Arnold P. on October 22, 1982. Leave to appeal against this part of his order was given by Sir John Arnold P. on February 2, 1983. The order was made after a substantial hearing and resulted from a detailed judgment dealing with many matters in issue between the parties including the custody of two children of the marriage, detailed provisions for access to the respondent husband and orders under sections 23 and 24 of the Matrimonial Causes Act 1973.

This appeal concerns a limited issue as to the proper disposal of the matrimonial home. The short history is as follows. The parties were married on December 19, 1964. The husband, Ernest John Simmons, is now 41 years of age and the wife 38 years of age. There are two children of the family: a boy, who was born on February 27, 1974, and is, therefore, nine years of age; and a boy, who was born on October 17, 1977, and who is just under five and a half. There were a series of matrimonial homes. The final one, which was bought in joint names, was a four-bedroomed house of ample proportions with two reception rooms. At the time of the hearing before Sir John Arnold P. its value was put at around £49,000. There was a mortgage outstanding of £10,500. The net equity after costs of sale etc. was placed at around £37,000. Mr. Archer, who appears for the wife, has suggested that this figure might be a little high in that the costs of sale etc. may well have been understated. The outgoings on the house, including capital repayment of the mortgage, are in the region of £2,750 per annum.

After about 16 years the marriage unhappily broke down. The wife presented a petition dated October 23, 1980, based on the irretrievable breakdown of the marriage and behaviour on the part of the husband falling within section 1(2)(b) of the Matrimonial Causes Act 1973. By consent an order was made which resulted in the husband leaving the matrimonial home on October 29, 1980. He has since then remained away from the home. Decree nisi was pronounced on June 18, 1981. There was an application for maintenance pending suit heard on February 27, 1981. On the husband's undertaking to continue to pay all the outgoings on the house no order was made for maintenance pending suit. The husband is a senior art teacher earning in the region of £10,000 gross per annum. The wife is in part-time employment earning in the region of £221 per month. Proposals which she has made include taking student lodgers, which would enable her to bring her total monthly income, including child allowance, to about £428. The husband now resides in a ground floor flat owned by a Mrs. Berry, with whom he lives and whom he plans to marry. This accommodation has only one bedroom and two other rooms. It is adequate for a weekend stay by the children, but not for longer stays. Access on a generous scale was ordered by Sir John Arnold P., including half the school holidays and alternate weekends. It is, therefore, important

that the husband should be able to improve his accommodation if for this purpose alone. The wife remains in the matrimonial home. The accommodation provided by this is more than is absolutely necessary for her and the two children; but, as I have already mentioned, she plans to make proper use of the accommodation by letting one or more of the rooms. This would enable her to be financially self-supporting and to service the mortgage and maintain the family home without having recourse to the husband, apart from a contribution towards the maintenance of the children.

Sir John Arnold P. made an order bearing in mind the importance of safeguarding the children, but also doing justice between the parties as it then appeared to him. This involved an order for the sale of the house and a further order that out of the proceeds of the sale the wife should receive £26,750. I quote from his judgment:

"Now, the prime need of this family is proper housing for the children, and I approach the problem upon that basis. Certainly the children's present home . . . where they live with their mother, is ample to provide a proper home; but if, consistently with providing a proper home for them, the father's capital (it is the only capital he has of substance) or a substantial proportion of it can be released to him, it seems to me to be fair, as between mother and father, that that should be so, provided that it can be done consistently with achieving the prime purpose. There is obviously, as there always is in a matter of this sort, a degree of speculation about exactly what will be available on the market at exactly the appropriate moment. But I am satisfied, on the evidence which I have seen, that for about £32,500 or £33,000 the mother can acquire a freehold house with four bedrooms tolerably near to the school. The mortgage and the costs which would necessarily have to be repaid and paid on a realisation of the former matrimonial home will leave something like £37,000 or £37,500 free for division between the two spouses. The mother's mortgage ability, I am told, ranks at about £7,000, provided she has a sufficient primary security. The father, without consenting to it, has made plain through his counsel that he attaches very considerable importance to having some free capital even at a cost of having to provide for the mother substantially more than her share of the proceeds of sale of the matrimonial home, and a figure which has been mentioned in that connection (and it seems to me to be a proper figure) is a figure which on present expectations would be something like three-quarters of the proceeds of sale, a figure of £26,750."

As Sir John Arnold P. remarked in the extract I have cited from his judgment, there must always be a degree of speculation. Speaking for myself, had I been approaching this problem at first instance I would probably not have had the courage to have put into operation such a closely tailor-made scheme as the one proposed. Having said that, however, Sir John Arnold P. approached the problem on entirely the correct basis, i.e., achieving, if it was possible, the provision of adequate accommodation for both parties by means of a careful redistribution of the family assets. Certainly such a provision standing unqualified could not be criticised in this court.

The keystone of the scheme proposed by Sir John Arnold P. was the payment to the wife of the sum of £26,750 from the proceeds of the sale of the matrimonial home. Sir John Arnold P. had unfortunately left out

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Simmons v. Simmons (C.A.)

Purchas L.J.

A of account the charge for the benefit of the legal aid fund created by section 9(6) of the Legal Aid Act 1974. This charge, making as it would a substantial inroad into the figure available to the wife to rehouse herself, effectively brought about the collapse of the scheme. The latest estimate of the wife's liability to the legal aid fund is £8,000. According to a calculation produced by Mr. Archer, all that the wife would have available to buy a new home for the family would be £15,900 plus £7,000 mortgage—total £22,900. This would not be sufficient.

B Mr. Coningsby has attempted skilfully and attractively to support a respondent's notice in order to uphold the order of Sir John Arnold P. or to place before the court an alternative solution. Mr. Archer, on the other hand, has argued in support of the appeal that a sale of the matrimonial home cannot in the full circumstances be justified and that in order to preserve a home for these young children and their mother she should be entitled to continue to live there making on her part a contribution by taking in lodgers and achieving her own individual financial viability, but receiving in exchange a transfer of the husband's interest in the property.

C Before coming to a consideration of the charge in favour of the legal aid fund it is necessary to notice two further events. In *Jones v. The Law Society*, The Times, January 27, 1983, Sir John Arnold P. was incorrectly reported to have said:

D "Perhaps some way could be found within the regulations so that the discretion of The Law Society could attach its charge to a fund which was intended to purchase a home as well as attaching to an existing home."*

E This comment was made in connection with an application which had been made by a respondent husband for a declaration that The Law Society was not entitled to a charge on moneys retained by his former solicitors as part of a settlement between him and the petitioner wife in regard to the disposal of the matrimonial home. Following *Hanlon v. The Law Society* [1981] A.C. 124 Sir John Arnold P. refused the application and in fact said that perhaps by statutory amendment or amendment of the Legal Aid (General) Regulations a way could be found to grant discretionary power to The Law Society enabling it to defer enforcement of a charge over a fund intended to be used in the purchase of a home. The second matter is the presentation to the court of a letter from The Law Society dated March 1, 1983, indicating that as a result of counsel's opinion which they have obtained as indicated in their leaflet headed "Legal Aid—the Statutory Charge" (2nd ed. January 1982) The Law Society had been advised that where the only property recovered or preserved is money, The Law Society has no power to postpone the operation of the charge. Mr. Coningsby has invited us to consider this matter which obviously is one of some general importance.

G Section 9(6) of the Legal Aid Act 1974 provides:

H "Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situated) which is recovered or preserved for him in the proceedings."

* *Reporter's note.* For a correction see The Times, January 28, 1983.

Section 4(1) of the Act of 1974 provides:

"In respect of advice or assistance given to any person (in this section and section 5 below referred to as a 'client'), the client shall not, except in accordance with the following provisions of this section, be required to pay any charge or fee."

Subsection (2) provides for the payment of contributions by the "client." Section 5 deals with the payment of charges or fees which would be properly chargeable to a client unless he were protected by section 4(1). Subsection 5(3) provides:

"Except in so far as regulations otherwise provide, charges or fees to which this section applies shall constitute a first charge for the benefit of the solicitor . . . (b) on any property (of whatever nature and wherever situated) which is recovered or preserved for the client . . ."

Subsection 5(4) provides:

"In so far as the charge created by subsection (3) above in respect of any charges or fees to which this section applies is insufficient to meet them, the deficiency shall, subject to subsections (5) and (6) below, be payable to the solicitor out of the legal aid fund."

Regulations made under powers granted by the Act of 1974 have where money is concerned superseded the effect of section 5 by providing for the immediate payment over of moneys recovered. The legal aid fund, therefore, accepts the liability to pay solicitors' fees with a right to recover where the payments made exceed the contribution received from the assisted person under section 9(6) of the Act. The use of the word "charge" in various parts of the Act creates some difficulty in construction when used in relation to the word "property." Property is not defined for the purposes of the Act. In some sections it would appear to be restricted to real property, but in other contexts would appear to extend to include moneys recovered. In section 5(3)(b) the use of the word "charge" in connection with property would appear to extend to the wider interpretation of a first claim on a fund of money as well as a charge capable of registration under the Land Charges Acts.

I now turn to review some of the regulations to which the provisions of the sections of the Act just cited are specifically made subject. The relevant regulations are the Legal Aid (General) Regulations 1980, as amended by the Legal Aid (General) Amendment Regulations 1981:

"Solicitor to pay moneys recovered to The Law Society"

"91(1) An assisted person's solicitor shall forthwith—(a) inform the appropriate area committee of any property recovered or preserved for the assisted person; and (b) subject to paragraph (2), pay all moneys received by him by virtue of an order or agreement made in the assisted person's favour to The Law Society. (2) Where the appropriate area committee considers that the rights of the fund will thereby be safeguarded and so directs, the assisted person's solicitor shall—(a) pay to The Law Society under paragraph 1(b) only such sums as, in the opinion of the appropriate area committee, should be retained by The Law Society in order to safeguard the rights of the fund under any provisions of the Act and these regulations; and (b) pay any other moneys to the assisted person."

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Simmons v. Simmons (C.A.)

Purchas L.J.

A The relief from the duty created by paragraph (1) to pay “forthwith” all moneys received is mitigated only where the rights of the fund will be safeguarded by the payment of a portion only of the moneys recovered. In practice, this provision has been operated by requiring an undertaking to be given by the solicitor involved that the costs which will become payable by the legal aid fund shall not exceed the amount of money retained under regulation 91(2)(a).

B Regulation 96 provides some exemptions from what is described as “the statutory charge.” Again “statutory charge” is not defined by the Regulations. It must, therefore, refer to a charge created by statute and the statute involved must be the Act of 1974. Where the nature of the charge may vary from one section to another it is perhaps unsafe to attempt to assign to the expression “statutory charge” when used in the Regulations a necessarily definitive and universal meaning. It is probably safer to consider each regulation in its own context. Returning to regulation 96 this provides:

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“The charge created by section 9(6) of the Act shall not apply to . . . (d) the first £2,500 of any money, or of the value of any property, recovered or preserved by virtue of—(i) an order made . . . under the provisions of section 23(1)(c) or . . . 24 . . . of the Matrimonial Causes Act 1973 . . .”

D

This regulation envisages a statutory charge involving lump sums of money as well as real property and sub-paragraph (d) excludes from the charge created by section 9(6) of the Act of 1974 the first £2,500 of such money or the value of such real property. The regulation, however, must be read in the context of the duty on the solicitor to pay all moneys recovered forthwith to The Law Society under regulation 91. Mr. Coningsby argued that regulation 96(d) could be used to preserve up to £2,500 of the moneys received by each of the parties from the proceeds of the sale of the matrimonial home. Taking each party, a total of £5,000 could be salvaged, although it must be remembered that the husband’s costs are thought to amount to about £7,000. In view of the absolute provisions of regulation 91 I am unable to accede to this submission. Mr. Coningsby’s alternative submission was that the provisions of regulation 97(1) granted to The Law Society a discretion to postpone collection of the moneys due to the legal aid fund and to transfer a charge to property bought with the proceeds of the sale of the matrimonial home. Regulation 97 provides:

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G “(1) Any charge on property recovered or preserved for an assisted person arising under section 9(6) of the Act shall vest in The Law Society. (2) The Law Society may enforce any such charge in any manner which would be available if the charge had been given inter partes. (3) Any such charge affecting land shall in the case of unregistered land be a land charge of Class B within the meaning of section 2 of the Land Charges Act 1972 and in the case of registered land shall be a registrable substantive charge .”

H

Without paragraph (3) it would, in my judgment, be clear that “property” in the context of regulation 97 must mean real property in view of the provisions of regulation 91. But paragraph (3) would in such an event contain superfluous words “affecting land.” The best solution is probably to adopt a broad and not strict approach to construing these regulations. Regulation 91 would appear to pre-empt any cause for a charge to arise where moneys are involved. This would support the

argument that where charges are mentioned in the regulations they must refer to property of one sort or another. It is possible that "property recovered" might extend to chattels—choses in action, etc.

The wife's costs so far incurred for which she will be liable to reimburse the legal aid fund under the provisions of the scheme were estimated at the time of the notice of appeal dated January 18, 1983, to be in excess of £6,000 (now being put at £8,000). Sir John Arnold P. made no order as to costs, therefore there will be a charge upon the sum of £26,750 received from the sale of the matrimonial home in the hands of the wife's solicitors which will so reduce the sum received by her as to make it impossible for her to implement the scheme designed by Sir John Arnold P. The sum will have to be paid over forthwith to The Law Society under regulation 91 subject only to the balance of that sum left after the wife's solicitors have given an undertaking that their costs will not exceed a certain sum. Viewing the question realistically, it is unlikely that those solicitors will be able to give an undertaking that the costs will not exceed a figure somewhat in excess of £8,000. I have little doubt that the amount released to the wife under the provisions of regulation 91(2) will be substantially less than £20,000. I will consider this later in this judgment. For the reasons I have already given, I do not think that there is any relief to be obtained under the provisions of regulation 96(d) in this context.

I now turn to consider the alternative scheme which is set out in a letter from Barclays Bank addressed to the husband's solicitors dated February 8, 1983. In essence the scheme is for the husband to raise a sum of £38,000 by way of a bridging advance secured upon the matrimonial home by a first legal charge. The period of time for the advance is envisaged as four months or thereabouts. I quote from the third paragraph of the letter:

"We are only prepared to consider the proposition on the basis outlined by Mr. Simmons that the funds are used to enable Mrs. Simmons to buy the new property so that the matrimonial home is vacated."

This envisages a sum of money being transferred into the hands of the wife or her solicitors as a result of her transferring her interest in the matrimonial home to the husband without which he would not be in a position to grant the first legal charge demanded by the bank. If this is the plan envisaged then, in my judgment, that money falls within the provisions of regulation 88:

"Moneys recovered to be paid to solicitor or The Law Society"

"88. Subject to regulations 90 and 96, all moneys payable to an assisted person—(a) by virtue of any agreement or order made in connection with the action, cause or matter to which his certificate relates, whether such agreement was made before or after the proceedings were taken . . . shall be paid or repaid, as the case may be, to the solicitor of the assisted person or, if he is no longer represented by a solicitor, to The Law Society, and only the solicitor, or, as the case may be, The Law Society, shall be capable of giving a good discharge for moneys so payable."

Thus, any sum which became available to the wife as a result of any agreement involving the bank would eventually be funds in the hands of

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A her solicitor and subject to regulation 91. That disposes of the scheme as disclosed in the bank's letter. In argument Mr. Coningsby also developed a suggestion that the husband should buy a house and transfer it to the wife and so avoid any moneys coming into the possession of the wife or her solicitor. The detailed mechanics of such an arrangement were not fully deployed and certainly would involve considerable concessions and goodwill on the part of the wife unless she were to be protected by some agreement which would immediately invoke the provisions of regulation 88. Without going into great lengths, I have come to the conclusion that any such scheme as proposed by Mr. Coningsby under which the husband placed himself in possession of two alternative houses, one of which he released to the wife, were not sufficiently secure or practical to justify disposing of the family home over the heads of the wife and children. I have, therefore, come to the conclusion that the operation of the Act of 1974 and the Regulations effectively prevent the putting into effect of the scheme proposed by Sir John Arnold P. or any other scheme proposed by Mr. Coningsby as a substitute and that, therefore, the appeal must be allowed.

D It is necessary to consider what is the appropriate order to make in respect of the matrimonial home. Unhappily the impact of the Legal Aid Act 1974 and the Regulations have, in my judgment, moved this family from one whose total assets might in the special circumstances have been just sufficient, even if marginally so, to provide adequate accommodation for both husband and wife and children to a family whose total assets are insufficient to achieve this purpose. One must then revert to first principles in solving the problem. As Sir John Arnold P. said in his judgment, the first object is to preserve an adequate home for the wife and the two young children placed in her custody.

E Where the only asset of substance is the matrimonial home, the courts have varied from time to time as to the proper approach in the light of section 25 of the Matrimonial Causes Act 1973. Where the matrimonial home is the only capital asset, then, had the marriage continued, neither party would have had access to the asset as a source of providing either capital or revenue: see *Martin v. Martin* [1978] Fam. 12. The solution proposed in the particular circumstances prevailing in *Mesher v. Mesher*, The Times, February 13, 1973, which preserved the matrimonial home until the children had grown up or ceased full time education and thereafter distributed the proceeds of the sale between the parties has been criticised as a general approach by the Court of Appeal on a number of occasions, e.g., in *Hanlon v. Hanlon* [1978] 1 W.L.R. 592; *Harvey v. Harvey* [1982] Fam. 83 and *Carson v. Carson* [1983] 1 W.L.R. 285. In the particular circumstances of this case the provisions of section 25 require that a home is preserved for the wife and the two young children of the family along the lines in *Martin v. Martin* [1978] Fam. 12 and *Harvey v. Harvey* [1982] Fam. 83. Whether in the particular circumstances of this case an out-and-out transfer of the husband's interest in the house to the wife should be made or whether the house should be settled upon a trust for sale with provisions similar to those adopted in *Harvey v. Harvey* requires further consideration. The husband's position is somewhat worse than that of the respondent in *Martin v. Martin* [1978] Fam. 12, because it is accepted that he has a need to improve the standard of accommodation either by extending the flat where he presently lives or by selling that with the assistance of Mrs. Berry and buying better accommodation.

In view of the animosity and tensions that have arisen in this case, it might be more conducive to a settled existence for the children and facilitate the operation of access if there is a definite and immediate disposal of the asset. There is not sufficient capital available to provide the husband with the few thousand pounds he requires in order to improve his accommodation. Sir John Arnold P. accepted this need in the context of there being sufficient funds available. Now that is no longer the case it is necessary to see what can be omitted without prejudice to the family as a whole. Bearing in mind the husband's earning capacity and the apparent capacity of Mrs. Berry to be self-supporting, including servicing her own mortgage upon her present property said to be worth £20,000, the probabilities are that the husband will have access to sufficient funds to improve his accommodation position. This ignores what may well be said to be the husband's contribution to the matrimonial home or his right to an interest, albeit postponed, in the equity represented by this asset. It is based on the husband's earning capacity and the fact that he is housed in accommodation owned by the lady he intends to marry; and at the moment seems to offer the only way in which both parties and the children can be housed at all. The wife can use the extra accommodation available by renting this to students to supplement her income so that she can both preserve and enhance the property and be self-sufficient. If the wife was prepared to consent to her application for periodical payments to be dismissed, this would relieve the husband of a contingent liability which might continue for a considerable period of time. It would be some compensation for his losing either his interest in the family asset or his interest in the equity being reduced or postponed. These children are nine and five. If an order in the form in *Mesher v. Mesher*, The Times, February 13, 1973, had been made, the sale of the house and the distribution of the assets would not take place for probably another 12 years and maybe longer if either child went for further education. Whether an order in the form in *Mesher v. Mesher*; *Martin v. Martin* [1978] Fam. 12 or *Harvey v. Harvey* [1982] Fam. 83 is made, the question arises: who is to pay the mortgage instalments and meet the upkeep and maintenance of the property in the meanwhile? By the time the sale took place, if these liabilities were shared the interests of the parties would not have been greatly distorted. Experience to date shows that the parties in this case do not find it easy to deal with financial details of this kind. There is an issue before us which we have not decided as to why the electricity bills have not been paid, etc. This augurs ill in the future for the efficacy of any order providing for sharing financial responsibilities.

The wife is able to shoulder the burden at some considerable sacrifice to herself. If she does this for 13 years her equity in the house would have substantially increased in relation to the residual equity in favour of the husband; and the mortgage might well have been eliminated. This, together with his being relieved from the burden of making periodical payments, would, in my mind, on a broad basis of what is just between the parties within the terms of section 25 of the Matrimonial Causes Act 1973 permit the husband's interest in the matrimonial home to be satisfied. I would, therefore, providing the wife is prepared to consent to her claim for periodical payments being dismissed, favour an immediate transfer of the husband's interest in the house to the wife, subject to a charge in favour of the husband rather than the more complicated trusts for sale which were established in *Martin v. Martin* and *Harvey v. Harvey*. The amount of the charge

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A should reflect the value of the husband's present interest in the house, reduced to take into account the fact that he is to be relieved of liability to pay periodical payments in the future, or to be responsible in the future for the payment of the mortgage instalments or for maintenance of the matrimonial home. The wife will have to meet all future mortgage repayments and be responsible for all outgoings. The value, as reduced, of the husband's interest in the house I would put at £12,000.

B I would allow the appeal and upon the wife consenting to an order dismissing her application for periodical payments and lump sum provision substitute an order transferring the husband's interest in the matrimonial home to her (subject to a charge for £12,000). If she is not prepared to do this, the matter must be sent back for further consideration in the Family Division. If, through some good fortune befalling her, the wife is able to obtain funds to pay off the husband's charge, then she will be able freely to deal with the property. If the wife decides to leave the property the husband will recover a sum which will leave him something in hand after meeting his obligation to the legal aid fund.

C I revert to the comment made by Sir John Arnold P. in *Jones v. The Law Society*, The Times, January 27 and 28, 1983; amendments to section 9(6) of the Legal Aid Act 1974 and regulations 88 and 91 of the Legal Aid (General Regulations) 1980 (S.I. 1980 No. 1894) to exclude the proceeds of the sale of the matrimonial home or funds allocated for the purchase of a primary home for either of the parties to the marriage or a child of the marriage to whom section 41 of the Matrimonial Causes Act 1973 applies would avoid the hardship caused in this case. A person's home and the tools of his trade are already excluded from assessment under the Act of 1974. However, a mere discretion granted to The Law Society would not, in my judgment, be sufficient to permit the court to assume that the moneys would not be collected; nor a charge enforced unless the position was secured by direct enactment.

E EVELEIGH J. The judgment of Purchas L.J. has been handed down. I agree with it entirely, and, although we are differing from Sir John Arnold P., I am quite satisfied that this is because we had more information as to the legal aid situation, that is to say more positive information than he had, and therefore, although we are differing from him, I do not propose to add anything to the judgment of Purchas L.J.

[The appeal was adjourned for the judgments to be considered.]

G April 12. At a resumed hearing upon the wife consenting to an order dismissing her application for periodical payments and a lump sum the appeal was allowed and an order made transferring the husband's interest in the matrimonial home to the wife subject to a charge for £12,000 in favour of the husband only enforceable upon the house being sold, the husband to pay the outgoings up to the date of transfer.

H *Appeal allowed.*
Order accordingly.
No order as to costs.

Solicitors: *Roberta Tish & Co.*; *Piper Padfield & Derby, Ilford.*

[Reported by MISS STELLA SOLOMON, Barrister-at-Law]

[1983]

[COURT OF APPEAL]

REGINA v. THE LAW SOCIETY, *Ex parte* SEXTON

1983 July 13, 14

Waller and O'Connor L.JJ. and
Sir David Cairns

Legal Aid—Costs—Charge on property—Divorce—Property adjustment order—Legally aided wife to receive lump sum payments for transferring interest in matrimonial home to husband—Whether legal aid fund's costs payable forthwith—Whether discretion in The Law Society to defer payment by substituting charge on property—Legal Aid Act 1974 (c. 4), s. 9(6)—Legal Aid (General) Regulations 1980 (S.I. 1980 No. 1894), regs. 88, 91, 97 (as amended by Legal Aid (General) (Amendment) Regulations 1981 (S.I. 1981 No. 173))

The applicant was granted a legal aid certificate with a nil contribution for the purpose of claiming ancillary relief in divorce proceedings. On October 5, 1982, a consent order was made in the Family Division whereby the applicant agreed to transfer to her husband her share in the matrimonial home in return for a lump sum payment of £15,000 payable by three equal instalments at six-monthly intervals beginning in April 1983. The Law Society refused the applicant's request that the statutory charge arising on the lump sum payment awarded to her should be transferred to a property that she intended to purchase with that money. On April 15, 1983, Woolf J. refused the applicant a declaration that The Law Society had been wrong in their conclusion that by virtue of section 9(6) of the Legal Aid Act 1974¹ and regulations 88, 91 and 97 of the Legal Aid (General) Regulations 1980² they had no power to accept a substitute charge in respect of the money awarded to the applicant, and dismissed her application for a judicial review.

On appeal by the applicant:—

Held, dismissing the appeal, that subject to regulation 91(2) of the Legal Aid (General) Regulations 1980, regulations 88 and 91(1) imposed an obligation to pay the lump sum recovered by the applicant to her solicitor and for it then to be paid over by the solicitor to The Law Society; that, on its true construction, regulation 91(2) did not entitle an area committee to conclude that the rights of the legal aid fund would be protected by transferring the charge to some other property to be acquired by the applicant; and that, accordingly, The Law Society had no power to transfer the charge arising under section 9 of the Legal Aid Act 1974 to any other property (post, p. 834A–C, G).

Hanlon v. The Law Society [1981] A.C. 124, H.L.(E.) distinguished.

Simmons v. Simmons [1983] 3 W.L.R. 818, C.A. approved.

Per Sir David Cairns. The provisions of section 17(9) of the Legal Aid Act 1974 that provided an interpretation of "payment" and other corresponding words for the purposes of Part I of that Act could not be interpreted as permitting a charge on property in place of an actual payment (see post, pp. 834H–835B).

Decision of Woolf J. affirmed.

¹ Legal Aid Act 1974, s. 9(6): see post, p. 832D–E.

² Legal Aid (General) Regulations 1980, reg. 88: see post, p. 833B.

Reg. 91: see post, p. 833C–D, D–E.

Reg. 97: see post, p. 832G.

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- A The following cases are referred to in the judgments:
Hanlon v. The Law Society [1981] A.C. 124; [1980] 2 W.L.R. 756; [1980] 2 All E.R. 199, H.L.(E.).
Simmons v. Simmons [1983] 3 W.L.R. 818, C.A.

The following additional cases were cited in argument:

- B *Blatcher v. Heaysman* [1960] 1 W.L.R. 663; [1960] 2 All E.R. 721, C.A.
Boys v. Chaplin [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085, H.L.(E.).
Catlow v. Catlow (1877) 2 C.P.D. 362.
Harrison v. Harrison [1888] 13 P. 180, C.A.
Jones v. The Law Society, *The Times*, January 27 and 28, 1983.
Law Society, The v. Rushman [1955] 1 W.L.R. 681; [1955] 2 All E.R. 544, C.A.
- C *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.).
Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204, C.A.

APPEAL from Woolf J.

- D By an amended notice of appeal dated May 24, 1983, the applicant, Mrs. Elizabeth Sexton, appealed from the judgment of Woolf J. dated April 15, 1983, dismissing her application for judicial review by way of an order of certiorari to quash the decision of The Law Society that they had no power to accept a substitute charge in respect of the money awarded to her by Booth J. in the Family Division on October 5, 1982; and an order of mandamus to compel The Law Society to reconsider their
- E decision and accept a substitute charge. The grounds of her appeal were that (1) on the true construction of section 9 of the Legal Aid Act 1974 and of the Legal Aid (General) Regulations 1980 The Law Society had power to transfer a charge arising under section 9 to other property; (2) the decision in *Simmons v. Simmons* [1983] 3 W.L.R. 818 was not binding on the full Court of Appeal, was decided per incuriam and in any event
- F it was contrary to the decision of the House of Lords in *Hanlon v. The Law Society* [1981] A.C. 124, and (3) that The Law Society were bound by their representation that they would accept a substitute charge.
- The facts are stated in the judgment of Waller L.J.

Nigel Ley for the applicant.

Duncan Matheson for The Law Society.

- G WALLER L.J. In this case the applicant, Mrs. Sexton, applied to the Divisional Court for an order by way of judicial review that The Law Society were wrong in their construction of section 9 of the Legal Aid Act 1974 and the Legal Aid (General) Regulations 1980 in coming to the conclusion that they had no power to transfer a charge arising under section 9 to other property. Woolf J. hearing that application, did not
- H hear argument at all because the parties agreed that the matter was concluded, by the decision of this court in *Simmons v. Simmons* [1983] 3 W.L.R. 818. Woolf J. refused the application so that the applicant could appeal to this court in the hope that a court of three judges would come to a different conclusion from the court in *Simmons v. Simmons*, which only consisted of two judges.

The original order of Booth J. made on October 5, 1982, out of which this application arises, was:

"By consent it is ordered that (1) the petitioner do pay to the [applicant] a lump sum of £15,000 by three instalments of £5,000 each at six monthly intervals, the first to be paid on April 5, 1983, payment thereof to be secured to the [applicant] by a charge on the property or any substituted property purchased by the petitioner as his home. (2) The [applicant] shall forthwith transfer to the petitioner absolutely her legal and beneficial interest in the property."

So that the effect of the decision, albeit by consent of the parties, was that the share which the applicant had in the matrimonial home was to be transferred to her husband, and in return he was to pay her £15,000. Both parties were legally aided, and The Law Society had a charge on this sum of money as security for the costs incurred by the legal aid fund. The applicant asked The Law Society to transfer the charge from the money to the house.

It was submitted on the applicant's behalf that the money is property, that it can be subject to a charge and that The Law Society in their discretion can transfer the charge from the money to the house. The Law Society said that they have no discretion in the matter and that money recovered, save for £2,500 must, by regulation 96(d) of the Legal Aid (General) Regulations 1980 be paid ultimately to The Law Society.

The matter is primarily governed by section 9(6) of the Legal Aid Act 1974, which is in these terms:

"Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situated) which is recovered or preserved for him in the proceedings."

So this sum of £15,000 is money recovered in the proceedings. It was common ground before us that money is property and, in personal injury actions, The Law Society frequently exercise their charge on the moneys recovered as damages.

I must next refer to the regulations which are contained in the Legal Aid (General) Regulations 1980. There are three important regulations to which I wish to refer. First of all, regulation 97 provides for vesting an enforcement of the statutory charge:

"(1) Any charge on property recovered or preserved for an assisted person arising under section 9(6) of the Act shall vest in The Law Society. (2) The Law Society may enforce any such charge in any manner which would be available if the charge had been given inter partes."

Mr. Ley submitted that *Hanlon v. The Law Society* [1981] A.C. 124 was a case where it was held that charges could be transferred from one property to another and that, in the circumstances of this case, The Law Society could transfer the charge from money to house. In *Hanlon's* case a number of matters were raised with which we are not concerned. But their Lordships did decide that where there was a house, the subject of a property adjustment order, and a house to which their charge applied, The Law Society not only had a discretion to postpone the enforcement of that charge—and a discretion which they frequently exercised—but also

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Waller L.J.

A had a discretion to transfer the charge on the matrimonial home in a proper case from one property to another. Mr. Ley's submission to us was that that was something which could be done in this case. But unfortunately there are other regulations in the Legal Aid (General) Regulations 1980 which deal specifically with money. In this regard I would refer to regulation 88, which is headed: "Moneys recovered to be paid to solicitor or The Law Society," and provides, *inter alia*:

B "Subject to regulations 90 and 96, all moneys payable to an assisted person . . . shall be paid or repaid, as the case may be, to the solicitor of the assisted person or, if he is no longer represented by a solicitor, to The Law Society . . ."

C Regulation 91, which is entitled "Solicitor to pay moneys recovered to The Law Society," is the regulation which is critical in this case. That regulation provides:

D "(1) An assisted person's solicitor shall forthwith—(a) inform the appropriate area committee of any property recovered or preserved for the assisted person; and (b) subject to paragraph (2) pay all moneys received by him by virtue of an order or agreement made in the assisted person's favour to The Law Society."

So, subject to paragraph (2) the money having been paid to the solicitor, he has to pay it over to The Law Society. Paragraph (2) provides:

E "Where the appropriate area committee considers that the rights of the fund will thereby be safeguarded and so directs, the assisted person's solicitor shall—(a) pay to The Law Society under paragraph (1)(b) only such sum as, in the opinion of the appropriate area committee, should be retained by The Law Society in order to safeguard the rights of the fund under any provision of the Act and these Regulations; and (b) pay any other moneys to the assisted person."

F Mr. Ley has drawn our attention to the earlier regulations which that regulation replaced—being regulations which dealt with the same problem—in 1950, 1960, 1962 and 1971. He has submitted that certain variations in the wording were intended by the draftsman to give a more liberal construction to the particular regulation. It is true that between 1950 and 1960 there was an appreciable change in the form of the regulations, but from 1960 onwards, although there were minor changes, in my opinion the meaning is identical. I do not find that there was any change other than a verbal one.

G So one has to look at the regulation and see whether it can be construed so that the provisions which enable the appropriate area committee to express the opinion that the rights of the fund would be protected, can be construed as including protected by transferring the charge from the money to other property so that The Law Society would then have a charge on that property and the appropriate area committee would consider that that was satisfactory.

H In my opinion, the words do not permit such a construction. In regulation 91(2) the words are: "where the appropriate area committee considers that the rights of the fund will *thereby* be safeguarded, and so directs, the assisted person's solicitor *shall* pay," and in regulation 91(2)(a): "pay to The Law Society . . . only *such sum* as, in the opinion of the appropriate area committee. . . ." In my opinion the combination

of the words and phrases I have emphasised does not permit of the construction proposed by Mr. Ley. He submitted that the words "if any" should be inserted after "such sum," but I do not accept that there is any need to insert such words because the meaning is clear. "Safeguarding thereby" clearly refers to the obligation to "pay such sum." An obligation to pay a sum of money is not fulfilled by transferring the charge to other property. The money must be paid.

I have come to the conclusion that regulations 88 and 91 make it impossible to avoid paying the money in the circumstances such as the present, first of all to the assisted person's solicitor and secondly, on his part, over to The Law Society. The decision of the House of Lords in *Hanlon v. The Law Society* [1981] A.C. 124 is not inconsistent with this. That case was concerned wholly with property other than money. The charge was on the property. So long as The Law Society is dealing only with property other than money, The Law Society has a discretion. However, in my opinion when it is dealing with money, that is to say money which has been preserved or recovered, The Law Society has no discretion at all.

Although I mentioned at the beginning of this judgment the decision of this court in *Simmons v. Simmons* [1983] 3 W.L.R. 818, I have not referred to it in the course of my reasons and have not relied on it for any step in this judgment. However I now return to it and say that, for the reasons which I have expressed, I have arrived at precisely the same conclusion as did this court in *Simmons v. Simmons*. So no question arises as to whether a three-judge court can overrule a two-judge court. What has happened is that a three-judge court has added the weight of its opinion to that of a court which has already given the same opinion.

However I cannot part with this case without an expression of sympathy for The Law Society on the one hand and with some legally aided litigants on the other. The Law Society have to administer these regulations so as to effect the purpose of the legal aid scheme. They endeavour, by warnings and directions, to reduce the amount of litigation when marriages break up, but this case illustrates that there is no reasonable limit to the total of costs which may be incurred. On the other hand, the rules are such that those legally aided persons who behave with restraint in their litigation are nevertheless sometimes prevented from arriving at a reasonable settlement by reason of the effect of these regulations. I cannot see any solution that can be produced by decisions of the court. The Law Society do what they can to discourage too much litigation but that any solution could be arrived at which would enable a reasonable party to be protected could only be by amendment to the Regulations.

I would dismiss this appeal.

O'CONNOR L.J. I agree.

SIR DAVID CAIRNS. I also agree that the appeal should be dismissed for the reasons given by Waller L.J. I would only add that a second argument was submitted to this court by Mr. Ley, on behalf of the applicant, based on section 17(9) of the Legal Aid Act 1974, which provides that the word "payment" and other corresponding words in that part of the Act are to be interpreted as "not requiring the making of an actual payment so as to prevent the obligation to satisfy in whole or in part by an allowance on account or in any other way." Mr. Ley asked us

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Sir David Cairns

A

to say that that provision in the Act should be deemed to apply also to the regulations, which I think is not unreasonable. He then submitted that "in any other way" would cover a charge on money or a house in place of actual payment. I cannot conceive that section 17(9) was intended to be interpreted as widely as that. I think the words "or in any other way" are to be understood ejusdem generis with the words before them and to mean that which is equivalent to the actual handing over of money,

B

which a charge clearly is not.

*Appeal dismissed with costs.
Leave to appeal refused.*

Solicitors: *Ralph Haeems & Co.; The Law Society.*

C

[Reported by MRS. HARRIET DUTTON, Barrister-at-Law]

D

[HOUSE OF LORDS]

REGINA RESPONDENT

AND

CHARD APPELLANT

E

1983 Oct. 17;
Nov. 10

Lord Diplock, Lord Scarman, Lord
Roskill, Lord Brandon of Oakbrook and
Lord Templeman

F

Crime—Court of Appeal—Reference by Secretary of State—Power to refer "whole case"—Whether consideration of court confined to grounds of reference—Criminal Appeal Act 1968 (c. 19), s. 17(1)(a)

Judicial Precedent—Statute—Construction—Re-enactment of statutory provision—Use of interpreted word in subsequent statute—Proper approach to construction

G

On a reference by the Secretary of State under section 17(1)(a) of the Criminal Appeal Act 1968,¹ to the Court of Appeal (Criminal Division) the defendant, who had been convicted at the Central Criminal Court in November 1975 on three counts of conspiracy to rob, sought to raise matters other than those contained in the Secretary of State's letter of reference. The Court of Appeal held that the court could not go into any matters apart from the grounds of the reference and, in the circumstances, dismissed the appeal.

H

On appeal by the defendant in respect of the wider matters sought to be raised:—

Held, (1) that the language of section 17(1)(a) of the Criminal Appeal Act 1968, was capable of bearing one meaning only, namely, that it was the whole case and nothing less than the whole case of the convicted person that the Secretary of State was empowered by the section to refer to the Court of Appeal, and that upon the receipt of such a reference it then became the

¹ Criminal Appeal Act 1968, s.17(1)(a): see post, p. 839C-D.

Reg. v. Chard (H.L.(E.))

[1983]

duty of the Court of Appeal to treat the case so referred *for all purposes* as an appeal to the court by *that* person (post, pp. 841E-F, 844G, 845B-C, D-E).

(2) That since it was "the whole case" that was referred, that must include all questions of fact and law involved in it; and the requirement that it should be treated as an appeal by the convicted person "for all purposes" must include its being so treated for the purposes of the Criminal Appeal Rules 1968, as they applied to appellants who, under section 1 of the Criminal Appeal Act 1968, had a right of appeal to the Court of Appeal without the leave of that court upon all questions of law or fact or implied law and fact involved in the trial that resulted in their conviction (post, pp. 841B-C, F-G, 843F, 844G, 845B-C, D-E).

(3) Dismissing the appeal, that a consideration of the wider matters sought to be raised by the defendant did not lead to the conclusion that the jury's verdict on any of the three counts on which he was found guilty was thereby rendered unsafe or unsatisfactory (post, pp. 844B-F, 844G, 845B-C, D-E).

Reg. v. Caborn-Waterfield [1956] 2 Q.B. 379, C.C.A. not followed.

Reg. v. Stones (No. 2) (1968) 52 Cr.App.R. 624, C.A. and all subsequent decisions in which *Reg. v. Caborn-Waterfield* has been applied to references under section 17(1)(a) of the Criminal Appeal Act 1968, including *Reg. v. Bardoe* [1969] 1 W.L.R. 398, C.A. overruled.

Per curiam. (i) Where on a reference a defendant seeks to argue grounds of appeal which not only are unconnected with the Secretary of State's letter of reference, but also have been unsuccessfully relied upon in a previous appeal or application for leave to appeal against conviction in the case that has been referred, the court hearing the reference and having before it the judgment of the Court of Appeal in the previous appellate proceedings will be very slow to differ, unless it is persuaded that some cogent argument that had not been advanced at the previous hearing, would if it had been properly developed at such hearing, have resulted in the appeal against conviction being allowed (post, pp. 843H-844B, G, 845B-C, D-E).

(ii) The speeches in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402, H.L.(E.), should not be treated as laying down an inflexible rule of construction to the effect that where once certain words in a statute have received a judicial construction in one of the superior courts and the legislature has repeated them without alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them (post, pp. 842A-D, 844G-H, 845B-C, D-E).

(*Per Lord Scarman, Lord Roskill and Lord Templeman.* The "rule" is at the most a presumption in circumstances where the judicial interpretation of a particular statutory provision was well settled and well recognised (post, pp. 845A-B, C-D, E).

Dictum of Lord Macmillan in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402, 447, H.L.(Sc.) approved.

Decision of the Court of Appeal (Criminal Division) affirmed on different grounds.

The following cases are referred to in their Lordships' opinions:

Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd. [1933] A.C. 402, H.L.(Sc.).

Reg. v. Bardoe [1969] 1 W.L.R. 398; [1969] 1 All E.R. 948, C.A.

Reg. v. Caborn-Waterfield [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636, C.C.A.

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- A *Reg. v. Humphrys* [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497, H.L.(E.).
Reg. v. Stones (No. 2) (1968) 52 Cr.App.R. 624, C.A.

The following additional cases were cited in argument:

- B *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349; [1961] 3 W.L.R. 619; [1961] 3 All E.R. 299, H.L.(N.I.).
Davies v. Director of Public Prosecutions [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507, H.L.(E.).
Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240; 47 Cr.App.R. 284.
Reg. v. Hamid (1979) 69 Cr.App.R. 324, C.A.
Reg. v. Hinds [1966] Crim.L.R. 100, C.C.A.
C *Reg. v. Lattimore* (1975) 62 Cr.App.R. 53, C.A.
Reg. v. Pattinson (1974) 58 Cr.App.R. 417, C.A.
Reg. v. Sparkes [1956] 1 W.L.R. 505; [1956] 2 All E.R. 245, C.C.A.
Reg. v. Swabey [1972] 1 W.L.R. 925; [1972] 2 All E.R. 1094, Ct.-M.A.C.
Rex v. Allen (1910) 5 Cr.App.R. 225, C.C.A.
Rex v. Collins (1950) 34 Cr.App.R. 146, C.C.A.
Rex v. McGrath [1949] 2 All E.R. 495, C.C.A.
D *Stafford v. Director of Public Prosecutions* [1974] A.C. 878; [1973] 3 W.L.R. 719; [1973] 3 All E.R. 762, H.L.(E.).

APPEAL from the Court of Appeal (Criminal Division).

- This was an appeal by the appellant, Alan John Chard, from the judgment dated December 21, 1982, of the Court of Appeal (Criminal Division) (O'Connor L.J., Peter Pain and Stuart-Smith JJ.) dismissing his appeal against conviction at the Central Criminal Court on November 21, 1975, for three offences of conspiracy to rob. The court certified that the following points of law of general public importance were involved in its decision, namely, "1. Where as a result of fresh evidence placed before him the Secretary of State has referred 'the whole of the case' to the Court of Appeal (Criminal Division) under section 17(1)(a) of the Criminal Appeal Act 1968, is the appellant entitled to argue matters unconnected with the reasons for the reference in the Secretary of State's letter referring the case? 2. If the answer to question 1 is 'No,' has the Court of Appeal (Criminal Division) a discretion to permit the appellant to argue such matters?" Leave to appeal was refused. On June 23, 1983, the House of Lords granted leave to appeal.

The facts are set out in the opinion of Lord Diplock.

- G *Patrick O'Connor* (who did not appear below) for the appellant.
Brian Leary Q.C. and *Timothy Cassel* for the Crown.

Their Lordships took time for consideration.

- H November 10. LORD DIPLOCK. My Lords, after a trial that had lasted nine weeks before Nield J. and a jury at the Old Bailey, the appellant Chard was convicted on November 7, 1975, on three counts of conspiracies to commit robbery. On November 21, he was sentenced to fifteen years' imprisonment on each count to run concurrently. The first count against him (count 6 in the indictment) was a general count of conspiracy in June and July 1974, which did not specify any particular places where robberies which were the subject of the conspiracy were to be committed; the other

two counts (14 and 15) referred to robberies at two identified places, Chigwell in Essex and a bank at Park Royal, London, respectively.

At the arraignment, Chard was charged with nine other defendants, alleged to be fellow members with him of a gang engaged in armed robberies for which Chard's principal function was to provide the firearms used by other members of the gang in carrying out the robberies. His role as armourer to the gang was the subject of the general conspiracy count, count 6. Count 14 relating to Chigwell was based upon his allegedly proposing and providing detailed information for carrying out a robbery of a bank there which, in the event, did not take place owing to the arrest of some of the leading members of the gang. Count 15 was based upon his having participated in "casing the joint" before the robbery of the bank at Park Royal, which, in the event, was carried out successfully. Of those nine members of the gang arraigned with Chard, five pleaded guilty, four upon arraignment, and a fifth at the close of the prosecution's case. Thereafter the trial proceeded against Chard and the other three remaining defendants. These gave evidence in their own defence. Chard chose not to go into the witness box, nor did he, as was then permitted, make any unsworn statement from the dock.

The principal evidence for the prosecution was that of three other members of the gang who had been charged, had pleaded guilty and had been sentenced before the trial in which Chard was a defendant began. These accomplices were, "Billy" Williams, James Trusty and Peter Wilding, of whom Billy Williams was probably the first criminal to earn the now-familiar sobriquet of "super-grass."

The only evidence against Chard on each of the three counts of which he was convicted was that of these accomplices, all three of them on count 6, the general count of conspiracy to commit robberies (although Wilding does not appear to have referred to Chard's role as armourer); Billy Williams and James Trusty implicated him on count 14 relating specifically to Chigwell, and Billy Williams and Peter Wilding did so on count 15 relating to the Park Royal bank.

Chard and two other of the four defendants who had been found guilty by verdict of the jury applied for leave to appeal against their convictions and sentences. Their applications ("the 1977 appeal") were heard by a Court of Appeal, consisting of Lawton L.J. and Bridge L.J. (as he then was) and MacKenna J. Lawton L.J. delivered the judgment of that court on March 8, 1977. Leave to appeal against conviction was refused to all three applicants, but leave to appeal against sentence was granted to Chard (and another appellant). Chard's sentence was reduced to twelve years' imprisonment concurrent on each count.

All three appellants were represented separately on the 1977 appeal by counsel of great experience in criminal cases; as appears from the transcript of the judgment of the Court of Appeal, none of these counsel had criticised the summing up by the trial judge which had extended over two days and was described by the Court of Appeal as "a model of clarity and conciseness." The judgment also records that counsel on behalf of Chard had made detailed submissions that there were inconsistencies in the prosecution's evidence of such a character as to make the verdicts against his client unsafe; and the latter part of the judgment in the 1977 appeal deals with and rejects those submissions.

Peter Wilding was released on parole early in 1981, and gave an interview to a journalist on "the Guardian" newspaper in which he retracted evidence that he had given at the trial and, in particular, his

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A positive identification of Chard as being one of the persons who had "cased the joint" before the raid upon the bank at Park Royal. In consequence of this article the Home Secretary had caused Wilding to be interviewed by a detective chief superintendent to whom Wilding repeated, albeit not entirely unequivocally, that his positive identification of Chard's presence on that occasion was untrue.

B By letter of April 2, 1981, the Home Secretary, in exercise of his powers under section 17(1)(a) of the Criminal Appeal Act 1968, referred to the Court of Appeal, Criminal Division, "the whole of the case of Alan John Chard for determination in respect of his conviction on November 7, 1975, of three offences of conspiracy to rob." In the previous paragraph of his letter he had referred to the article in "The Guardian" newspaper and also to Mr. Wilding's statement to the detective chief superintendent.

C A copy of the record of this statement was enclosed.

Section 17 of the Criminal Appeal Act 1968 is in the following terms:

D " (1) Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Secretary of State may, if he thinks fit, at any time either—(a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person; or (b) if he desires the assistance of the court on any point arising in the case, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly. (2) A reference by the Secretary of State under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application."

E In my view, which I understand is shared by all your Lordships, the words of paragraph (a) of subsection (1) in their natural and ordinary meaning are free from any trace of ambiguity; the person whose case which resulted in his conviction is the subject matter of the reference is to be treated for all purposes as if he were a person upon whom there is conferred by section 1 of the Criminal Appeal Act 1968 a general right of appeal to the Court of Appeal on any ground which he wishes to rely (whether it be of law or fact or mixed law and fact), without need to obtain the prior leave of that court.

F The Court of Appeal by whom Chard's case that had been referred to it by the Home Secretary, ("the second appeal"), was heard, was composed of O'Connor L.J., Peter Pain J. and Stuart-Smith J., none of whom had sat on the 1977 appeal. Application was made on Chard's behalf to adduce at the hearing of the second appeal fresh evidence in the form of the statement made by Wilding to the detective chief superintendent of which a copy had been enclosed with the Home Secretary's letter; and a perfected notice of grounds of appeal in the following terms was lodged:

G "1. The appellant's convictions upon all three counts of conspiracy to rob (originally counts 10, 20 and 21; later renumbered counts 6, 14 and 15) are unsafe and unsatisfactory and should be quashed for the following reasons: (a) fresh evidence is now available to the effect that the prosecution witness, Peter Wilding, has admitted committing perjury in relation to his evidence against the appellant on counts 6 and 15; (b) although the said Peter Wilding gave no evidence against the appellant on count 14, his own admissions of perjury implicate the main prosecution witness on that count, 'Billy' Williams, in

instigating and blackmailing him into giving his perjured evidence; (c) all three convictions depended on the uncorroborated evidence of accomplices as to count 6: 'Billy' Williams, James Trusty and Peter Wilding; as to *count 14* 'Billy' Williams and James Trusty; as to *count 15* 'Billy' Williams and Peter Wilding; (d) the said uncorroborated accomplice evidence was subject to particular contradictions and weaknesses on each count against this appellant."

It is to be observed that although paragraphs (a) and (b) rely upon the fresh evidence of Peter Wilding, paragraphs (c) and (d) seek to impugn the verdicts against Chard as unsafe or unsatisfactory upon wider grounds that are not alluded to in the Home Secretary's letter of reference of April 2, 1981. The ground relied upon on paragraph (c) that the convictions were based upon the uncorroborated evidence of accomplices would open the door to criticism (expressly disclaimed by Chard's counsel at the 1977 appeal) of the adequacy of the trial judge's warning to the jury of the danger of convicting on such evidence; while the ground, relied upon in paragraph (d); that even if such warning had been adequate the accomplice evidence against Chard was itself subject to contradictions and weaknesses that made a verdict of guilty based upon it unsafe or unsatisfactory was a complaint that had been advanced by Chard's counsel in the 1977 appeal and is dealt with in some detail in the judgment of the court on that occasion when it was rejected as insufficient ground for granting Chard leave to appeal against conviction.

Wilding himself gave oral evidence to the Court of Appeal at the hearing of the second appeal. He confirmed that the evidence that he had given at the trial in 1975 which inculpated Chard was true; this confirmation and his explanation that he had said what he did to the journalist and the detective chief superintendent in order to escape harassment of himself and his family by members of the underworld (with whom "grasses" are understandably unpopular) were accepted by the Court of Appeal as being true; and no complaint against this part of the judgment in the second appeal has been advanced before this House.

What is complained of on behalf of Chard is the Court of Appeal's ruling that on a reference by the Home Secretary under section 17(1)(a) of the Criminal Appeal Act 1968 the court, in its consideration of the appeal, must confine itself to the grounds set out in the Home Secretary's letter as his reasons for making the reference; the court may not consider other grounds for allowing the appeal upon which the convicted person whose case has been referred might wish to rely. Pursuant to this ruling the Court of Appeal refused to allow Chard's counsel to argue the grounds sought to be relied upon in paragraphs (c) and (d) of Chard's perfected notice of appeal.

In so ruling the Court of Appeal relied upon two previous authorities. The first in date was a judgment of the Court of Criminal Appeal delivered by Lord Goddard C.J. in *Reg. v. Caborn-Waterfield* [1956] 2 Q.B. 379, a case that was decided upon a reference under section 19(a) of the Criminal Appeal Act 1907, before that section had been amended by section 19 of and Schedule 3 to the Administration of Justice Act 1960, so as to adopt the wording later reproduced in section 17(1)(a) of the (consolidating) Criminal Appeal Act 1968. The second authority was *Reg. v. Stones* (No. 2) (1968) 32 Cr.App.R. 624 decided by the Criminal Division of the Court of Appeal also upon a reference under section 19(a) of the Criminal Appeal Act 1907 but after the 1960 amendment to it. The judgment of

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A the court, delivered by Sachs L.J. treated the case as governed by *Caborn-Waterfield* [1956] 2 Q.B. 379. There are other reported cases subsequent to *Stones* (No. 2) that proceed on the same basis, and the Court of Appeal in the instant case was, in my opinion, constrained by authority to make the restrictive ruling that it did as to the matters open to be argued in the second appeal.

B In view of what would seem to be the plain and unambiguous wording of section 17(1)(a) of the Criminal Appeal Act 1968, this ruling raises a point of law that is of general public importance. The terms in which the Court of Appeal certified the questions of law involved were:

C "1. Where as a result of fresh evidence placed before him the Secretary of State has referred 'the whole of the case' to the Court of Appeal Criminal Division under Section 17(1)(a) of the Criminal Appeal Act 1968, is the appellant entitled to argue matters unconnected with the reasons for the reference in the Secretary of State's letter referring the case? 2. If the answer to question 1 is 'No,' has the Court of Appeal Criminal Division a discretion to permit the appellant to argue such matters?"

D Leave to appeal was granted by this House: and in the printed case for the appellant your Lordships were invited in the event of either of the certified questions being answered in favour of Chard to dispose of the second appeal finally by yourselves hearing argument upon and dealing with the matters that are referred to in paragraphs (c) and (d) of the perfected grounds of appeal which counsel for Chard had been debarred from raising in the Court of Appeal.

E My Lords, the point of law raised by the certified questions is purely one of statutory construction; and, as I have already indicated, the language of section 17(1)(a) is in my opinion capable of bearing one meaning only. If the Home Secretary decides to act under paragraph (a), rather than paragraph (b), in the case of a particular convicted person, it is the whole case and nothing less than the whole case of that person that the Home Secretary is empowered by the section to refer to the Court of Appeal. Upon receipt of such a reference it then becomes the duty of the Court of Appeal to treat the case so referred *for all purposes* as an appeal to the court by *that* person.

G Since it is the "whole case" that is referred, this must include all questions of fact and law involved in it: and the requirement that it shall be treated as an appeal by the convicted person "for all purposes" must include its being so treated for the purposes of the Criminal Appeal Rules 1968 (S.I. 1968 No. 1962) as they apply to appellants who, under section 1 of the Criminal Appeal Act 1968, have a right of appeal to the Court of Appeal without the leave of that court upon all questions of law or fact or mixed law and fact involved in the trial that resulted in their conviction. Those rules entitle, and indeed require, such persons to give notice of any grounds, whether of law or fact or mixed law and fact, on which they propose to rely on the hearing of the appeal. No limitation is imposed by H the rules upon the grounds that such appellants may rely on.

Mr. Leary Q.C. appearing for the Crown did not seek to argue that if one gave to the words of section 17(1)(a) to which I have drawn particular attention their natural and ordinary meaning, it is possible to extract from the words themselves any restriction upon the grounds on which the person who is to be treated as if he were appellant may rely. Nevertheless counsel submitted that the restrictive effect that had been attributed to

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section 19(a) of the Criminal Appeal Act 1907 by judicial decisions of appellate courts from 1956 onwards must be understood as expressing the intention of Parliament when the same words were re-enacted by it in section 17(1)(a) of the Criminal Appeal Act 1968.

My Lords, the role that judicial construction of particular words and phrases used in previous statutes may play in the interpretation of the same words in subsequent statutes in *pari materia* was the subject of discussion in four of the speeches in this House in the case of *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402. The divergence between the different speeches makes it in my view a thoroughly unsatisfactory authority for any rule of statutory construction of general application or one that could assist the Crown in the instant case. It is certainly no authority for either of the propositions: (a) that mere failure by Parliament to take an opportunity of passing amending legislation to substitute other words for those which have been construed by a court that is not one of final resort as having borne a meaning which this House subsequently holds to have been incorrect, can throw any retrospective light on the intention of a differently constituted Parliament at the time that the Act to be construed was passed; or (b) that re-enactment of ipsissima verba of an existing statute in an Act that is passed for the purposes of consolidation only, (which is subject to a special parliamentary procedure precluding debate upon the merits of any of the individual clauses) is capable of having any effect upon the construction of those words.

Moreover, the legislative history of section 19(a) of the Criminal Appeal Act 1907 from the date of the decision of *Caborn-Waterfield* in 1956 and its incorporation in a pure Consolidation Act as section 17(1)(a) of the Criminal Appeal Act 1968, itself puts paid to any submission on the lines Mr. Leary sought to advance. At the time of *Caborn-Waterfield* [1956] 2 Q.B. 379 the relevant words in paragraph (a) of section 19 were:

“the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; . . .”

These words are less emphatic than those of section 17(1)(a) of the Criminal Appeal Act 1968 which it falls to your Lordships to construe. The reference to the case being treated *for all purposes* as an appeal is missing and the person by whom the appeal is to be treated as having been brought is not specifically identified by the demonstrative adjective “that,” i.e., the person whose whole case has been referred to the court by the Home Secretary, but is described by the indefinite article “a.”

Caborn-Waterfield was a case which had been referred by the Home Secretary on the grounds of fresh evidence having become available. At the hearing of the reference, counsel for *Caborn-Waterfield* refused to call any of such fresh evidence but sought to rely exclusively upon grounds which had been relied upon some eighteen months previously in an application by *Caborn-Waterfield* for leave to appeal. As would appear from his reported interlocutory interventions this tactic excited the wrath of Lord Goddard C.J. and in a characteristically robust passage at the conclusion of his judgment, which it is unnecessary to quote in full, he said [1956] 2 Q.B. 379, 385:

“this court desires to say quite definitely that on a reference by the Secretary of State under section 19(a) they go through the grounds on which the Home Secretary has referred the case and confine

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A themselves to those grounds. The court cannot go into all sorts of different grounds, otherwise, as has been pointed out, there might be no end to it."

B It is not wholly clear from the full passage whether Lord Goddard was saying the court had no jurisdiction to consider any grounds of appeal other than those on which the Home Secretary had referred the case, or that as a matter of practice the court would refuse to do so. If it meant the former, and it has been uniformly treated as having done so, it was in my respectful view wrong, even on the language of section 19(a) of the Criminal Appeal Act 1907 as it stood in 1956. By the Administration of Justice Act 1960, however, Parliament itself stepped in and by Schedule 3 amended section 19(a) of the Act of 1907 and, among other changes, took the occasion to substitute the more emphatic words that still remain in force as section 17(1)(a) of the Criminal Justice Act 1968, with the immaterial difference that the words "that person" in the 1968 consolidating Act were "the person" in the 1960 amendment. It is difficult to think of any other explanation for this part of the 1960 amendment than a parliamentary intention to overrule the effect of the judgment of Lord Goddard in *Caborn-Waterfield*.

D *Reg. v. Stones* (No. 2), 52 Cr.App.R. 624, in which the attention of the court does not appear to have been drawn to the change of wording of section 19(a) since *Caborn-Waterfield*, was not decided until after there had been passed the Criminal Appeal Act 1966 and the Criminal Justice Act 1967, the Acts incorporating, inter alia, amendments to the Criminal Appeal Act 1907 which paved the way for the consolidation effected by the Criminal Appeal Act 1968 and one month after the Consolidation Act itself was passed. So there is simply no foundation for the suggestion that on the two occasions when Parliament had the opportunity of making further amendments to the wording of section 19(a) of the Act of 1907, it had any reason to suppose that judicial construction would subsequently ascribe to the altered wording that it had enacted in 1960 the same meaning as had been ascribed in *Caborn-Waterfield* [1956] 2 Q.B. 379, to the wording that it had so recently been at pains to repeal and replace.

E So I see no reason that could justify your Lordships giving to the words of section 17(1)(a) of the Criminal Appeal Act 1968 any meaning other than their natural and ordinary meaning which I find to be plain and free from any ambiguity. I would accordingly answer the first certified question: "Yes."

G It follows that *Reg. v. Stones* (No. 2), 52 Cr.App.R. 624 and all subsequent decisions in which *Reg. v. Caborn-Waterfield* [1956] 2 Q.B. 379 has been applied to references under section 17(1)(a) of the Criminal Appeal Act 1968, including among them *Reg. v. Bardoe* [1969] 1 W.L.R. 398, should be treated as overruled.

H As has been demonstrated by the briefness of the additional time that it has taken to hear the instant appeal in consequence of your Lordships' acceptance of the appellant's invitation to dispose of the reference finally by hearing argument on the grounds relied upon in paragraphs (c) and (d) of his perfected grounds of appeal, this does not mean that the time taken up in hearing references under section 17(1)(a) is likely to be significantly increased. Where, on such a reference an appellant seeks to argue grounds of appeal which not only are unconnected with the reasons in the Home Secretary's letter referring the case, but also have been unsuccessfully relied upon in a previous appeal or application for leave to appeal against

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conviction in the case that has been referred, the court which hears the reference will have had before it and have read, as your Lordships have done in the instant case, the judgment of the Court of Appeal in the previous appeal or application for leave to appeal. While it is true that the doctrine of issue estoppel plays no part in criminal law (*Reg. v. Humphrys* [1977] A.C. 1), the court that hears the reference will give weight to that previous judgment, from which it will be very slow to differ, unless it is persuaded that some cogent argument that had not been advanced at the previous hearing would, if it had been properly developed at such hearing, have resulted in the appeal against conviction being allowed.

In the instant case Mr. O'Connor, who appeared on behalf of Chard in your Lordships' House but had not represented him on any earlier occasion, sought to criticise Nield J.'s summing-up at the original trial on the ground that, although he gave an impeccable instruction on the danger of convicting on the uncorroborated evidence of accomplices, he weakened its effect by inviting the jury to consider whether there was any reason why particular accomplices should want to give false evidence incriminating particular defendants. No such criticism had been advanced by counsel appearing for Chard in the 1977 appeal. In my opinion there is nothing in it. It is a question, dictated by simple common sense, which the members of the jury would probably have asked for themselves in the course of their deliberations even if the judge had not mentioned it. I have read for myself the whole of the judge's summing-up and I understand that each of your Lordships has done likewise. For my part I think it a model of clarity, accuracy and fairness in a case of considerable complexity.

Mr. O'Connor also drew your Lordships' attention to what he suggested were inconsistencies and weaknesses in the accomplice evidence that notwithstanding an impeccable summing-up were in themselves sufficient to render the jury's verdict unsafe or unsatisfactory. For the most part these were the same as those that had been relied upon for the same purpose by Mr. Evans who appeared as counsel for Chard in the 1977 appeal. They are dealt with in the Court of Appeal's judgment dismissing Chard's application for leave to appeal against conviction. For my part I remain wholly unconvinced that such inconsistencies and weaknesses as Mr. O'Connor has drawn to your Lordships' attention have the cumulative effect of rendering unsafe or unsatisfactory the jury's verdict against Chard on any of the three counts on which he was found guilty.

I would dismiss the appeal.

LORD SCARMAN. My Lords, I agree with the speech delivered by my noble and learned friend, Lord Diplock, and for the reasons which he gives I would dismiss the appeal.

I respectfully agree with my noble and learned friend that it would be wrong to extract from the speeches of their Lordships in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402 an inflexible rule of construction to the effect that where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts and the legislature has repeated them without alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them. Viscount Buckmaster (p. 412) clearly thought that such a rule existed and that it was salutary and necessary: but others of their

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A

Lordships took a different view, notably Lord Blanesburgh (p. 414) and Lord Macmillan (pp. 446–447). Lord Macmillan—for, as I respectfully think, compelling reasons—treated the rule not “as a canon of construction of absolute obligation” but as a presumption in circumstances where the judicial interpretation was well settled and well recognised: and even then his Lordship thought the rule must yield to the fundamental rule that in construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless it leads to some absurdity, repugnance, or inconsistency. This view accords with modern principles of statutory interpretation and should, in my opinion, be preferred to that adopted by Viscount Buckmaster.

B

C

D

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Diplock. For the reasons he gives I too would answer the first certified question in the affirmative but also for the reasons he gives I would dismiss this appeal. I would also respectfully endorse what both he and my noble and learned friend, Lord Scarman, have said regarding the unsatisfactory decision of the House in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402 and especially Lord Scarman’s expression of preference for the reasoning in the speech of Lord Macmillan in that case.

LORD BRANDON OF OAKBROOK. My Lords, I agree entirely with the speech delivered by my noble and learned friend, Lord Diplock, and would accordingly dispose of the appeal in the manner proposed by him.

E

LORD TEMPLEMAN. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I too would dismiss this appeal. I agree with the observations of Lord Scarman.

Appeal dismissed.

Solicitors: *B. M. Birnberg & Co.; Director of Public Prosecutions.*

F

J. A. G.

G

[QUEEN’S BENCH DIVISION]

ATTORNEY-GENERAL v. ABLE AND OTHERS

[1982 G. No. 2610]

1983 April 19, 20; 28

Woolf J.

H

Crime—Suicide—Aiding and abetting—Booklet containing practical instruction for persons contemplating suicide—Whether supply of booklet conduct amounting to aiding, abetting, counselling or procuring suicide—Suicide Act 1961 (9 & 10 Eliz. 2, c. 60), s. 2(1) Practice—Declaratory judgment—Jurisdiction to make—Attorney-General seeking declaration that conduct amounting to criminal offence—Whether declaration to be granted

The defendants, who were members of the executive committee of the Voluntary Euthanasia Society, published a booklet

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entitled "A guide to self-deliverance," for distribution to members of the society, subject to certain qualifications, the expressed aim of which was to overcome the fear of the process of dying. While the booklet could deter a would-be suicide, it could assist persons to commit suicide who might not otherwise do so: it set out five separate methods of suicide.

On the Attorney-General's application by originating summons for declarations that supply of the booklet to a class of persons known to include, or to be likely to include, persons considering or intending to commit suicide constituted an offence or an attempted offence of aiding, abetting, counselling or procuring the suicide of another, contrary to section 2(1) of the Suicide Act 1961¹:—

Held, refusing the applications, that for supply of the booklet to amount to an offence under section 2(1) of the Act of 1961, it had to be proved that the supplier, whilst intending the booklet to be used by a person actually contemplating suicide, and with the object of assisting or otherwise encouraging him, supplied the booklet to such a person who then read it and, except in the case of an attempted offence, was assisted or encouraged by reading it to commit or to attempt to commit suicide; that whilst there might be circumstances in which supply of the booklet would undoubtedly amount to an offence, without proof of the necessary intent it could not be said in advance that any particular supply would be an offence and that it was for a jury to decide in each case whether the necessary facts had been proved; and that, accordingly, there was no form of declaration that it was appropriate for the court to grant (post, pp. 856G–H, 858E–F, G—859A, B).

Imperial Tobacco Ltd. v. Attorney-General [1981] A.C. 718, H.L.(E.) considered.

Per curiam. It is important that the court should bear in mind the danger of usurping the jurisdiction of the criminal courts. While recognising the advantages of the application of the law being clear in relation to future conduct, it would only be proper to grant a declaration if it is clearly established that there is no risk of it treating conduct as criminal which is not clearly in contravention of the criminal law (post, p. 854c, E–F).

The following cases are referred to in the judgment:

Attorney-General v. Bastow [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

Attorney-General's Reference (No. 1 of 1975) [1975] Q.B. 773; [1975] 3 W.L.R. 11; [1975] 2 All E.R. 684, C.A.

Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.).

Imperial Tobacco Ltd. v. Attorney-General [1981] A.C. 718; [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866, H.L.(E.).

National Coal Board v. Gamble [1959] 1 Q.B. 11; [1958] 3 W.L.R. 434; [1958] 3 All E.R. 203, D.C.

Reg. v. Bainbridge [1960] 1 Q.B. 129; [1959] 3 W.L.R. 656; [1959] 3 All E.R. 200, C.A.

Reg. v. Fretwell (1862) 9 Cox C.C. 152, C.C.A.

Reg. v. McShane (1977) 66 Cr.App.R. 97, C.A.

Reg. v. Reed [1982] Crim.L.R. 819, C.A.

Rex v. Baker (1909) 28 N.Z.L.R. 536.

Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800; [1981] 2 W.L.R. 279; [1981] 1 All E.R. 545, C.A. and H.L.(E.).

¹ Suicide Act 1961, s. 2(1): see post, p. 848c.

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The following additional cases were cited in argument:

Advocate, H.M. v. Johnstone, 1926 J.C. 89

Attorney General v. G. (unreported), March 3, 1983, High Court of Australia (Gibbs C.J.)

Attorney General v. Huber (1971) 2 S.A.S.R. 142

Bowker v. Woodroffe [1928] 1 K.B. 217, D.C.

Commonwealth of Australia v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39

Crook v. Edmundson [1966] 2 Q.B. 81; [1966] 2 W.L.R. 672; [1966] 1 All E.R. 833, D.C.

Director of Public Prosecutions v. Stonehouse [1978] A.C. 55; [1977] 3 W.L.R. 143; [1977] 2 All E.R. 909, H.L.(E.)

Ferguson v. Weaving [1951] 1 K.B. 814; [1951] 1 All E.R. 412, D.C.

Lake v. Lake [1955] P. 336; [1955] 3 W.L.R. 145; [1955] 2 All E.R. 538, C.A.

R.C.A. Corporation v. John Fairfax & Sons Ltd. [1982] R.P.C. 91

Reg. v. Allan [1965] 1 Q.B. 130; [1963] 3 W.L.R. 677; [1963] 2 All E.R. 897, C.C.A.

Reg. v. Broadfoot [1976] 3 All E.R. 753, C.A.

Reg. v. Clarkson [1971] 1 W.L.R. 1402; [1971] 3 All E.R. 344, Ct.-M.A.C.

Reg. v. Coney (1882) 8 Q.B.D. 534

Rex v. Christian (1913) 23 Cox C.C. 541

Rex v. Croft [1944] 2 All E.R. 483, C.C.A.

Thambiah v. The Queen [1966] A.C. 37; [1966] 2 W.L.R. 81; [1965] 3 All E.R. 661, P.C.

Thomas v. Lindop [1950] 1 All E.R. 966, D.C.

Tuck v. Robson [1970] 1 W.L.R. 741; [1970] 1 All E.R. 1171, D.C.

ORIGINATING SUMMONS

By summons dated July 9, 1982, Her Majesty's Attorney-General claimed against the five respondents, Brenda Able, Celia Fremlin, Harry Ree, Jean Davies and Barbara Smoker (1) a declaration that the supply of the booklet known as "A guide to self-deliverance" to a class of persons known to include persons intending to commit suicide or likely to include such persons constituted an offence contrary to section 2 of the Suicide Act 1961 if any such person subsequently committed suicide following the advice contained in that booklet; (2) a declaration that the supply of the booklet known as "A guide to self-deliverance" to a class of persons known to include persons intending to commit suicide or likely to include such persons constituted an attempt to commit an offence contrary to section 2 of the Suicide Act 1961 if no such person subsequently committed suicide following the advice contained in that booklet; (3) a declaration that the supply of the booklet known as "A guide to self-deliverance" to a class of persons known to include persons considering committing suicide or likely to include such persons constituted an offence contrary to section 2 of the Suicide Act 1961 if any such person subsequently committed suicide following the advice contained in that booklet; (4) a declaration that the supply of the booklet known as "A guide to self-deliverance" to a class of persons known to include persons considering committing suicide or likely to include such persons constituted an attempt to commit an offence contrary to section 2 of the Suicide Act 1961 if no such person subsequently committed suicide following the advice contained in that booklet.

The facts are stated in the judgment.

*Simon D. Brown and Stephen Aitchison for the Attorney-General.
Geoffrey Robertson and Andrew Nicol for the respondents.*

Cur. adv. vult.

April 28. WOOLF J. read the following judgment. In this case, Her Majesty's Attorney-General applies by originating summons for declaratory relief that, in the circumstances specified by him, the distribution of a booklet entitled "A guide to self-deliverance," which is published by the executive committee of the Voluntary Euthanasia Society (which also used to be known as Exit), is unlawful as being either an offence or an attempted offence contrary to the provisions of section 2(1) of the Suicide Act 1961.

That Act, by section 1, abrogated the rule of law whereby it was a crime for a person to commit suicide. Section 2(1) provides:

"A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years."

The respondents to the summons, whose names were changed at the outset of the proceedings, are members of the executive committee of the society. The society is an unincorporated association of members. Its amended constitution recites the purposes for which the society was established. These are:

"(2) The society shall work for the legalisation of voluntary euthanasia and for the enactment and beneficial working of any other measure seeking to establish the right, within properly defined limits, to avoid suffering and to die peacefully. (3) The society shall publish and distribute a form of declaration enabling members and others to make known their wishes with regard to terminal and emergency treatment. (4) The society may take any other steps intended to promote a general acceptance and understanding of the principles of voluntary euthanasia. (5) The society may consider and evaluate questions relating to the avoidance of suffering and to peaceful death and may provide information and practical and other advice to members of mature years and reasonable length of membership (by, for example, publication and distribution of a pamphlet or booklet) as to how most appropriately a prolonged and painful death can be avoided, and a life can be ended painlessly by someone hopelessly and painfully ill who has decided to embark on self-deliverance. (6) The society may carry out research in relation to all the above purposes and apply funds accordingly."

The respondents dispute the claim for relief on two main grounds. First, it is said that this is not a case in which it would be proper for the court to exercise its jurisdiction to grant declaratory relief, since it is for the criminal courts and not this court to apply the criminal law and if the law is unclear, the proper body to clarify the law is Parliament and not the courts. Secondly, they submit that the distribution of the booklet is not unlawful. The respondents go on to contend that if it is appropriate to grant declaratory relief, then a declaration should be granted that:

"No offence against section 2 of the Suicide Act is committed by publishing or supplying factual information about methods of com-

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mitting suicide or arguments about the propriety of so doing, if its publisher or supplier (a) has no knowledge that the recipient has a present intention of committing suicide, or (b) lacks an intention to persuade a particular recipient to commit suicide, or (c) where the information or argument published is by its nature or by the circumstances attending its publication unlikely to precipitate suicidal attempts.”

Before considering the issues between the parties, it is necessary for me to deal with the facts giving rise to the application in so far as they are established before me. The background to the publication of the booklet can be ascertained from a chronology which is set out in the booklet itself.

In July 1979 the then executive committee decided to ask the then 2,000 members whether they would appreciate a booklet describing how to end one's life. There was an overwhelming response in favour. In October 1979 a resolution was passed in favour of producing the booklet and thereafter the membership of the society increased rapidly by 1,000 a month. In June 1980 the committee obtained opinions from two different Queen's Counsel, who gave conflicting views as to the likelihood of prosecution. In July 1980 it was decided not to publish. In August 1980 the Scottish society decided to produce a booklet for its members. That booklet was published in September 1980 under the title "How to Die with Dignity." On October 18, 1980, when the membership of the society had increased to 10,000, an annual general meeting appointed a new committee pledged to publish the booklet.

On October 22, 1980, Dr. Scott, a retired doctor, brought proceedings in the High Court to restrain publication of the booklet and obtained an undertaking that it would not be published, the grounds of his application being that it was contrary to the constitution of the society to publish the booklet. In February 1981 the constitution was changed and, in March 1981 Dr. Scott withdrew his proceedings on the society paying his costs.

In June 1981 the booklet was first distributed. There has since been a considerable demand for the booklet. According to the respondents' evidence, by November 25, 1982 (that is in less than 18 months), 8,300 copies had been sold. This is despite the fact that the society has taken steps to limit the sales by charging £6 for each copy of the booklet and by limiting the sales to members of three months standing, aged 25 or over.

It is next necessary to consider the booklet itself. Before I do so, I should make the position of the court clear. I am, of course, aware of the serious debate as to whether or not voluntary euthanasia should be legalised. However, I am not in any way concerned with the morality of voluntary euthanasia or the morality of publishing and distributing a booklet of this sort. The court's sole concern is with the legal issues between the parties, to which I have already alluded and, in particular, to the lawfulness of distributing the booklet. Although that is the position of the court, justice requires that I should make it clear that there has been no suggestion made on behalf of the Attorney-General that if it is lawful to distribute a booklet of this nature, there is anything objectionable about the form or contents of this particular booklet. Indeed, having read the booklet more than once, it is manifest that no objection of that sort could be made. If it is appropriate to have distributed a booklet dealing with this subject, then this booklet provides a satisfactory treatment which it would not be easy to improve upon. As the extracts which I will quote will make clear, it could deter a would-be suicide, but it will, in many

cases, assist them to commit suicide when they might not otherwise do so, and this should be apparent to any reasonably intelligent person who has read the booklet.

Since the conclusion of the evidence, I have been supplied with a supplement to the booklet which has not been published by the society. That supplement, supplied by Dr. Scott, confirms the views which I have just expressed.

On the inside page of the booklet there appears the statement: "Before considering self-deliverance; have you rung the Samaritans? Their number is in your local phone book."

The booklet commences with a preface by the late Arthur Koestler, to which I should refer because it indicates the reasons for publishing it. The preface begins:

"When people talk of 'the fear of death,' they often fail to distinguish between two types of fear which may be combined in experience but are separate in origin. One is the fear of the state of death (or non-existence); the other the fear of the process of dying, the agony of the transition to that state. The aim of this booklet—and of the society which, after much soul-searching, decided to publish it—is to overcome the second of these fears."

Later, he said:

"If the agnostics among us could be assured of a gentle and easy way of dying, they would be much less afraid of being dead. This is not a logical attitude, but fear is not governed by logic."

There is then an introduction, which commences:

"The reasons for writing this pamphlet are quite simple. Those who join Exit do so because they believe that they have a right to a say in the manner and timing of their death, particularly if it seems likely that the process of dying will be a long one and distressing either to them or to their friends and families. For some the main fear will be of continuing pain, while for others the main fear is of paralysis of body or mind or simply weariness with a life that has deteriorated beyond repair."

The introduction goes on to say that:

"Exit receives frequent requests from members for advice about how they might most appropriately end their lives themselves if the need should arise. The main objectives of the society are to secure the enactment of the 1969 Voluntary Euthanasia Bill by Parliament. . . . Pending such legislation, we see no alternative to supplying on request the necessary information to bring about their own deliverance. Exit neither advocates nor deplores suicide. It has a neutral stance, and regards such decisions as matters of personal belief and judgment."

The introduction concludes by stating:

"The society certainly does not wish to encourage people to commit suicide, and in fact wishes to discourage people from killing themselves merely because of some personal crisis which will look a good deal less serious a few days or even a few hours later."

The booklet then deals with the question of suicide and Christianity, and gives assistance as to the forms of powers of attorney designed to avoid

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A being given life sustaining treatment in circumstances “where they consider it better for their life to end.”

B The next two pages of the booklet are entitled “Why you should think again.” There are then set out, under seven separate headings, reasons why the reader should indeed think again before seeking to take his own life. The next page is entitled “Before taking a final decision about seeking self-deliverance.” There are then four numbered paragraphs, the first of which advises the reader “to consider over a substantial period—months if possible, rather than weeks—whether self-deliverance is the best way of dealing with your problems.” The second asks the reader to consider “whether your problems could be overcome by seeking medical or other help, by changing your way of life,” etc. The third paragraph warns that “no method of suicide is absolutely foolproof” and a failure could result in brain damage or damage to other organs. It points out that failed suicides are often handled unsympathetically. The final paragraph states that “of those who survive apparently serious suicide attempts . . . a significant proportion find that they can cope with life after all.”

C The booklet then deals with “Care and distribution of this pamphlet,” in these terms:

D “In writing this pamphlet the readers we have had particularly in mind are those who might have wished to benefit from the provisions of the proposed 1969 Voluntary Euthanasia Bill. It is because we are anxious to discourage people from ending their lives without due thought and consideration of the alternatives that we have decided that this pamphlet should be available only to those who have been members of Exit for at least three months. We accept that it may, despite all precautions, occasionally come into the hands of potential impulsive suicides, but we feel that we have to set against that risk the very real misery experienced by a much larger number of people who are currently forced to suffer against their will, sometimes for long periods. Accordingly we urge those who request the pamphlet to consider the wishes of our membership in deciding how it should be stored. We recommend that they keep it in a secure place and that they do not show it to others. If they ever decide to end their lives, before doing so they should either destroy the booklet or, better, send it back to us.”

The booklet then sets out certain general principles, among which are:

G “Although this pamphlet is designed to reduce the incidence of unsuccessful attempts, it would be naive to think that it can prevent them entirely. . . . We imagine that those who contemplate using this pamphlet will wish to die in such a way that their discovery will cause the minimum of distress to their families and friends.”

H The booklet then turns to “How not to do it” and sets out five separate methods of “self-deliverance” in clear, straightforward and reasonably detailed terms. The booklet also contains a guide to sedative drugs, a list of references to other works, a passage dealing with coroners and inquests, a statement of the law and then it deals with the position of life assurance, medical research and transplants. Finally, there is a postscript by a Dr. Eliot Slater, which makes it clear that the writer believes it is the absolute right of every human being to choose to live or to choose to die.

I have dealt with the booklet in some detail because its contents are the most important evidence in the case and I consider it right to try and

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give an indication of the balanced nature of those contents. It is, however, not possible to obtain the full effect of the booklet from the passages cited. This can only be obtained by reading the booklet as a whole.

In his affidavit, filed on behalf of the respondents, Dr. Brewer argues that the ordinary reader would find the descriptions as to methods "off-putting in their nature and subject matter" and that the booklet, "by giving details of what it accurately terms 'elaborate preparations,' " provides facts which dispel the emotion that suicide is an easy matter to accomplish. He disputes that the effect of the publication of the booklet is likely to encourage suicide and expresses the opinion that "it will not cause *a significant increase in* suicide or suicidal attempts." I emphasise the words "*a significant increase in*" because they were inserted in longhand, presumably by the doctor before he deposed the affidavit because he appreciated it would cause some increase. In my view, the doctor underestimates the effect of the booklet. He concludes his affidavit by saying:

"I conclude that there is no reason to suspect that receipt of the booklet will have the effect of persuading persons to take their own lives, or 'tipping over the brink' those who are contemplating such a course . . . it is in the public interest to make it available in a responsible and balanced form to those adults prepared to take steps to obtain it."

The Attorney-General, by the evidence filed on his behalf, takes the opposite view. It is explained how the matter came to the attention of the authorities in consequence of the suicide, at Claridges Hotel, of Robert McLeod, who was only 22. This was on July 20, 1981, only shortly after the first distribution of the booklet, yet a copy was found in his room. There are exhibited various documents which were obtained from the society's London office. These and the other evidence make it clear that this highly intelligent young man was determined upon taking his own life and was convinced of his moral right to do so. Further inquiries were then made and it was ascertained from the various police forces that, over the period of approximately 18 months after the first distribution of the booklet, there were 15 cases of suicides linked to the booklet and 19 suicides where documents were found which showed that the deceased was a member of, or had corresponded with, the society. As is pointed out on behalf of the Attorney-General, there may be many other cases, particularly as members are invited in the booklet, if they decide to end their lives, before doing so either to destroy the booklet or send it back to the society.

Mr. Nursaw, the Attorney-General's legal secretary, explains in his affidavit why these proceedings were commenced, in the following manner:

"When Her Majesty's Attorney-General's attention was drawn to these cases the view was taken that the distribution of the booklet to Exit's subscribers constituted an offence under section 2 of the Suicide Act 1961. However, when this opinion was communicated to Exit in an attempt to bring the distribution to an end, the executive committee's solicitors disputed its correctness. . . . It is accepted that the members of that committee are respectable persons who chose to issue the booklet out of genuine and strongly-held beliefs and who would not follow a course of action which they know to be criminal. In view of the existence of a genuine dispute as to the precise ambit

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A of the law it was considered desirable to seek a declaration from this honourable court to resolve that dispute quickly and authoritatively without exposing respectable people to prosecution for an offence carrying a maximum penalty of 14 years' imprisonment. Although initially it was envisaged that an injunction would be sought as well as a declaration, it has now been decided solely to seek declaratory relief at this stage. This decision has been taken in the light of the letter of May 7, 1982, and in the confident expectation and belief that should this honourable court uphold Her Majesty's Attorney-General's interpretation of the law all further publication and distribution of the booklet would cease immediately. Her Majesty's Attorney-General and the Director of Public Prosecutions have decided that it would not be right to bring criminal proceedings in respect of acts done by the defendants in distributing the booklet before the decision of this honourable court is made known."

Before I proceed to set out my conclusions as to the legal effect of the evidence, I should deal with the first ground of opposition raised by the respondents, since, if it would not be appropriate to grant declaratory relief, it would not be right for me to proceed further with my examination of the facts and the issues of law which arise from them.

D The House of Lords has recently dealt with the question of the propriety of the civil courts granting declaratory relief in cases involving the criminal law in *Imperial Tobacco Ltd. v. Attorney-General* [1981] A.C. 718. In that case it was the company which sought the declaratory relief and the Attorney-General who opposed the grant of it. Before the matter came before the High Court, criminal proceedings had already been commenced. Giving the leading speech, Viscount Dilhorne said, at p. 742:

"My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so. In my opinion it cannot be right to grant a declaration that an accused is innocent after a prosecution has started."

G That there can be circumstances where it is appropriate to give declaratory relief I accept. Indeed, in *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] A.C. 800, I gave such relief, and my decision to do so was not subject to criticism in either the Court of Appeal or the House of Lords. Furthermore, if it is open to a private individual, in exceptional circumstances, to obtain such relief, it is certainly open to the Attorney-General to do so, since his right to seek the assistance of the civil courts in upholding the criminal law has been fully recognised by the courts: see *Attorney-General v. Bastow* [1957] 1 Q.B. 514.

H The position of the Attorney-General in this respect was also dealt with by the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. Lord Fraser of Tullybelton said, at p. 523:

"It seems to me entirely appropriate that responsibility for deciding whether to initiate preventive proceedings for injunction or declaration in the public interest should be vested in a public officer, and for historical reasons that officer is the Attorney-General. It is well established that he is not bound to prosecute in every case where

there is sufficient evidence, but that when a question of public policy may be involved the Attorney-General has the duty of deciding whether prosecution would be in the public interest, see the statement by Sir Hartley Shawcross in 1951 quoted in *Edwards on The Law Officers of the Crown*, p. 223. It seems even more necessary that similar consideration should be given to the public interest before initiating preventive procedure for injunction or declaration."

There are, however, differences between this case and other cases where declaratory relief has been granted in aid of the criminal law. Declarations are being sought that certain conduct is criminal, not that certain conduct is not criminal. The declarations are addressed to future distributions of the booklet and it is a real possibility that if a declaration is granted, but despite this further distributions take place, there could be a criminal prosecution. This makes it particularly important that this court should bear in mind the danger of usurping the jurisdiction of the criminal courts.

In this connection, I do not accept in full the submission by counsel for the respondents that because the proceedings are brought by the Attorney-General, it will only be appropriate exceptionally to refuse declaratory relief. It is true, as he contends, that in effect the Attorney-General is in a position to obtain declarations as to the law from the Court of Appeal (Criminal Division) on an Attorney-General's reference. However, while the court's decision on such references frequently clarifies the law, the court does so in relation to specific facts which are before it, in exactly the same way as it would in the case of an ordinary appeal against conviction. Furthermore, if a court declares what conduct will be criminal, it may be performing exactly the task which the jury would have to perform at a criminal trial. However, if the court rules that conduct is not criminal, it is performing a similar function to the judge at a criminal trial who stops the case on a submission of no case to answer. While of course recognising the advantages of the application of the law being clear in relation to future conduct, it would only be proper to grant a declaration if it is clearly established that there is no risk of it treating conduct as criminal which is not clearly in contravention of the criminal law.

Adopting this standard, I consider it appropriate to proceed to consider whether, on the evidence which is before me, the Attorney-General has established that he is entitled to the declaratory relief which he seeks. A starting point of such consideration must be the terms of section 2(1) itself. The intent of the subsection is clear. Section 1 of the Act having abrogated the criminal responsibility of the suicide, section 2(1) retains the criminal liability of an accessory at or before the fact. The nature of that liability has, however, changed. From being a participant in an offence of another, the accessory becomes the principal offender. This has the result that to attempt to "aid, abet, counsel or procure the suicide of another, or an attempt by another to commit suicide" can be an offence even if the person concerned does not attempt to commit suicide: see *Reg. v. McShane* (1978) 66 Cr.App.R. 97 and section 3 of the Criminal Attempts Act 1981. This is of significance in relation to the present issues because if the distribution of the booklet amounts to an offence under section 2(1) when the person to whom the booklet is distributed commits suicide or attempts to commit suicide, then the distribution to that person, if there is no attempt to commit suicide, could be an attempt to commit an offence under section 2(1) in the appropriate circumstances.

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A

This being the general effect of section 2(1), the issue can be confined to considering whether to distribute the booklet to someone who commits suicide or attempts to commit suicide makes the distributor “an accessory before the fact” to the suicide or attempted suicide, the position so far as the distributor is concerned being exactly the same as it would be if either suicide or attempted suicide was still a criminal offence.

B

Of the opening words of section 2(1), the words “aids, abets” are normally regarded as referring to an accessory at the fact, and the words “counsels or procures” to an accessory before the fact. However, it is not right to ignore the words “aids, abets” in considering whether a person is an accessory before the fact.

C

As is pointed out in *Russell on Crime*, 12th ed. (1964), p. 150, the conception of accessories before the fact is one of great antiquity and it cannot properly be understood without consideration of its history. Coke used both the word “aide” and the word “abetting” in dealing with accessories before the fact. Hale said in his *Pleas of the Crown* (1778 ed), p. 615: “An accessory before, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony.”

D

Therefore, in the ordinary case, in deciding whether or not an offence has been committed, it is preferable to consider the phrase “aids, abets, counsels or procures” as a whole. However, some of the previous decisions of the courts are explained by the fact that in the particular circumstances of that case, the court was considering only one part of the phrase.

E

The editor of *Russell* also provides assistance as to what is the “bare minimum” which is necessary to constitute a person an accessory before the fact. At p. 151, it is stated that

“the conduct of an alleged accessory should indicate (a) that he knew the particular deed was contemplated, and (b) that he approved of or assented to it, and (c) that his attitude in respect of it in fact encouraged the principal offender to perform”—and I would here add “or attempt to perform”—“the deed.”

F

In relation to the first minimum requirement, those responsible for publishing the booklet, because of its terms, would almost certainly know that a significant number of those to whom the booklet was intended to be sent would be contemplating suicide. They would not know precisely when, where or by what means the suicide was to be effected, if it took place, but this does not mean they cannot be shown to be accessories. As Lord Parker C.J. said in *Reg. v. Bainbridge* [1960] 1 Q.B. 129, 134:

G

“if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the man who has advised or helped, aided or abetted, will be guilty as an accessory before the fact.”

H

As the judge had directed the jury in that case: “It must be proved he knew the type of crime which was in fact committed was intended.”

In relation to the second requirement, if the recipients of the booklet attempted to commit or committed suicide, the contents of the booklet indicate that the publishers approved or assented to their doing so. To conclude otherwise is inconsistent with the whole object of the booklet, which is to assist those who feel it necessary to resort to self-deliverance.

I turn, therefore, to the final minimum requirement. I have no doubt that in the case at least of certain recipients of the booklet, its contents

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would encourage suicide. Ignorance as to how to commit suicide must by itself be a deterrent. Likewise, the risks inherent in an unsuccessful attempt must be a deterrent. The contents of the booklet provide information as to methods and methods which are less likely to result in an unsuccessful attempt. This assistance must encourage some readers to commit or attempt to commit suicide. This is clearly appreciated by the publishers, thus their care to control the persons to whom the booklet is to be sold and their advice as to the safe-keeping of the booklet.

I, therefore, have come clearly to the conclusion that there could be circumstances in which to supply the booklet could amount to an offence.

This conclusion is consistent with the decision of the Court of Appeal in *Reg. v. Reed* [1982] Crim.L.R. 819, of which case I have a transcript. That case concerned the former secretary of the society. He is now wholly disowned by the society, which disapproves of his conduct, that conduct having come to light as a result of his prosecution. Although he was convicted of offences under section 2 of the Act of 1961 and the Court of Appeal did not intervene, the decision of the court is of limited assistance because Reed's conduct went far beyond anything which is here being considered. The case against him was that he put his co-accused in touch with people so that the co-accused could actually assist them in committing suicide. As is stated in the transcript:

"there was no dispute that the conduct of Reed in putting Lyons in touch with would-be suicides . . . constituted taking the appropriate steps to produce a result. The issue and the only issue was what result was intended. Was it the bringing of comfort to the sufferer, as Reed contended, or was it the procuring of suicide, as the Crown contended?"

Some assistance is to be obtained from a New Zealand case, *Rex v. Baker* (1909) 28 N.Z.L.R. 536. In that case it was held that:

"Where one person writes a letter to another explaining how a crime of a particular nature may be committed, and the other person subsequently attempts to commit a crime of that nature, the writer of the letter is guilty of an attempt to commit that crime . . . even though when the letter was written no specific crime of that nature was in the contemplation of either of the parties."

However, that case has to be approached with caution as it has been the subject of considerable criticism by academic writers.

The fact that the supply of the booklet could be an offence does not mean that any particular supply is an offence. It must be remembered that the society is an unincorporated body and there can be no question of the society committing an offence. Before an offence under section 2 can be proved, it must be shown that the individual concerned "aided, abetted, counselled or procured" an attempt at suicide or a suicide and intended to do so by distributing the booklet. The intention of the individual will normally have to be inferred from facts surrounding the particular supply which he made. If, for example, before sending a copy of the booklet, a member of the society had written a letter, the contents of which were known to the person sending the booklet, which stated that the booklet was required because the member was intending to commit suicide, then, on those facts, I would conclude that an offence had been committed of at least an attempted offence contrary to section 2 of the Act. However, in the majority of cases, a member requesting the booklet

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A will not make clear his intentions and the supply will be made without knowledge of whether the booklet is required for purposes of research, general information, or because suicide is contemplated. Is it, therefore, enough that in any particular case the person responsible for making the supply would appreciate that there is a real likelihood that the booklet is required by one of the substantial number of members of the society who will be contemplating suicide? It is as to this aspect of the case that there

B is the greatest difficulty and little assistance from the authorities.

Mr. Robertson, on behalf of the society, contends that before a person can be an accessory, there must be a consensus between the accessory and the principal, and there can be no consensus where the alleged accessory does not even know whether the principal is contemplating (in this case) suicide. As, however, is pointed out in *Smith & Hogan, Criminal Law*, 4th ed. (1978), while counselling implies consensus, procuring and

C aiding do not. The editors say at p. 116:

“the law probably is that: (i) ‘procuring’ implies causation but not consensus (ii) ‘abetting’ and ‘counselling’ imply consensus but not causation and (iii) ‘aiding’ requires actual assistance but neither consensus nor causation.”

D As a matter of principle, it seems to me that as long as there is the necessary intent to assist those who are contemplating suicide to commit suicide if they decide to do so, it does not matter that the supplier does not know the state of mind of the actual recipient. The requirement for the necessary intent explains why in those cases where, in the ordinary course of business, a person is responsible for distributing an article, appreciating that some individuals might use it for committing suicide, he

E is not guilty of an offence. In the ordinary way, such a distributor would have no intention to assist the act of suicide. An intention to assist need not, however, involve a desire that suicide should be committed or attempted.

In this connection, I must refer to *Reg. v. Fretwell* (1862) 9 Cox C.C. 152. In that case the Court of Criminal Appeal decided that the mere provision of the means of committing a crime is not sufficient to make the provider guilty as an accessory. In giving the judgment of the court, Erle

F C.J. said, at p. 154:

“In the present case the prisoner was unwilling that the deceased should take the poison; it was at her instigation and under the threat of self-destruction that he procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it.

G It would be consistent with the facts of the case that he hoped she would change her mind; and it might well be that the prisoner hoped and expected that she would not resort to it.”

While I accept that this reasoning does not accord with mine, I do not regard the case as requiring me to come to a different conclusion from that which I have indicated. That case is inconsistent with *National Coal Board v. Gamble* [1959] 1 Q.B. 11, and I regard it as confined to its own facts, for the reasons indicated in *Smith & Hogan, Criminal Law*, pp. 120

H and 121.

Counsel for the respondents points out, and this I accept, that in some cases the booklet, far from precipitating someone to commit suicide, might have the effect of deterring someone from committing suicide when they might otherwise have done so. In such circumstances, he submits, it

would be quite nonsensical to regard the supply of the booklet as being an attempted offence contrary to section 2. I agree, though I recognise that on one approach the result would be different. The reason why I agree with the submission is because, in such a case, the booklet has not provided any assistance with a view to a contemplated suicide. Such assistance is necessary to establish the actus reus for even the attempted offence.

There will also be cases where, although the recipient commits or attempts to commit suicide, the booklet has nothing to do with the suicide or the attempted suicide; for example, a long period of time may have elapsed between the sending of the booklet and the attempt. In such a case, again, I would agree with counsel for the respondents that there would not be a sufficient connection between the attempted suicide and the supply of the booklet to make the supplier responsible. This does not mean that it has to be shown that the suicide or attempted suicide would not have occurred but for the booklet. However, if "procuring" alone is relied upon, this may be the case. As Lord Widgery C.J. stated in *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773, 779-780:

"To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening . . . You cannot procure an offence unless there is a causal link between what you do and the commission of the offence . . ."

However, you do not need to procure to be an accessory and the same close causal connection is not required when what is being done is the provision of assistance.

I therefore conclude that to distribute the booklet can be an offence. But, before an offence can be established to have been committed, it must at least be proved: (a) that the alleged offender had the necessary intent, that is, he intended the booklet to be used by someone contemplating suicide and intended that person would be assisted by the booklet's contents, or otherwise encouraged to attempt to take or to take his own life; (b) that while he still had that intention he distributed the booklet to such a person who read it; and, (c) in addition, if an offence under section 2 is to be proved, that such a person was assisted or encouraged by so reading the booklet to attempt to take or to take his own life, otherwise the alleged offender cannot be guilty of more than an attempt.

If these facts can be proved, then it does not make any difference that the person would have tried to commit suicide anyway. Nor does it make any difference, as the respondents contend, that the information contained in the booklet is already in the public domain. The distinguishing feature between an innocent and guilty distribution is that in the former case the distributor will not have the necessary intent, while in the latter case he will.

However, in each case it will be for a jury to decide whether the necessary facts are proved. If they are, then normally the offence will be made out. Nevertheless, even if they are proved, I am not prepared to say it is not possible for there to be some exceptional circumstance which means that an offence is not established.

The situations with which I have just sought to deal illustrate the problems in this case of granting any form of declaration to Her Majesty's Attorney-General. However, as I am clearly of the view that the supply of this booklet can amount to an offence contrary to section 2, if the

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A recipient commits or attempts to commit suicide, there can be no question of the respondents being granted a declaration.

Recognising the difficulties created by the sort of situations to which I have referred, in the course of argument, counsel for the Attorney-General submitted alternative forms of declarations from those set out in the originating summons. However, despite his gallant efforts, he has failed so far to produce a declaration which would not have the effect of indicating an offence has been committed, when, in fact, no offence would be committed. Having examined the facts and the law, I am satisfied that there is no form of declaration that it would be appropriate to grant. That it is desirable for the law to be clarified I accept, but if there is to be any clarification as a result of the proceedings before this court, it must come not as a result of my granting a declaration, but from the limited assistance which I have been able to give in the course of this judgment. One happy consequence of this conclusion is that both parties will be at liberty to appeal and no doubt, as a result of such an appeal, all will be made clear. If it is not, only Parliament can provide the answer.

It remains for me to express my gratitude for the very considerable assistance which I have received from all counsel in this case. I am very grateful for the care and assistance with which they made their submissions.

Declarations refused.

Solicitors: Treasury Solicitor; Calvert-Smith & Sutcliffe, Richmond.

[Reported by PAUL MAGRATH, ESQ., Barrister-at-Law]

[QUEEN'S BENCH DIVISION]

F GILLICK v. WEST NORFOLK AND WISBECH AREA HEALTH
AUTHORITY AND ANOTHER

[1982 G. No. 2278]

1983 July 18, 19; 26

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G *National Health Service—Family planning clinics—Children under 16—Departmental guidance to area health authority—Contraceptive advice and treatment to children under 16 without parental knowledge or consent—Whether advice contained in guidance lawful—Whether adherence to advice resulting in commission of criminal offence or unlawful conduct—Sexual Offences Act 1956 (4 & 5 Eliz. 2, c. 69), ss. 6, 28(1)(3) (as amended by Criminal Law Act 1967 (c. 58), s. 10, Sch. 2, para. 14)¹*

The Department of Health and Social Security issued to area health authorities a notice dealing with the organisation and development of a family planning service in which it was stated that family planning clinic sessions should be available to people

¹ Sexual Offences Act 1956, s. 6, as amended: "(1) It is an offence . . . for a man to have unlawful sexual intercourse with a girl [under] the age of 16."

S. 28(1) (3); see post, p. 866D-E.

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irrespective of their age. It emphasised that attempts should always be made to persuade children under 16 who attended clinics to involve parents or guardians and said that it would be most unusual to provide contraceptive advice and treatment without parental consent, but that in exceptional cases it was for a doctor, exercising his clinical judgment, to decide whether contraceptive advice or treatment should be provided. The plaintiff, who was the mother of four girls under the age of 16, wrote to her local area health authority seeking an assurance from them that no contraceptive advice or treatment would be given to any of her children while under 16 without her knowledge and consent. The area health authority refused to give such an assurance, expressing their intention of abiding by the advice contained in the notice.

On the plaintiff's action begun by writ for a declaration, inter alia, that the notice gave advice which was unlawful and wrong and which adversely affected parental rights and duties:—

Held, (1) that although the department, in issuing the notice, were exercising their statutory functions so that the plaintiff could have sought judicial review under R.S.C., Ord. 53, the plaintiff was equally entitled to proceed by way of writ, but in order to obtain the relief sought she had to establish that adherence to the advice contained in the notice would inevitably result in the commission of a crime or other unlawful conduct (post, pp. 865F—866C).

Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800, H.L.(E.) applied.

(2) That the prescribing of contraceptives by a doctor at a clinic to a girl under 16 who had sought advice or treatment did not constitute the offence of causing or encouraging unlawful sexual intercourse with a girl under 16 for whom he was responsible contrary to section 28(1) of the Sexual Offences Act 1956, since, whether or not the doctor was causing or encouraging unlawful sexual intercourse, he was not responsible for the girl because she was not in the "care" of the doctor or the clinic within the terms of section 28(3); nor did the doctor commit the offence of aiding or abetting a man to have unlawful sexual intercourse with a girl under 16 contrary to section 6 of the Act of 1956 unless it were shown that he had provided the contraceptive advice or treatment with the intention of encouraging them to have sexual intercourse and, accordingly, the probabilities were that a doctor would not render himself liable to criminal proceedings by following the advice in the notice (post, pp. 866E—H, 868F—G).

(3) That a child under 16 was capable of consenting to medical treatment provided that the child was sufficiently mature to be capable of making a reasonable assessment of the advantages and disadvantages of the proposed treatment and, accordingly, where the doctor's conduct in prescribing contraceptives constituted a trespass, a child could be capable of giving consent if that consent could properly be described as a true consent and, therefore, if such consent were given, the lack of parental consent would not render the doctor's conduct unlawful, and accordingly the plaintiff was not entitled to the relief sought (post, pp. 869A—B, F—G, 871C—D).

Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 139 applied.

The following cases are referred to in the judgment:

Attorney-General v. Able [1983] 3 W.L.R. 845.

Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653; [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913, H.L.(N.I.).

Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 139.

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- A *National Coal Board v. Gamble* [1959] 1 Q.B. 11; [1958] 3 W.L.R. 434; [1958] 3 All E.R. 203, D.C.
P. (A Minor), In re (1981) 80 L.G.R. 301.
Reg. v. Bourne (1952) 36 Cr.App.R. 125, C.C.A.
Reg. v. Tyrrell [1894] 1 Q.B. 710.
Rex v. Cooper (1833) 5 C. & P. 535.
Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800; [1981] 2 W.L.R. 279; [1981] 1 All E.R. 545, C.A. and H.L.(E.).
- B

The following additional cases were cited in argument:

- Chatterton v. Gerson* [1981] Q.B. 432; [1980] 3 W.L.R. 1003; [1981] 1 All E.R. 257.
D. (A Minor) (Wardship: Sterilisation), In re [1976] Fam. 185; [1976] 2 W.L.R. 279; [1976] 1 All E.R. 326.
Hewer v. Bryant [1970] 1 Q.B. 357; [1969] 3 W.L.R. 425; [1969] 3 All E.R. 578, C.A.
Parry-Jones v. Law Society [1969] 1 Ch. 1; [1968] 2 W.L.R. 397; [1968] 1 All E.R. 177, C.A.
Reg. v. Allan [1965] 1 Q.B. 130; [1963] 3 W.L.R. 677; [1963] 2 All E.R. 897, C.C.A.
Reg. v. Broadfoot [1976] 3 All E.R. 753, C.A.
Reg. v. Cox and Railton (1884) 14 Q.B.D. 153.
Thambiah v. The Queen [1966] A.C. 37; [1966] 2 W.L.R. 81; [1965] 3 All E.R. 661, P.C.
Thornton v. Mitchell [1940] 1 All E.R. 339, D.C.
- C
- D

ACTION

- E By a writ dated August 5, 1982, issued out of the Cambridge District Registry (1982 G. No. 305), and re-issued on amendment of the statement of claim indorsed thereon on February 8, 1983, out of the Central Office of the Supreme Court of Judicature, the plaintiff, Victoria Gillick, brought an action against the Norfolk Area Health Authority (subsequently amended to the West Norfolk and Wisbech Area Health Authority), and the Department of Health and Social Security, claiming (i) a declaration against both defendants that on its true construction, Health Notice (H.N. (80) 46), had no authority in law and gave advice which was unlawful and wrong, and which adversely affected or might adversely affect the welfare of the plaintiff's children, and/or the rights of the plaintiff as parent and custodian of the children, and/or the ability of the plaintiff properly and effectively to discharge her duties as such parent and custodian; and (ii)
- F a declaration against the area health authority that no doctor or other professional person employed by them either in the Family Planning Service or otherwise might give any contraceptive and/or abortion advice and/or treatment to any child of the plaintiff below the age of 16 without the prior knowledge and consent of the child's parent or guardian.
- G

The facts are stated in the judgment.

- H *Gerard Wright Q.C.* and *David Poole* for the plaintiff.
Simon D. Brown for the Department of Health and Social Security.
 The area health authority did not appear and was not represented.

Cur. adv. vult.

July 26. WOOLF J. read the following judgment. The plaintiff, who is the mother of five daughters all below the age of 16, and who resides

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in the area of the West Norfolk and Wisbech Area Health Authority, brings these proceedings seeking two declarations in respect of a Health Service Notice (H.N. (80) 46) issued by the Department of Health and Social Security in December 1980 which was a revised version of part of an earlier Health Service Circular (Interim Series) (H.S.C. (I.S.) 32), which was first issued in May 1974. The circular outlined the arrangements to be made for the organisation and development of a comprehensive family planning service within the National Health Service and it was accompanied by a Memorandum of Guidance which dealt inter alia with family planning clinics. The section of the Memorandum which dealt with the young was section G. As it was part of the plaintiff's case that the true effect of the advice could only be assessed when the revised version was considered in the light of what it replaced, I should read out both versions.

The first version was in the following terms:

"40. In 1972 there were 1,490 births and 2,804 induced abortions among resident girls aged under 16; these figures are vivid reminders of the need for contraceptive services to be available for and accessible to young people at risk of pregnancy, irrespective of age. It is for the doctor to decide whether to provide contraceptive advice and treatment, and the Department is advised that if he does so for a girl under the age of 16, he is not acting unlawfully provided he acts in good faith in protecting the girl against the potentially harmful effect of intercourse. The Department is also advised that other professional workers who refer, advise or persuade a girl under 16 years of age to go to a doctor in his surgery or at a clinic or elsewhere for the purpose of obtaining contraceptive advice and treatment would not, by such act alone, be acting unlawfully.

"41. The Medical Defence Union have advised that the parents of a child, of whatever age, should not be contacted by any staff without his or her permission even though as a matter of clinical judgment the refusal of permission to involve the parents may affect the nature of the advice given to the child. Nevertheless it would always be prudent to seek the patient's consent to tell the parents."

There is then an extract from the Report of the Committee on the Working of the Abortion Act (1974) (Cmd. 5579) (the Lane Committee) dealing with contraception, parental consent and confidentiality. I read part of it, at para. 243:

"If the girl refuses this permission, the doctor has three alternative courses open to him: he may break confidentiality with the girl in order to obtain her parents' consent to the treatment; he may refuse to continue with the treatment in the absence of consent by the parents, and so fail to give the girl the care which he considers medically necessary and leave her at risk of becoming pregnant; or he may continue with the treatment without parental consent. The last course may involve a technical assault if a vaginal examination is undertaken or an intra-uterine device is fitted; but no action has hitherto been taken against a doctor in such circumstances and we express no opinion as to whether legal or disciplinary proceedings would be likely to be successful. The doctor in each individual case has to balance his obligation of confidentiality against the desirability that, unusual circumstances apart, the parents of a child should be informed of, and agree to, the treatment given to her. This is of particular importance where a young girl has already had an abortion.

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A

The doctor may also be influenced by the knowledge that other girls may be deterred from seeking necessary medical advice if they feel that their confidence may not be respected."

B

C

With regard to this version, Mr. Wright on behalf of the plaintiff, submits that it amounts to the department openly encouraging the provision of advice and contraceptives to girls under 16, with whom it is illegal to have sexual intercourse; that the advice suggests that it is for the doctor, and not for the parents of the child, to decide whether the girl under 16 should be provided with contraceptive advice and treatment, and that the doctor can be a doctor at a clinic who may not have any previous knowledge of the girl so that he is wholly ill-equipped to deal with the socio-psychological problems involved in deciding whether or not to provide contraceptive advice or treatment. Mr. Wright also submits that the advice on the law which is given is wrong and that it wholly disregards the legitimate interest of the parents of the girl in question.

The revised version of December 1980 reads:

D

"There is widespread concern about counselling and treatment for children under 16. Special care is needed not to undermine parental responsibility and family stability. The Department would therefore hope that in any case where a doctor or other professional worker is approached by a person under the age of 16 for advice in these matters, the doctor, or other professional, will always seek to persuade the child to involve the parent or guardian (or other person in loco parentis) at the earliest stage of consultation, and will proceed from the assumption that it would be most unusual to provide advice about contraception without parental consent.

E

F

"It is, however, widely accepted that consultations between doctors and patients are confidential; and the Department recognises the importance which doctors and patients attach to this principle. It is a principle which applies also to the other professions concerned. To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted disease, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life. This would apply particularly to young people whose parents are, for example, unconcerned, entirely unresponsive, or grossly disturbed. Some of these young people are away from their parents and in the care of local authorities or voluntary organisations standing in loco parentis.

G

"The Department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor."

H

Mr. Wright, although recognising that the revised section G is an improvement on its predecessor, submits it still has the same defects. It still encourages the giving of advice and treatment to children under 16 without consulting their parents. It still leaves the final decision, as to whether or not to prescribe contraception, to the clinical judgment of the doctor. The legal advice is not changed and, while it expresses the "hope" that the doctor will seek to persuade the child to involve the parents, it clearly is recommending that advice can be given without parental consent.

Having regard to the contents of the guidance, the plaintiff wrote a series of letters to the area health authority seeking an assurance that

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"in no circumstances whatsoever will any of my daughters . . . be given contraceptive or abortion treatment whilst they are under 16 in any of the family planning clinics under your control, without my prior knowledge, and irrefutable evidence of my consent? Also, should any of them seek advice in them, can I have your assurance that I would be automatically contacted in the interests of my children's safety and welfare?"

In a subsequent letter dated January 29, 1981, the plaintiff again wrote to the area health authority enclosing a copy of an article which indicated that in the Suffolk Area Health Authority, in the event of a parent registering his or her objection to a minor receiving contraceptive advice, this would be honoured.

In their response, and in particular in a letter of February 19, 1981, the area health authority made it clear that they were acting in accordance with the guidance contained in the Health Notice from the department. The authority did go on to say that it was

"prepared to make your wishes known to the Family Planning Clinic in Wisbech and the two clinics in King's Lynn because we fully accept that special care is needed not to undermine parental responsibility and family stability . . . what I cannot do is to give you a categorical assurance in the terms you request because we believe it is widely accepted that consultations between doctors and patients are confidential and therefore the final decision must be for the doctor's clinical judgment."

Not being satisfied with this offer, the plaintiff commenced these proceedings. The statement of claim, in paragraph 7, sets out the particulars of her complaints and the declarations which she seeks in these terms:

"The said notice, which has no authority in law, gives advice which is unlawful and wrong and which adversely affects or which may adversely affect the welfare of the plaintiff's said children, and/or the rights of the plaintiff as parent and custodian of the said children.

"PARTICULARS

"The said advice: (a) condones and/or encourages and/or recommends and/or directs the giving of contraceptive or abortion advice to a child below the age of 16, thereby contemplating the fact or the possibility of a criminal offence against such child, namely the offence of unlawful sexual intercourse with an infant; further, it contemplates the barring of the parent and/or custodian of such child from access to information necessary for the proper and effective discharge of his or her duties towards such child, and in particular the duties of supervising the physical and moral welfare of such child; (b) permits and/or advises a doctor to conduct a physical examination on a child below the age of 16 and/or to prescribe and/or administer drugs to such child without the prior knowledge or consent of the said child's parent or guardian; (c) condones and/or encourages and/or connives at unlawful conduct on the part of males over the age of 14 against female children below the age of 16, namely the committing of offences of unlawful sexual intercourse with an infant."

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A The plaintiff claims:

“(i) a declaration against the first defendants and the second defendants on a true construction of the said notice and in the events which have happened, including and in particular the publication and the circulation of the said notice, the said notice has no authority in law and gives advice which is unlawful and wrong, and which adversely affects or which may adversely affect the welfare of the plaintiff’s said children, and/or the rights of the plaintiff as parent and custodian of the said children, and/or the ability of the plaintiff properly and effectively to discharge her duties as such parent and custodian; (ii) a declaration against the first defendants that no doctor or other professional person employed by the first defendants either in the Family Planning Service or otherwise may give any contraceptive and/or abortion advice and/or treatment to any child of the plaintiff below the age of 16 without the prior knowledge and consent of the said child’s parent or guardian.”

D There are two principal limbs to the argument of Mr. Wright on behalf of the plaintiff. The first is that the guidance advises doctors either to commit offences as principals of causing or encouraging unlawful sexual intercourse with a girl under 16, contrary to section 28 of the Sexual Offences Act 1956, or offences of being an accessory to unlawful sexual intercourse with a girl under the age of 16, contrary to section 6 of the Act of 1956. The second limb is that the guidance authorises doctors to give advice and treatment to children under 16 without their parents’ consent, which, if it is not a criminal offence under the foregoing provisions, is inconsistent with the rights of the parents of that child and the ability of the parents properly and effectively to discharge their duties as parents of supervising the physical and moral welfare of their children.

F Having regard to the first limb of the argument, Mr. Brown, on behalf of the department, raises the general question as to the propriety of the court granting a declaration because of the involvement of the criminal law. He reminded me about what I said on this subject in *Attorney-General v. Able* [1983] 3 W.L.R. 845. Although I am mindful of the dangers of trespassing upon the jurisdiction of the criminal courts, I do not consider that I should be inhibited from dealing with the issues raised in this action. It has not been suggested that the plaintiff was acting inappropriately by commencing these proceedings in the ordinary way by writ rather than by an application for judicial review, and the propriety of considering the issues is indicated by the fact that the declarations which the plaintiff seeks could have been applied for on an application under R.S.C., Ord. 53. In issuing the guidance, the department were exercising their statutory functions and, if in the course of so doing, they were giving advice which was unlawful, or more accurately, if the advice, if followed, would result in unlawful acts, then their decision to do so could be challenged on the conventional ground that it was wholly unreasonable to exercise their discretion to give advice with this result. Although distinctions can be drawn between this case and the *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] A.C. 800, I do not see any real distinction between the department in that case seeking a declaration that the advice which they were giving was lawful, and the plaintiff in this case seeking a declaration that the advice

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would result in acts which were unlawful. It was not contended that the giving of the advice itself amounted to a crime.

Mr. Brown makes a second point with regard to the form of relief which is being sought which I consider has more substance and which was not contested: that unless the plaintiff can show that the result of following the department's advice is the commission of a criminal offence by a doctor or unlawful conduct by a doctor, the plaintiff is not entitled to the declarations which she seeks. In this I regard Mr. Brown as being substantially correct. If the doctor could exercise his clinical judgment to give advice and to prescribe contraceptives without committing an offence or otherwise acting unlawfully, then it cannot be said that the department have acted either unlawfully or unreasonably in leaving the ultimate decision, at least in exceptional cases, to the doctor, since the department must be entitled to assume that its advice would only be followed in a lawful manner where this is possible and reasonably practical.

I will now deal with the two limbs of the plaintiff's argument. It will be appreciated that in doing so I am only concerned with the legality of the department's guidance. It is not my task to express any view as to the advisability or morality of the department's conduct.

Does the prescribing of contraceptives to a girl under 16 amount to criminal conduct on the part of a doctor?

Section 28(1) of the Sexual Offences Act 1956 makes it

"an offence for a person to cause or encourage . . . the commission of unlawful sexual intercourse with . . . a girl under the age of 16 for whom he is responsible."

Subsection (3) provides:

"The persons who are to be treated for the purposes of this section as responsible for a girl are . . . (c) any other person who has the custody, charge or care of her."

Putting aside the question of whether or not the doctor's conduct could be said to amount to encouraging unlawful sexual intercourse, I cannot accept Mr. Wright's submission that when a girl goes to a clinic for advice and/or treatment, she is in the ad hoc care of the doctor or the clinic. The words should not be narrowly construed but, in my view, they are inappropriate to cover a situation where a girl attends a clinic to seek help.

So far as the offence against section 6 of the Sexual Offences Act 1956, is concerned, I accept that a doctor who is misguided enough to provide a girl who is under the age of 16, or a man, with advice and assistance with regard to contraceptive measures with the intention thereby of encouraging them to have sexual intercourse, is an accessory before the fact to an offence contrary to section 6. I stress the words "with the intention thereby of encouraging them to have sexual intercourse." However, this, I assume, will not usually be the attitude of a doctor.

There will certainly be some cases, and I hope the majority of cases, where the doctor decides to give the advice and prescribe contraceptives despite the fact he was firmly against unlawful sexual intercourse taking place but felt, nevertheless that he had to prescribe the contraceptives because, whether or not he did so, intercourse would in fact take place, and the provision of contraceptives would, in his view, be in the best interests of the girl in protecting her from an unwanted pregnancy and the

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A risk of a sexually transmitted disease. It is as to whether or not in such a situation the doctor is to be treated as being an accessory, that I have found the greatest difficulty in applying the law.

B Mr. Wright submits, and I accept that he is right in this submission, that it is necessary to distinguish between motive and intent. Even if your motives are unimpeachable, if you in fact assist in the commission of an offence, Mr. Wright submits you are an accessory. He relies on the judgment of Devlin J. in *National Coal Board v. Gamble* [1959] 1 Q.B. 11. In that case, Devlin J. said, at p. 20:

C “A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. . . . Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.”

D Devlin J.’s judgment in that case was considered by Lord Simon of Glaisdale in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, 698–699:

E “As regards the actus reus, ‘aiding’ and ‘abetting’ are, as *Smith and Hogan* notes (p. 93), synonymous. But the phrase is not a pleonasm; because ‘abet’ clearly imports mens rea, which ‘aid’ might not. As Devlin J. said in *National Coal Board v. Gamble* . . .”—and he quotes the passage I have just quoted—“The actus reus is the supplying of an instrument for a crime or anything essential for its commission. On Devlin J.’s analysis the mens rea does not go beyond this. The act of supply must be voluntary (in the sense I tried to define earlier in this speech), and it must be foreseen that the instrument or other object or service supplied will probably (or possibly and desiredly) be used for the commission of a crime. The definition of the crime does not in itself suggest any ulterior intent; and whether anything further in the way of mens rea was required was precisely the point at issue in *Gamble’s* case. Slade J. thought the very concept of aiding and abetting imported the concept of motive. But Lord Goddard C.J. and Devlin J. disagreed with this. So do I. Slade J. thought that abetting involved assistance or encouragement, and that both implied motive. So far as assistance is concerned, this is clearly not so. One may lend assistance without any motive, or even with the motive of bringing about a result directly contrary to that in fact assisted by one’s effort.”

H However in applying those statements of the law, three matters have to be borne in mind. First of all, contraceptives do not in themselves directly assist in the commission of the crime of unlawful sexual intercourse. The analogy of providing the motor car for a burglary or providing poison to the murderer, relied on in argument, are not true comparisons. While if the man wears a sheath, there may be said to be a physical difference as to the quality of intercourse, the distinction that I am seeking to draw is clearer where the woman takes the pill or is fitted with an internal device, when the unlawful act will not be affected in any way. The only effect of the provision of the means of contraception is that in some cases it is likely to increase the likelihood of a crime being committed

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by reducing the inhibitions of the persons concerned to having sexual intercourse because of their fear of conception or the contraction of disease. I therefore see a distinction between the assistance or aiding referred to by Lord Simon of Glaisdale and Devlin J. and the act of the doctor in prescribing contraceptives. I would regard the pill prescribed to the woman as not so much "the instrument for a crime or anything essential to its commission" but a palliative against the consequences of the crime.

The second factor that has to be borne in mind is that the girl herself commits no offence under section 6 since the section is designed to protect her from herself: see *Reg. v. Tyrrell* [1894] 1 Q.B. 710. This creates problems with regard to relying upon any encouragement by the doctor as making him the accessory to the offence where the girl alone attends the clinic. The well-known case, *Reg. v. Bourne* (1952) 36 Cr.App.R. 125, has to be distinguished because there, the woman can be said to have committed the offence although she was not criminally responsible because of duress. The doctor, if he is to be an accessory where the woman alone consults him, will only be an accessory if it can be shown that he acted through the innocent agency of the woman, the situation dealt with in *Rex v. Cooper* (1833) 5 C. & P. 535.

The final point that has to be borne in mind, is that there will be situations where long-term contraceptive measures are taken to protect girls who, sadly, will strike up promiscuous relationships whatever the supervision of those who are responsible for their well-being, the sort of situation that Butler-Sloss J. had to deal with in *In re P. (A Minor)* (1981) 80 L.G.R. 301. In such a situation the doctor will prescribe the measures to be taken purely as a safeguard against the risk that at some time in the future, the girl will form a casual relationship with a man when sexual intercourse will take place. In order to be an accessory, you normally have to know the material circumstances. In such a situation the doctor would know no more than that there was a risk of sexual intercourse taking place at an unidentified place with an unidentified man on an unidentified date—hardly the state of knowledge which is normally associated with an accessory before the fact.

Under this limb of the argument, the conclusion which I have therefore come to is, that while a doctor could, in following the guidance, so encourage unlawful sexual intercourse as to render this conduct criminal, in the majority of situations the probabilities are that a doctor will be able to follow the advice without rendering himself liable to criminal proceedings. Before leaving this limb of the argument, I should make it absolutely clear that the absence of consent of the parents makes no difference to the criminal responsibility of the doctor. If his conduct would be criminal without the parents' consent, it would be equally criminal with their consent.

Is the giving of advice or the prescribing of contraceptives without parental consent unlawful?

Turning to the second limb of the argument, this only arises in what is described in the revised section G as "exceptional cases" which are left to the clinical judgment of a doctor. Unlike the first limb of the argument, this argument cannot apply when, in what is assumed in the guidance to be the usual situation, the advice about contraception will take place with parental consent, so there can be no interference with the "rights" of the parents.

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A For advice to be given and contraceptives prescribed without their consent, Mr. Wright submitted, would be inconsistent with the fundamental rights of the parents. However he cited no authority to establish such "rights" and the interest of parents, I consider, are more accurately described as responsibilities or duties. The interference in the exceptional case with "parental rights" could only make the doctor's acts unlawful if his conduct also amounts to a trespass. This limb can only therefore apply where the doctor does some physical act to the child without there being a consent which would amount to a defence for the purpose of the law of trespass.

B It is most surprising that there is no previous authority of the courts in this country as to whether a child under 16 can consent to medical treatment. So far as minors over the age of 16 are concerned, the Family Law Reform Act 1969 provides by section 8(1):

C "The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; . . ."

However, section 8(3) provides:

D "Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

E The Act of 1969 was passed in consequence of a Report of the Committee on the Age of Majority, 1967 (Cmnd. 3342). Paragraph 479 of the report reads:

"increasingly at the present time it is becoming customary to accept the consent of minors aged 16 and over. There is no rigid rule of English law which renders a minor incapable of giving his consent to an operation but there seems to be no direct judicial authority establishing that the consent of such a person is valid."

F In the absence of binding authority, the position seems to me to be as follows: the fact that a child is under the age of 16, does not mean automatically that she cannot give consent to any treatment. Whether or not a child is capable of giving the necessary consent will depend upon the child's maturity and understanding and the nature of the consent which is required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent if given can be properly and fairly described as a true consent. If the child is not capable of giving consent, then her parents can do so on the child's behalf. If what is involved is some treatment of a minor nature, and the child is of normal intelligence and approaching 16, it will be easier to show that the child is capable of giving the necessary consent; otherwise if the implications of the treatment are long-term.

G Taking an extreme case, I would have thought it is unlikely that a child under the age of 16 will ever be regarded by the courts as being capable of giving consent to sterilisation.

H In so propounding the approach, I respectfully adopt the judgment of Addy J. of the Ontario High Court in *Johnston v. Wellesley Hospital* (1970) 17 D.L.R. (3d) 139. I would quote from his judgment, at p. 143, and would particularly rely on the passage quoted from *Nathan, Medical Negligence* (1957):

“The next question which requires consideration is whether a consent was required from the parents or guardian of the plaintiff previous to the medical procedure being undertaken by the doctor, or, more specifically, whether the plaintiff, being an infant, was capable at law of giving his consent to the treatment, for, if he was capable at law of giving his consent and did in fact give it, there would, of course, be no necessity of obtaining any parental consent. The question of consent, of course, is very relevant to the case because, if there was no legal consent, the treatment administered by the doctor would constitute an actionable assault, the question of negligence would not enter into consideration, and liability, in so far as the doctor at least is concerned, would flow automatically in the circumstances of the present case. There is, of course, no question here of this being an emergency treatment of the kind which would justify a doctor acting without consent in order to preserve life or to prevent a serious impairment of the patient’s health. Treatment could easily have been postponed to obtain parental consent, if required. Also, parental consent could easily have been obtained between the time of the original visit and interview and that of the actual treatment.

“There is no doubt that the plaintiff in fact consented to receiving treatment by the carbon dioxide slush method for, as stated previously, he specifically requested it, although, as pointed out later, the actual technique used by Dr. Williams was somewhat different from the technique previously used.

“Although the common law imposes very strict limitations on the capacity of persons under 21 years of age to hold, or rather to divest themselves of, property or to enter into contracts concerning matters other than necessities, it would be ridiculous in this day and age, where the voting age is being reduced generally to 18 years, to state that a person of 20 years of age, who is obviously intelligent and as fully capable of understanding the possible consequences of a medical or surgical procedure as an adult, would, at law, be incapable of consenting thereto. But, regardless of modern trend, I can find nothing in any of the old reported cases, except where infants of tender age or young children were involved, where the courts have found that a person under 21 years of age was legally incapable of consenting to medical treatment. If a person under 21 years were unable to consent to medical treatment, he would also be incapable of consenting to other types of bodily interference. A proposition purporting to establish that any bodily interference acquiesced in by a youth of 20 years would nevertheless constitute an assault would be absurd. If such were the case, sexual intercourse with a girl under 21 years would constitute rape. Until the minimum age of consent to sexual acts was fixed at 14 years by a statute, the courts often held that infants were capable of consenting at a considerably earlier age than 14 years.

“I feel that the law on this point is well expressed in the volume on *Medical Negligence* (1957), by Lord Nathan, page 176: ‘It is suggested that the most satisfactory solution of the problem is to rule that an infant who is capable of appreciating fully the nature and consequences of a particular operation or of particular treatment can give an effective consent thereto, and in such cases the consent of the guardian is unnecessary; but that where the infant is without that

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A capacity, any apparent consent by him or her will be a nullity, the sole right to consent being vested in the guardian.”

B Mr. Wright submitted that the explanation for the absence of authority is that at least in Victorian times it would never have been suggested that anything but parental consent would suffice for a child under 16. I do not know whether he is justified in making this submission, though I recognise that he could be. However, even assuming that he is right, it does not mean that I am required to ignore the change in attitudes since the Victorian era. I would respectfully rely for support on the vivid language of Lord Denning M.R. in *Hewer v. Bryant* [1970] 1 Q.B. 357, where he said, at p. 369F: “The common law can, and should, keep pace with the times.” (I would add “where there is no authority to the contrary.”)

C The quality of the consent of the child will therefore be critical where the parents have not consented, and the conduct of the doctor would otherwise be trespass. This will not apply to the majority of methods of contraception. However, whether it does so or not, it should not be thought, as a result of anything I have said, that I disagree with the clear advice given in the revised circular that in every case it “would be most unusual to provide advice about or methods of contraception without parental consent.” However, having regard to that advice, I find that there is nothing unlawful in the department recognising that in the exceptional case there remains a discretion for the clinical judgment of a doctor as to whether or not to prescribe contraception.

E This means, that as the law stands at present, the plaintiff is not entitled to either of the declarations which she seeks. I appreciate that my decision will not only be extremely disturbing to the plaintiff, but to many others who are naturally very concerned about the provision of contraceptive advice and treatment to those under 16. However, to put my decision in context, I would stress the following points. First, if the department’s guidance is followed, it should only be in the exceptional cases that parents are not consulted. In the normal case of concerned parents, such as the plaintiff, if the department’s guidance is followed, they will be consulted. Secondly, as is indicated in this case, some area health authorities are prepared to register with the local clinics the view of parents. Thirdly, even in the exceptional cases, the doctor, according to the guidance, has to exercise his residual discretion. In many matters concerning our health, we have to rely on doctors to act responsibly and, in this area, it is to be expected that the doctors will exercise their responsibility—which is a heavy one—in a proper manner. In this regard, the plaintiff has in this case obtained confirmation, if confirmation was necessary, that doctors can be guilty of a criminal offence if they intentionally encourage unlawful sexual intercourse, and doctors will no doubt bear this in mind in exercising their responsibility. Finally, if contrary to my conclusions, the plaintiff had been right in what I regard as being her principal argument, the result would not have been to substitute in those exceptional cases the discretion of the parents for that of the doctor, but to prevent children under 16 being lawfully provided with contraceptives in any circumstances.

H The statistics to which I have referred, even in 1972, of pregnancies among the very young, indicate to those whose religious beliefs do not dictate the contrary, that some of those children, at any rate, were very much in need of assistance in avoiding such pregnancies. The need must be even greater today and, at least as a result of my conclusions, the help

[1983]

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No order for costs.

B

[Reported by ISOBEL COLLINS, Barrister-at-Law]

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A

[QUEEN'S BENCH DIVISION]

REGINA v. EPSOM JUSTICES, *Ex parte* GIBBONS1983 June 24;
July 27

Watkins L.J. and Taylor J.

B

Justices—Jurisdiction—Joint trials—Information laid against defendant—Defendant subsequently laying information against prosecutor—Informations involving same incident—Whether discretion in justices to try informations together

C

An information was laid by a police constable against the applicant alleging an assault contrary to section 51 of the Police Act 1964. Ten days later the applicant laid an information against the constable alleging common assault in respect of the same incident. The applicant applied to the justices for the informations to be heard together on the ground that they involved substantially similar facts. The justices accepted the constable's submission that, having refused his consent to a joint trial, he had an absolute right to have the charge against him dealt with separately. They accordingly ordered that the informations be heard separately, and that the earlier of the two informations be heard first.

D

On an application for judicial review by way, *inter alia*, of an order of certiorari to quash the justices' decision:—

E

Held, dismissing the application, that where an informant had an information laid against him so that he was both a prosecutor and a defendant, justices were obliged to try the informations separately, even though they were founded on the same incident and even if the respective defendants had given their consent to a joint trial; and that, accordingly, the justices had reached the right conclusion in the circumstances although the reasons for their decision were inappropriate (*post*, p. 877B–D).

In re Clayton [1983] 2 W.L.R. 555, H.L.(E.) distinguished.

F

The following cases are referred to in the judgment of Watkins L.J.:

Aldus v. Watson [1973] Q.B. 902; [1973] 2 W.L.R. 1007; [1973] 2 All E.R. 1018, D.C.

Brangwynne v. Evans [1962] 1 W.L.R. 267; [1962] 1 All E.R. 446, D.C.

Clayton, In re [1983] 2 W.L.R. 555; [1983] 1 All E.R. 984, H.L.(E.).

G

No additional cases were cited in argument.

APPLICATION for judicial review

H

By a notice dated June 6, 1983, the applicant, Susan Patricia Gibbons, applied for leave to apply for judicial review by way of (a) an order of certiorari to quash a decision of the Epsom justices, dated April 7, 1983, regarding the dates of trial of an information laid by Police Constable Douglas Corrie against the applicant on March 13, 1983, alleging an offence under section 51 of the Police Act 1964, and an information laid by the applicant against the constable on March 23, 1983, alleging an assault under section 42 of the Offences against the Person Act 1861, as amended; (b) an order of prohibition to prevent the justices from proceeding with the trial of the first information against the applicant; and (c) an order of mandamus requiring the justices to hear and determine, according to law, an application by the applicant that the information laid

against her should be heard together with the information laid against the constable.

The relief was sought on the grounds that the justices had refused an application duly made to them by the applicant on April 7, 1983, that the informations should be tried together; that the justices wrongly concluded that they were bound by the decision of the Divisional Court in *Aldus v. Watson* [1973] Q.B. 902; and that having regard to the fact that the defendant to the charge arising out of the first information was the prosecutor of the charge arising out of the second information, the defendant to which was the prosecutor of the charge arising out of the first information and that both informations related to the same facts; and that both charges were of a similar nature, the justices were wrong to allow the constable a separate trial and to order that the charge arising out of the first information be tried before the charge arising out of the second information laid by the applicant.

On June 7, McNeill J. gave the applicant leave to apply for judicial review and directed that all proceedings before the justices be stayed until the hearing of the application or further order. On the same day the applicant gave notice that pursuant to that leave, the Divisional Court would be moved for an order for relief in the terms and on the grounds set out in the notice of application of June 6.

Alexander Cranbrook for the applicant.
Simon Pratt for the constable.

Cur. adv. vult.

July 27. WATKINS L.J. read the following judgment. This is an application by Susan Patricia Gibbons made, pursuant to leave granted on June 7, 1983, for judicial review of a decision of the Epsom justices, on April 7, 1983. The justices had before them, on that day, two summonses arising out of informations laid. The first of them, on March 13, 1983, was by Police Constable Douglas Corrie of the Metropolitan Police, against the applicant alleging that she had, on March 13, 1983, at Long Grove Hospital, Horton Lane, Epsom, assaulted him in the execution of his duty, contrary to section 51(1) of the Police Act 1964. The second, laid by the applicant on March 23, 1983, against the constable, alleged that, on the same day and place already mentioned, he did assault and beat her, contrary to section 42 of the Offences against the Person Act 1861.

It was submitted to the justices, by counsel for the prosecution, that the informations should be tried separately. The constable, he said, relying on *Aldus v. Watson* [1973] Q.B. 902, had an absolute right to a separate trial and, seeing that his information was laid earlier than the applicant's, the charge against her should be heard first. Mr. Dirks, the applicant's solicitor, contended that, since the two informations were founded on the same incident and much of the evidence in respect of them was identical, separate trials would serve no good purpose. It would merely produce a waste of time and what was more important, he said, it would prejudice the applicant and deny her natural justice.

The justices, having considered these submissions, decided that the informations should be heard separately, that of the constable first. They adjourned the hearing of the charge against the applicant until June 10, 1983, and that against the constable to a date to be fixed thereafter.

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Reg. v. Epsom Justices, Ex p. Gibbons (D.C.)

Watkins L.J.

A

The applicant asks this court (1) to quash the decision of the justices; (2) to order that they do not hear the charge against the applicant on June 10; and (3) to direct them to hear afresh, according to the proper law, the application that the informations be heard together.

B

The grounds upon which this relief is sought are that the justices were wrong to regard themselves as being bound by the decision in *Aldus v. Watson* [1973] Q.B. 902; wrong to order separate trials, seeing that the informations arose out of the same incident and involved the same facts; and failed to have regard to matters explained in *In re Clayton* [1983] 2 W.L.R. 555. It must be said at this point, I think, that the justices were not referred to that case. Thus it is, of course, impossible to criticise the justices for not taking account of it. What effect it has, if any, upon this court is an altogether different matter.

C

That the justices were guided by *Aldus v. Watson* [1973] Q.B. 902 in reaching their decision is confirmed by the contents of a letter written by their clerk to the Crown Office of which the following is an extract:

D

E

“As explained when speaking to you on the telephone yesterday afternoon, I am satisfied that the justices concerned with this proceeding would not wish to quarrel with the facts as broadly set out in the applicant’s affidavit supporting her application for leave to apply for judicial review, as their decision was clearly based on the authority contained in the case of *Aldus v. Watson* to which they had been referred. The recent decision of the House of Lords in *Clayton v. Chief Constable of Norfolk* [1983] 1 All E.R. 984, published on April 8, last and which seemingly the applicant relies upon, was not brought to the justices’ notice and therefore was not considered by them in their deliberations. It would therefore seem necessary, in the circumstances of this particular case, for an affidavit to be filed on behalf of the justices. I would, of course, be pleased to hear from you should you consider otherwise.”

F

The justices have not been called upon to provide an affidavit by this court which feels able, upon the available information, to deal fully with the issues involved here.

G

The question posed to this court in *Aldus v. Watson* [1973] Q.B. 902 was, having regard to the fact that each of four defendants was charged separately with an identical offence arising out of the same set of facts and that it was the joint action of the defendants which caused the offences, were the justices right to refuse them separate trials? This court’s answer to that was, applying *Brangwynne v. Evans* [1962] 1 W.L.R. 267, that where separate informations are preferred against two or more defendants a magistrates’ court has no power to try the informations together without the defendants’ consent, even though each defendant is charged with an identical offence arising out of the same set of facts. In *Brangwynne’s* case [1962] 1 All E.R. 446, it was held:

H

“It has always been a principle of law that a defendant in a magistrates’ court can only be called on to answer one charge at a time unless he consents, either expressly or impliedly, to informations being heard together; accordingly, a magistrates’ court should never proceed to hear two or more informations at the same time without expressly asking the defendant whether he consents to that course.”

The absence of consent in the present case by the constable, the prosecutor, to a joint hearing of the two informations in the light of these

Watkins L.J.

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authorities, obviously induced the decision of the justices complained of. They regarded the absence of consent as depriving them entirely of a discretion to decide the procedural point in issue, according to notions of what would have been a just and reasonable manner of proceeding.

However, the House of Lords in *In re Clayton* [1983] 2 W.L.R. 555, in reviewing *Brangwynne v. Evans* [1962] 1 W.L.R. 267, *Aldus v. Watson* [1973] Q.B. 902 and a number of other cases bearing upon practice and procedure in magistrates' courts, ruled that lack of consent by a defendant or a number of defendants, although an important consideration, does not deprive justices of a discretion to proceed in their court in a manner which, in the circumstances appears to them to be just.

In the only speech, Lord Roskill, at pp. 564-565, stated in clear terms how this discretion should be exercised. Justices would, in my view, be well advised to follow carefully the guidance there provided. I do not enlarge this judgment by quoting the relevant passages, solely and simply because the circumstances to which that decision can be applied differ from those which obtain in the present case. In *In re Clayton* [1983] 2 W.L.R. 555, and in all those cases reviewed in it, the facts involved either the trial of one defendant upon more than one information, or the trial of more than one defendant upon separate informations. Here, what is contemplated is the trial of two informations together upon one of which the prosecutor is the constable and upon the other that same constable is the defendant. Therefore, Mr. Pratt, who has appeared before us, instructed by the Solicitor of the Metropolitan Police, argues that the present case is vitally distinguishable from *Clayton's* case.

There are many reasons, he has submitted, why it would be wholly impractical for informations such as are usually referred to as summons and cross-summons to be heard together even if the prosecution and defence agreed to such a course being taken. The following seem to be the most impressive of these reasons; some of which were easily foreseeable, I think, before argument upon them was developed.

It is a basic right of every defendant to decline to cross-examine prosecution witnesses, to make a submission of no case to answer at the close of the prosecution, to decline to give evidence and to make any kind of address to the court. When that person is both defendant and prosecutor in the same proceeding, how is he to decide in advance how he would conduct himself in these respects when he may, according to the procedure decided upon, either have to prosecute or defend at short notice? Problems may well arise about the order in which witnesses will be called on one side or the other. Who really will have the right to go first and who to make the final address? Suppose one or other of the persons involved has previous convictions, how is the question to be resolved as to whether to allow those to be referred to, if such an issue properly arises? The calling of the wife of one of these persons could give rise to difficulties.

Justices should not, it is said, be subjected to a proceeding which could give rise to these and many other complications of evidence and procedure which might well defy the ability of the most experienced of judges to resolve.

Furthermore, we are invited to have regard to the sinister purpose with which some cross-summons are served and which would probably encourage an exacerbation of the tendency to use the cross-summons merely as an unjustifiable weapon of defence if a joint hearing of summons and cross-summons is permitted.

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A Mr. Cranbrook endeavoured valiantly to minimise the force of these arguments by contending that the present and *Clayton's* case are not distinguishable. Justices, he said, should be masters of their procedure, subject only to a proper and just exercise of their discretion. Accordingly, the justices should be called upon to exercise their discretion in accordance with the guidance provided in *Clayton's* case.

B I do not agree with him. No argument was addressed to the House of Lords upon the matter of joint trial of summons and cross-summons and I see no reason, therefore, to suppose that they could have had that in their contemplation when reaching their conclusions upon very different circumstances.

C The kind of trial which concerns us cannot, I think, be sensibly compared for procedural purposes with any of the kinds of trials referred to in *Clayton's* case. It produces unique considerations and I believe that these must lead to the conclusion, accepting as I do Mr. Pratt's submissions, that summons and cross-summons can in no circumstances be tried together. There is no authority to the contrary and I am persuaded that justices do not have the power to permit a proceeding of that kind to take place no matter who condescends to consent to do it.

D Accordingly, although they did so for a reason which I think was inappropriate, I am of the view that the justices reached the right decision and should, as they intend, hold separate trials.

I would dismiss this application.

TAYLOR J. I agree.

Application dismissed.

Legal aid taxation of applicant's costs.

Solicitors: *Spencer Gibson & Co., Sutton*; Solicitor for the Metropolitan Police.

[Reported by ISOBEL COLLINS, Barrister-at-Law]

[CHANCERY DIVISION]

In re PEACHDART LTD.

[No. 003812 of 1982]

1983 March 9, 10, 11

Vinelott J.

Sale of Goods—Retention of title—Rights of resale and tracing—Conditions of sale reserving title to goods until payment in full—Goods subject to manufacturing process—No obligation to keep unpaid goods separate—Buyers in receivership—Whether seller having exclusive title to products manufactured from such goods—Whether agreement creating registrable charge over manufactured product—Companies Act 1948 (11 & 12 Geo. 6, c.38), s.95

The seller supplied leather to the buyer, a company which manufactured handbags. The conditions of sale contained title retention clauses which provided that, until payment was received in full the seller retained ownership of the leather including the right of resale if payment was overdue, and had the right to trace any proceeds of sale by the buyer including any goods made with the leather, by the creation of a fiduciary relationship between buyer and seller. In August 1981, the company's bankers appointed a receiver under a debenture granted to them by the company in January 1980, duly registered under section 95 of the Companies Act 1948, under which all the company's book debts were made subject to a fixed charge and stock to a floating charge.

By an originating summons the receiver sought directions for the determination of whether the title retention clauses gave a priority interest or charge to the seller over the debenture holder, preferential creditors and unsecured creditors in respect of the proceeds of sale of, inter alia, the completed and uncompleted handbags sold since the receiver's appointment and the handbags sold before his appointment but for which no payment had been received:—

Held, that the true construction of the conditions of sale contemplated an intention by the parties, once the leather had been appropriated into the handbag making process, for the seller, whether as bailor or unpaid vendor, to cease to have exclusive title to the leather and instead to have a charge over the completed and uncompleted handbags including any proceeds of sale; that, since the charge had not been registered pursuant to section 95 of the Companies Act 1948, it was void and, accordingly, the seller had no priority over the debenture holder and other creditors in respect of the proceeds of sale (post, pp. 885C-E, G—886D).

Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd. [1976] 1 W.L.R. 676, C.A. and *Borden (U.K.) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch. 251, C.A. considered.

The following cases are referred to in the judgment:

Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd. [1976] 1 W.L.R. 676; [1976] 2 All E.R. 552, Mocatta J. and C.A.

Bond Worth Ltd., In re [1980] Ch. 228; [1979] 3 W.L.R. 629; [1979] 3 All E.R. 919.

Borden (U.K.) v. Scottish Timber Products Ltd. [1979] 2 Lloyd's Rep. 168; [1981] Ch. 25; [1979] 3 W.L.R. 672; [1979] 3 All E.R. 961; [1980] 1 Lloyd's Rep. 160, C.A.

Hallett's Estate, In re (1880) 13 Ch.D. 696.

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The following additional cases were cited in argument:

*Bevington and Morris v. Dale & Co. Ltd.*¹ (1902) 7 Com.Cas. 112.

Holroyd v. Marshall (1862) 10 H.L.Cas. 191;

Wait, In re [1927] 1 Ch. 606.

ORIGINATING SUMMONS

By an originating summons dated August 6, 1982, Nicholas Lyle, the receiver and manager of Peachdart Ltd. (the company) applied to the court to determine, inter alia, whether the sellers, Freudenberg Leather Co. Ltd., by virtue of their conditions of sale under clause 11 had on the appointment of the receiver an interest or charge on (i) unused leather supplied by Freudenberg to the company at the company's premises at the date of the appointment of the receiver (ii) handbags manufactured by the company at its premises and unsold at the date of the appointment of the receiver, incorporating leather supplied by Freudenberg (iii) uncollected invoices payable to the company in respect of handbags manufactured by the company incorporating leather supplied by Freudenberg; whether any such charge or interest was valid and enforceable and/or had priority against or over the bank, as debenture holder, having been registered against the company under the provisions of section 95 of the Companies Act 1948 and whether the receiver was accountable for the unused leather, handbags and uncollected invoices.

The facts are stated in the judgment.

Simon Mortimore for the receiver.

Jeffrey Littman for the company.

VINELOTT J. This is an application by the receiver of a company, Peachdart Ltd. ("the company") which formerly carried on the business of manufacturing handbags. The question is whether the respondent, Freudenberg Leather Co. Ltd. ("Freudenburgs") who supplied leather for the manufacture of the handbags is entitled under a retention of title clause in the conditions of sale governing the supply of the leather to claim, in priority to the holder of the debenture under which the receiver was appointed and to preferential creditors, first the proceeds of sale of a stock of unused leather in the possession of the company when the receiver was appointed; secondly the proceeds of sale of handbags, some completely and some partly manufactured when the receiver was appointed and since sold by him; and thirdly the proceeds of sale of handbags which had been sold by the company before the receiver was appointed but for which the company had not been paid when he was appointed.

The facts which give rise to these questions are shortly as follows. On January 21, 1980, the company (which until December 1981 when the right to use its original name was sold was called S. Launer & Co. (London) Ltd.) granted a debenture to Barclays Bank Ltd. to secure all moneys for the time being owed by the company to the bank. The debenture was in the bank's standard form. By clause 3 of the debenture the company charged by way of first fixed charge all freehold and leasehold property to become vested in the company, together with all buildings, fixtures, fixed plant and machinery from time to time thereon and its goodwill and uncalled capital, and also by way of first fixed charge all book debts and other debts then or from time to time becoming due to

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the company, and by way of floating charge all other undertaking and assets of the company:

"but so that the company is not to be at liberty to create any mortgage or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the premises either in priority to or *pari passu* with the charge hereby created."

The debenture contained a usual provision for the appointment of a receiver. The charge created by the debenture was duly registered pursuant to section 95 of the Companies Act 1948 on February 11, 1980. The receiver was appointed on August 10, 1981. He duly took possession of the assets of the company, which comprised trade debts owed to the company under contracts for the supply of handbags which had been delivered amounting to £27,317, leather and leather goods (the manufactured or partly manufactured handbags) valued in the statement of affairs at £7,500, plant, machinery, furniture and fittings valued at £8,500, and a motor car valued at £1,200. The debt due to the bank amounted to over £64,000. Debts owed to preferential creditors amounted to nearly £50,000. The company owed Freudenberg's some £16,200, and other unsecured creditors approximately £26,000. Freudenberg's claim to be entitled under the title retention clause to the moneys recovered by the receiver from the trade debtors (all these debts arose on the sale of handbags which had been delivered before the receiver was appointed) and to the proceeds of the sale by the receiver of the unused leather and the completed or partly completed handbags in the possession of the company when he was appointed. The receiver has in fact sold the unused stock of leather to Freudenberg's for £1,400 on terms that that sum will be reimbursed to Freudenberg's if they establish that they retained title to it under the retention of title clause, in which event Freudenberg's will, of course, have purchased their own goods. The stock of manufactured and partly manufactured handbags has been sold and realised a little under £1,500. The unused leather and the handbags and partly completed handbags were not, of course, the subject of any fixed charge in the debenture and the proceeds of sale of those items (if Freudenberg's cannot establish prior title under the title retention clause) will be payable to the preferential creditors who will rank before the bank's floating charge by virtue of section 94 of the Companies Act 1948. To save costs Mr. Mortimore, who appeared for the receiver, has in effect represented the interests of the bank, which relies upon the first fixed charge in clause 3(c) of the debenture as regards the book debts, and the preferential creditors in opposing Freudenberg's claim.

Freudenberg's supplied the company with substantially all its requirements of leather for use in the manufacture of handbags. I should observe in passing that the company manufactured only high quality leather handbags. In practice, Freudenberg's sold leather to the company as and when required on the terms of their standard general conditions of sale. It is common ground that these terms were incorporated into each contract for the supply of each parcel of leather.

The conditions of sale are printed on the reverse side of Freudenberg's standard form of invoice in microscopic print. I have fortunately been supplied with a typed copy which in normal print runs to nearly eight foolscap pages. I need only refer to a few of the conditions. Condition 1 (a) defines "seller" as Freudenberg's. "The products" as "the products to

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A which this document relates" and "buyer" as the customer buying the products. Clause 2 (a) provides that "Unless otherwise agreed all payments are due immediately on delivery without any deductions." It was not "otherwise agreed" in this case. Condition 10 (a) provides that the seller is to be entitled to interest at two per cent. over Bank of England minimum lending rate on overdue payments. Part of the sums claimed by Freudenberg's represent interest. Condition 11 I should read in full:

B "(a) The risk in the products shall pass to the buyer. (i) When the seller delivers the products in accordance with the terms to the buyer or its agent or other person to whom the seller has been authorised by the buyer to deliver the products or (ii) if the products are appropriated to the buyer but kept at the seller's premises at the buyer's request and the seller shall have no responsibility in respect of the safety of the products thereafter and accordingly the buyer should insure the products thereafter against such risks (if any) as it thinks appropriate. (b) However the ownership of the products shall remain with the seller which reserves the right to dispose of the products until payment in full for all the products has been received by it in accordance with the terms of this contract or until such time as the buyer sells the products to its customers by way of bona fide sale at full market value. If such payment is overdue in whole or in part the seller may (without prejudice to any of its other rights) recover or resell the products or any of them and may enter upon the buyer's premises by its servants or agents for that purpose. Such payment shall become due immediately upon the commencement of any act or proceeding in which the buyer's solvency is involved. If any of the products are incorporated in or used as material for other goods before such payment the property in the whole of such other goods shall be and remain with the seller until such payment has been made or the other goods have been sold as aforesaid and all the seller's rights hereunder in the products shall extend to those other goods. (c) Until the seller is paid in full for all the products the relationship of the buyer to the seller shall be fiduciary in respect of the products or other goods in which they are incorporated or used and if the same are sold by the buyer the seller shall have the right to trace the proceeds thereof according to the principles in *In re Hallett's Estate* [(1880) 13 Ch.D. 696]. A like right for the seller shall apply where the buyer uses the products in any way so as to be entitled to payment from a third party."

G The effect of similar title retention clauses has been considered in a group of recent cases. They are in chronological order the decisions of Mocatta J. and of the Court of Appeal in *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676 (the *Romalpa* case); the decision of Judge Rubin sitting as a High Court judge, in *Borden (U.K.) Ltd. v. Scottish Timber Products Ltd.* [1979] 2 Lloyd's Rep. 168; the decision of Slade J. in *In re Bond Worth Ltd.* [1980] Ch. 228 and the decision of the Court of Appeal in the *Borden* case [1981] Ch. 25.

H None of the title retention clauses considered in those cases is in precisely the same terms as the title retention clause in clause 11 of Freudenberg's general conditions of sale. The nearest is the clause considered by Mocatta J. and the Court of Appeal in the *Romalpa* case [1976] 1 W.L.R. 676. But there is this vital difference. In *Romalpa* the

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question was whether the vendor could recover from the receiver first aluminium foil supplied by it which had not been used by Romalpa in any process of manufacture and which under the terms on which it was supplied had to be stored in such a way that it was clearly the property of the vendor, and secondly the proceeds of sale of aluminium foil which similarly had not been used in any process of manufacture and which had been sold by Romalpa before the receiver was appointed. The receiver had received and paid the proceeds of sale into a separate account with Romalpa's bankers and the vendors claimed to be entitled to the moneys in the account which were less than the unpaid balance of the price of aluminium supplied. There was a preliminary issue whether the title retention clause had been incorporated into the contract for the supply of the aluminium foil in question. It was conceded on behalf of the receiver that if, as was held by Mocatta J. and the Court of Appeal, the retention of title clause was so incorporated then Romalpa became and remained a bailee of any aluminium foil delivered to it, pending payment in full of all moneys due by Romalpa under contracts for the supply of aluminium foil, and that the vendor was accordingly entitled to recover the unused aluminium foil in the possession of the receiver. It was held in the Court of Appeal that Romalpa had an implied power to sell as agent for the vendor unused aluminium foil which remained the property of the vendor. It followed that Romalpa, and after his appointment the receiver, were accountable for the proceeds of sale. Roskill L.J. said, at p. 690:

"I see no difficulty in the contractual concept that, as between the defendants and their sub-purchasers, the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs' goods which they were selling as agents for the plaintiffs to whom they remained fully accountable. If an agent lawfully sells his principal's goods, he stands in a fiduciary relationship to his principal and remains accountable to his principal for those goods and their proceeds. A bailee is in like position in relation to his bailor's goods. What, then, is there here to relieve the defendants from their obligation to account to the plaintiffs for those goods of the plaintiffs which they lawfully sell to sub-purchasers? The fact that they so sold them as principals does not, as I think, affect their relationship with the plaintiffs; nor (as at present advised) do I think—contrary to Mr. Price's argument—that the sub-purchasers could on this analysis have sued the plaintiffs upon the sub-contracts as undisclosed principals for, say, breach of warranty of quality."

It was argued before Mocatta J. that if the vendor succeeded in its tracing claim it would, in effect, have found a way of avoiding section 95 of the Companies Act 1948. Mocatta J. held that section 95(1) had no application on the ground that if the property in the aluminium foil never passed to Romalpa the proceeds of the sub-sales belonged in equity to the vendor and were not the subject of any charge. On that analysis the vendor remained the legal owner of the goods supplied until payment for these goods and any goods supplied in like terms; the title would pass only on payment of any outstanding balance and the purchaser's right to claim the property in the goods would be a contractual right under the contract of sale and not an equity of redemption. No reference was made to section 95 in the Court of Appeal.

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A In *Romalpa* the second part of the title retention clause (dealing with the title to mixed or manufactured goods and the sale of them in the ordinary course of business) was relied on to support the implication of a power for Romalpa to sell the unused aluminium foil as agent for the vendor. But the question whether the vendor could claim to be entitled to or to a charge on mixed or manufactured goods was not in issue. That was the question in issue in *Borden (U.K.) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch. 25. But in that case the title retention clause provided only that the property in goods supplied by the vendors (resin for use in making chipboard) under any given contract of sale for the supply of resin would pass only on payment in full for all resin supplied under that or any other contract for the supply of resin. The claim by the vendor was a bold claim to trace resin which under the title retention clause remained the property of the vendor up to the time when it was used in the manufacture of chipboard into the chipboard and the proceeds of sale of the chipboard. The purchaser was clearly entitled to use the resin in the manufacture of chipboard and to do so notwithstanding that moneys were still due to the vendor of the resin and that the property in the resin accordingly remained with the vendor. When used the resin ceased to exist as a separate or separable constituent of the chipboard. D The Court of Appeal accordingly had little difficulty in holding that when the resin became an inseparable ingredient of the chipboard the vendor no longer had any property in it and that the title retention clause did not preclude the purchaser from selling the chipboard, receiving the purchase price and employing the proceeds of sale in its business. Templeman L.J. said, at p. 44, that the property in the resin

E “could be retained by the plaintiffs, and was retained only as security for the payment of the purchase price and other debts incurred, and to be incurred, by the defendants to the plaintiffs in respect of supplies of resin . . . When the resin was incorporated in the chipboard, the resin ceased to exist, the plaintiffs’ title to the resin became meaningless and their security vanished. There was no provision in the contract for the defendants to provide substituted or additional security. The chipboard belonged to the defendants.” F

Bridge L.J. rejected the argument which had succeeded in the court below that the purchaser was a bailee of the resin. He said, at p. 35, that in circumstances where

G “it was never intended that the resin should be recovered, either in its original or in its altered form or at all, it seems to me quite impossible to say that this was a contract of bailment. The contract was essentially one of sale and purchase, subject only to the reservation of title clause, whatever its effect may have been.”

H That conclusion seems to me implicit also in the passage from the judgment of Templeman L.J. which I have read. Buckley L.J. left open the question whether while the resin remained in the possession of the purchaser in the state in which it was supplied the purchaser was a bailee of it. He said, at p. 46:

“Common ownership of the chipboard at law is not asserted by the defendants; so the plaintiffs must either have the entire ownership of the chipboard, which is not suggested, or they must have some equitable interest in the chipboard or an equitable charge of some kind upon the chipboard. For my part I find it quite impossible to

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spell out of this condition any provision properly to be implied to that effect. It was impossible for the plaintiffs to reserve any property in the manufactured chipboard, because they never had any property in it; the property in that product originates in the defendants when the chipboard is manufactured. Any interest which the plaintiffs might have had in the chipboard must have arisen either by transfer of ownership or by some constructive trust or equitable charge, and, as I say, I find it impossible to spell out of this condition anything of that nature.”

A

B

In the instant case Mr. Mortimore concedes that the property in the unused stock of leather which came into the hands of the receiver when he was appointed remained with Freudenberg's. He submits that the company was not strictly a bailee but (like the purchaser in *Borden's* case) a purchaser under an agreement to sell under the terms of which agreement the property in each parcel of leather was to pass only on payment of the price for that parcel. The company if it sold had implied authority to sell the leather or to use it in the manufacture of handbags. On a sale of the unused leather the sub-purchaser, of course, would obtain a good title under section 25(1) of the Sale of Goods Act 1979.

C

D

Mr. Littman, who appeared for Freudenberg's, submitted that the company was a bailee of each parcel of leather pending payment in full of the price of that parcel. He pointed out that the concession by counsel for Romalpa that Romalpa was a bailee of the unused aluminium foil was accepted by the Court of Appeal as properly made and submitted that there was no material difference between the first part of the title retention clause in the instant case and the first part of the title retention clause considered in the *Romalpa* case. Indeed the instant case is in one respect even stronger than that considered in the *Romalpa* case in that under clause 11(b) Freudenberg's have the right to enter the premises of the company and to take away “the products” if not fully paid for. The only other material difference is that in the instant case there is no specific provision corresponding to the provision in the *Romalpa* case requiring the purchaser to store the materials supplied in such a way that it was clearly the property of the vendor. Mr. Littman submitted that no such requirement was needed in a case where the material supplied under each contract would inevitably remain separate and easily identifiable. He informed me that in practice a person skilled in the leather trade could identify without difficulty any given skin as that sold under a particular contract, and indeed could do so even after it had been made into a handbag. However, for reasons which will later appear, I do not find it necessary to decide whether in this case the company was strictly a bailee of the unused leather.

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F

G

Turning to the partly or wholly manufactured handbags and the proceeds of sale of those sold before the receiver was appointed, Mr. Littman's submission was shortly as follows. It was said that under the terms of the bailment of each parcel of leather supplied by Freudenberg's pending payment in full of the price for that parcel the company as bailee was entitled to use the leather in the manufacture of handbags, a process which involved cutting and shaping and sewing a piece of leather and attaching to it hinges, handles, clasps and the like, in the course of which the piece of leather would remain identifiable throughout. The thread and attachments which were, it was said (and I do not think it is disputed) of comparatively minor value, then became the property of Freudenberg's as

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A accessories to the leather. Thus the company remained a bailee of the handbags throughout the process of manufacture, and when the company sold the handbag it sold it (as in *Romalpa*) as agent for Freudenberg's, and was accordingly accountable to Freudenberg's as owner for the entire proceeds of sale. Freudenberg's was not entitled to a mere charge. Mr. Littman instanced as an analogy a sportsman who having shot a rare animal takes the skin to a leather worker and instructs him to make it into

B a game bag. There the property in the skin would remain with the sportsman notwithstanding that the skin would undergo many operations and would have thread and other material added to it. He distinguished the *Borden* case on the ground that in that case the resin was inevitably consumed and destroyed as a separate substance when used in the manufacture of chipboard. The title retention clause accordingly did not

C purport to vest the property in the chipboard in the vendor, and if it had done so the vesting could only have been by way of equitable transfer of something not in existence when the resin was sold.

To my mind it is impossible to suppose that in the instant case, even assuming in Freudenberg's favour that the company became a bailee of the leather when it was first delivered to it, the parties intended that until a parcel of leather had been fully paid for the company would remain a

D bailee of each piece of leather comprised in the parcel throughout the whole process of manufacture, that Freudenberg's should have the right until the parcel had been fully paid for, to enter the company's premises and identify and take away any partly or completely manufactured handbag derived from it, and that on the sale of a completed handbag the company would be under an obligation to pay the proceeds of sale into a

E separate interest bearing account and to keep them apart from their other moneys and not employ them in the trade.

It may be that, as Mr. Littman asserts, an expert in the leather trade could identify each handbag whether partly or completely manufactured as made from a skin comprised in a particular parcel of leather. But after a handbag had been sold it would be impossible to do so. There is nothing in the conditions of sale which requires the company to keep a record of

F handbags sold so as to identify those of which it was a bailee and agent of Freudenberg's. No such records were in fact kept and there is nothing in the evidence which suggests that the parties contemplated that they would be. Indeed on the facts of this case it would be impossible for Freudenberg's now to prove that the handbags sold by the company but not paid for when the receiver was appointed were in fact made out of leather

G comprised in any of the parcels to which the unpaid invoices relied on by Freudenberg's relate. It seems to me that the parties must have intended that at least after a piece of leather had been appropriated to be manufactured into a handbag and work had started on it (when the leather would cease to have any significant value as raw material) the leather would cease to be the exclusive property of Freudenberg's (whether as bailor or as unpaid vendor) and that Freudenberg's would thereafter have

H a charge on handbags in the course of manufacture and on the distinctive products which would come into existence at the end of the process of manufacture (the value of which would be derived for the most part from Mr. Launer's reputation and skill in design and the skill in his workforce). The charge would in due course shift to the proceeds of sale. That I accept does some violence to the language of clause 11(b) in so far as that clause provides that, "The property in the whole or such other goods shall be and remain with the seller" (my emphasis). I do not think that those

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words compels the conclusion that the company was to be a mere bailee throughout the whole process of manufacture until the whole purchase price of the relevant parcel had been paid, and that on a sale before that time it would be no more than an agent for Freudenberg's. The language is, I think, consistent with the view that once the process of manufacture had started so that in the course of manufacture work and materials provided by the company would result in the leather being converted into (that is incorporated in or used as material for) other goods of a distinctive character the property in those other goods would vest in Freudenberg's only as security for any outstanding balance of the price of the relevant parcel of leather. What the draftsman has done is to elide and I think confuse two quite different relationships, that of bailor and bailee, with a superimposed contract of sale (or of vendor and purchaser) on the one hand and that of chargor and chargee on the other hand.

Mr. Littman conceded, and I think he must concede, that if Freudenberg's had no more than a charge on the partly completed and completed handbags the charge was void for non-registration. It was also void as regards the book debts against the bank, which under the debenture had a prior fixed charge (all the invoices on which Freudenberg's rely are dated after January 1980) and as regards the completed or partly completed handbags against the preferential creditors by virtue of section 94 of the Companies Act 1948.

Order accordingly.

Solicitors: *David Elton & Wineman; Gamlens for Marc Engel & Co. Northampton.*

[Reported by IAN SAXTON, Barrister-at-Law]

[CHANCERY DIVISION]

In re J. W. LAING TRUST

STEWARDS' CO. LTD. v. ATTORNEY-GENERAL

[1982 L. No. 573]

1983 Jan. 27, 28;
Feb. 25

Peter Gibson J.

Charity—Cy-près doctrine—Trust funds—Obligation to distribute capital and income of trust within 10 years of settlor's death—Whether stipulation "original purposes" of gift—Whether trustee to be discharged from obligation—Charities Act 1960 (8 & 9 Eliz. 2, c.58), s.13

In 1922 a settlor transferred 15,000 shares in his company, valued at par, to the plaintiff, company as trustee to hold on a charitable trust. Subsequently the trust was completely constituted by a memorandum under seal which stated, inter alia, that the

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A proceeds of the shares and any dividends were to be devoted to charitable purposes and the capital and income were to be wholly distributed within the settlor's lifetime or within 10 years of his death. The capital had not been distributed and because of the growth of the settlor's company into a large group of public companies, the trust investment increased substantially and by 1982 it was valued at £24 m. The income distribution policy fostered Christian evangelical causes both at home and overseas

B which had come to depend on the charity. The greater part of the distributions had been made to individuals or bodies unsuited to receive large sums of capital including the work of the Christian Brethren who did not accept any organization as a governing or controlling body but operated on an individual basis.

C The settlor had indicated before his death in 1978 that he wished to withdraw the stipulation that the capital should be distributed within 10 years of his death but the Charity Commissioners refused applications by the plaintiff for the removal of that stipulation.

On the plaintiff's application to the court by originating summons for the settlement of a scheme enabling the trustee to be discharged from the obligation to distribute capital within 10 years of the settlor's death either by an order for a *cy-près* application under section 13 of the Charities Act 1960¹ or under the inherent jurisdiction of the court in respect of charities:—

D *Held*, (1) that in section 13 of the Charities Act 1960 the "original purposes" of the gift were to be construed as the objects on which the property given was to be applied; that the stipulation as to distribution of capital was an administrative provision and not an original purpose and, accordingly, the court could not remove the stipulation under section 13 of the Act applied (post, pp. 890C–E, 891F–H, 893E–F).

E *In re Robinson* [1923] 2 Ch. 332; *In re Dominion Students' Hall Trust* [1947] Ch. 183 and *In re Lysaght, decd.* [1966] Ch. 191 considered.

(2) That the very altered circumstances of the charity made it inexpedient for the capital to be distributed and, therefore, the court, in the exercise of its inherent jurisdiction, would approve a scheme under which the trustee would be discharged from the obligation to distribute the capital within 10 years of the death of the settlor (post, p. 895D–F).

The following cases are referred to in the judgment:

Dominion Students' Hall Trust, In re [1947] Ch. 183.
Inglewood (Lord) v. Inland Revenue Commissioners [1983] 1 W.L.R. 366, C.A.

G *Lepton's Charity, In re* [1972] Ch. 276; [1971] 2 W.L.R. 659; [1971] 1 All E.R. 799.

Lysaght, decd., In re [1966] Ch. 191; [1965] 3 W.L.R. 391; [1965] 2 All E.R. 888.

Pearson v. Inland Revenue Commissioners [1980] Ch. 1; [1979] 2 W.L.R. 353; [1979] 1 All E.R. 273; [1980] Ch. 1; [1979] 3 W.L.R. 112; [1979] 3 All E.R. 7, C.A.; [1981] A.C. 753; [1980] 2 W.L.R. 872; [1980] 2 All E.R. 479, H.L.(E.).

H *Robinson, In re* [1923] 2 Ch. 332.

No additional cases were cited in argument.

ORIGINATING SUMMONS

The plaintiff, Stewards' Co. Ltd., sought by an originating summons, the settlement of a scheme by the court for the administration and

¹ Charities Act 1960, s.13: see post, p. 889B–H.

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management of the trusts of a memorandum under seal dated August 30, 1922, from the plaintiff to the settlor, John W. Laing, enabling the trustees for the time being of the trusts to be discharged from the obligation to distribute the capital subject to the trusts within 10 years of the settlor's death (a) under the inherent jurisdiction of the court in respect of charities or alternatively (b) under section 13 of the Charities Act 1960 on the footing that the direction as to distribution had ceased to provide a suitable and effective method of using the property subject to the trusts, regard being had to the spirit of the original gift by the settlor and that the property and funds subject thereto ought to be applied *cy-près*. The Charity Commissioners authorised the proceedings under section 28 of the Charities Act 1960.

The facts are stated in the judgment.

Hubert Picarda for the plaintiff.

Christopher McCall for the defendant.

Cur. adv. vult.

February 25. PETER GIBSON J. read the following judgment. I have already held that the charitable trust set up by the settlor in 1922 was completely constituted on August 30, 1922, the date of a memorandum which was under seal and addressed to the settlor, Sir John Laing (then Mr. J. W. Laing) by which the plaintiff company acknowledged receipt of 15,000 shares in John Laing & Sons Ltd. The memorandum continued:

"the proceeds of which and the dividends thereon from time to time declared and paid are to be devoted to charitable purposes, it being understood that the capital and income is to be wholly distributed within your lifetime or within ten years of your decease. The company appoints you, during your lifetime its agent in the distribution of the income it may receive on the above mentioned shares and of the proceeds of sale thereof, it being understood that such distribution shall be made for charitable purposes alone."

It is accepted by the plaintiff that the words in the memorandum relating to distribution, although introduced by the words "it being understood," should be treated as a requirement binding on the plaintiff.

The plaintiff, shortly before the death of the settlor, which occurred on January 11, 1978, and also since that date, applied to the Charity Commissioners to remove the requirement to distribute the capital before the expiration of ten years from the death of the settlor. But the commissioners declined to do so, though, very properly, they have authorised these proceedings to be brought.

The relevant paragraph of the originating summons with which I am now concerned seeks relief in this form:

"That a scheme may be settled by the judge for the administration and management of the trusts of a memorandum under seal dated August 30, 1922, from Stewards' Company Ltd., to Mr. J. W. Laing (hereafter called 'the settlor') enabling the trustees for the time being of the said trust to be discharged from the obligation to distribute the capital subject to the said trust within 10 years of the death of the settlor (a) under the inherent jurisdiction in respect of charities of Her Majesty's High Court of Justice; or, alternatively (b) under section 13 of the Charities Act 1960 on the footing that the said

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A direction as to distribution (in so far as the same is a purpose of the trust) has ceased to provide a suitable and effective method of using the property subject to the trust, regard being had to the spirit of the original gift by the settlor, and that the property and funds subject thereto ought to be applied *cy-près*.”

B However, the first defendant, the Attorney-General, has persuaded the plaintiff to seek an order under section 13 first and, only if that fails, to seek an order under the inherent jurisdiction. Accordingly, I must first determine whether the statutory conditions of section 13 are satisfied. The provisions of section 13—the whole of which I shall read except for subsection (4)—are as follows:

C “(1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied *cy-près* shall be as follows:—(a) where the original purposes, in whole or in part,—(i) have been as far as may be fulfilled; or (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or (e) where the original purposes, in whole or in part, have, since they were laid down,—(i) been adequately provided for by other means; or (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift. (2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied *cy-près*, except in so far as those conditions require a failure of the original purposes. (3) References in the foregoing subsections to the original purposes of a gift shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable. . . . (5) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied *cy-près*, to secure its effective use for charity by taking steps to enable it to be so applied.”

H

It is common ground between Mr. Picarda for the plaintiff and Mr. McCall for the Attorney-General that the purpose of subsection (2) is to preserve the requirement under the law prior to the Act of 1960 that the donor must show a general charitable intent by his gift. This requirement is manifestly satisfied by the gift in this case, expressly devoted, as it is, to charitable purposes. The duty imposed by subsection (5) is new. The

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plaintiff considers itself to be under that duty and submits that the present case is a case falling within section 13(1)(e)(iii).

For the court to have jurisdiction to make the order sought by the plaintiff under section 13 two questions must be answered affirmatively.

(1) Is the requirement to distribute before the expiration of 10 years from the settlor's death included in the "the original purposes" of the charitable gift? (2) If so, have the original purposes, in whole or in part, since they were laid down, ceased to provide a suitable and effective method of using the property available by virtue of the gift?

Mr. Picarda and Mr. McCall unite in submitting that both questions should be answered in the affirmative, though on the first question Mr. Picarda did not disguise his own predilection for the view that the requirement as to distribution was an administrative direction rather than a purpose of the gift.

To answer the first question it is necessary to identify the original purposes of the gift. I venture to suggest that, as a matter of ordinary language, those purposes in the present case should be identified as general charitable purposes and nothing further. I would regard it as an abuse of language to describe the requirement as to distribution as a purpose of the gift. Of course, that requirement was one of the provisions which the settlor intended to apply to the gift, but it would, on any natural use of language, be wrong to equate all the express provisions of a gift, which *ex hypothesi* the settlor intended to apply to the gift, with the purposes of a gift. To my mind the purposes of a charitable gift would ordinarily be understood as meaning those charitable objects on which the property given is to be applied. It is not meaningful to talk of the requirement as to distribution being either charitable or non-charitable. The purposes of a charitable gift correspond to the beneficiaries in the case of a gift by way of a private trust.

However, as Mr. McCall rightly submits, the meaning of "purposes" in section 13 must be construed in its statutory context. He submits that in the Charities Act 1960 a distinction is recognised between the purposes of a gift and its administration. Thus in section 46 the word "trusts" in relation to a charity is defined as meaning the provisions establishing it as a charity and regulating its purposes and administration. He also drew my attention to section 18(1)(a) under which the Charity Commissioners have power to establish a scheme for the administration of a charity, and submitted that such a scheme is to be contrasted with section 13 under which the original purposes of a charitable gift can be altered to allow a *cy-près* application of property the subject of that gift. I accept, therefore, that the question I must answer is whether the requirement as to distribution is part of the original purposes or a provision relating to administration.

The other guidance that I can obtain from the Act as to the meaning of "purposes" is from the references to purposes in section 13. From them it is apparent that the relevant purposes are those for which the property given is applicable, and that the relevant purposes include those which provide a use for part only of the property available by virtue of the gift, those which were laid down by reference to an area or class of person, those which have been provided for by other means, those which have ceased to be in law charitable, and (in section 13(1)(e)(iii)) those which have ceased in some other way to provide a suitable or effective method of using the property. Save possibly for the last reference, none of those references seems to me to support a meaning for the word "purposes"

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A wide enough to cover the direction as to distribution; rather, they support the view that the purposes in question are the particular charitable purposes for which the property is to be applied and nothing further. Section 13(1)(e)(iii) does, however, contemplate that the purposes may provide a method of using the property and, in one sense, a requirement to use capital by the particular date might be said to provide a method of using the property. But, to my mind, that is an unnatural way of construing

B section 13(1)(e)(iii) as the requirement as to distribution is not so much a method of using the property as a direction as to the date by which the property is to be used. This tells one nothing of that on which the capital is to be applied. If the words of that sub-paragraph are given their natural meaning in their cy-près context, to my mind they refer to a specific mode of application of the property in respect of which the donor has indicated

C a general charitable intention. The internal evidence of section 13 itself does not, therefore, encourage an interpretation of “purposes” extending beyond what I have ventured to suggest was that word’s natural meaning.

Mr. McCall submitted that the distinction between “purposes” and “administration” is akin to that recognised elsewhere in the law between dispositive and administrative provisions. He drew my attention to *Pearson v. Inland Revenue Commissioners* [1981] A.C. 753, 774 where Viscount

D Dilhorne, after referring to section 8(1) of the Perpetuities and Accumulations Act 1964 (which itself distinguished between the administration and the distribution of property), recognised a distinction in the context of the capital transfer tax legislation between dispositive and administrative powers of trustees. I was also referred to what was said in *Lord Inglewood v. Inland Revenue Commissioners* [1983] 1 W.L.R. 366, 373,

E where, again in a capital transfer tax context, Fox L.J., giving the judgment of the Court of Appeal, referred to a similar distinction. But while I do not question that the distinction between administrative and dispositive provisions exists and is relevant in other contexts, it does not seem to me to follow that it is precisely the same distinction that is being drawn in the Charities Act 1960 when Parliament has simply referred, in the context of charitable gifts, to purposes on the one hand and adminis-

F tration on the other.

Mr. McCall submitted that the purposes of a gift included not only the specific charitable purposes, but also any provision as to time affecting the gift and that “purposes” could also include the identity of the property given, the identity of the trustee and any other provisions affecting distribution, such as, for example, in the present case, the agency of the settlor in making distributions. In effect, that is to equate every provision

G which may affect how the trust property is to be distributed with the purposes of the gift. That seems to me to be a very strange use of language and, in the context of section 13, an impossible construction. For example, it is clear that the property and the purposes for which the property is applicable are treated as distinct. Mr. McCall posed the example of a trust to charity A for 20 years, followed by a trust to charity B and

H submitted that the purposes of the gift must include the fact that the interest of charity A is limited to a period of 20 years, and that it is subject to that limited interest that the property is held for charity B. Let me assume (without deciding) that in that case the identification of the purposes must include the time by which A’s interest is limited. Nevertheless, the present case is readily distinguishable. The interest of charity in the present case is immediate, unlimited and absolute, extending, as it does, to both capital and income forthwith.

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Both Mr. McCall and Mr. Picarda advanced a more subtle argument on the following lines. (1) Section 13 not merely re-enacted the circumstances in which cy-près applications were allowed under the previous law but also extended those circumstances. (2) Prior to the Act of 1960 the court had allowed by way of cy-près schemes the removal of impracticable conditions attached to charitable gifts. (3) Such conditions must be regarded as purposes within the meaning of section 13. (4) The requirement as to distribution is also to be treated as, or as similar to, a condition and so a purpose within section 13.

I accept the first and second of these propositions. The first is supported by the remarks of Sir John Pennycuik V.-C. in *In re Lepton's Charity* [1972] Ch. 276, 284. The second is illustrated by cases such as *In re Robinson* [1923] 2 Ch. 332 and *In re Dominion Students' Hall Trust* [1947] Ch. 183.

But I have difficulty with the third and fourth propositions. I baulk at the universality of the third. Take the case of *In re Robinson*. The testatrix gave money for the endowment of an evangelical church but imposed "an abiding condition" that a black gown be worn in the pulpit, a condition held by P. O. Lawrence J. to be impracticable as defeating the main evangelical intention of the gift. It is not clear from the report whether the money that was given could be used for the provision of black gowns. If it could, then I would accept that the condition might accurately be described as a subsidiary purpose, as indeed the judge, at p. 336, appears to describe the condition. But if not, to my mind this case is more accurately described as falling within the class of cases where the main charitable purpose is practicable but a subsidiary purpose or direction is impracticable. I was referred by Mr. Picarda to *Tudor on Charities and Mortmain*, 4th ed. (1906), pp. 202 *et seq.*, where there is a heading "Subordinate Purpose Impracticable." But the text goes on to refer to "subsidiary purpose or direction." If a purpose is limited, as I think section 13 requires, to that for which the property comprised in the gift is to be applied and the money given could not be applied in providing a black gown, I do not think that the wearing of a black gown would be a purpose within section 13. But I do not see why the circumstances of *In re Robinson* cannot be fitted within section 13(1)(a)(ii) on the footing that the condition stipulated for is a direction and not an original purpose.

On the other hand, the relevant condition in *In re Dominion Students' Hall Trust* [1947] Ch. 183 went to defining the class of persons to whom the benefits of the charity were limited, that is to say male students of the overseas dominions of the British Empire of European origin. The requirement that the students be of European origin was removed as tending to defeat the main object of the charity. There is no difficulty in treating that condition as part of the original purposes, or alternatively as a direction, and in either event the circumstances of that case would fall within section 13(1)(a)(ii).

In argument reference was also made to *In re Lysaght, decd.* [1966] Ch. 191 in which a gift by a testatrix to the Royal College of Surgeons to found medical studentships limited those who could qualify for such studentships by excluding persons of the Jewish and Roman Catholic faith. That excluding condition was removed by Buckley J. as tending to defeat the charitable gift, because it was an essential part of the testatrix's intentions that the Royal College should be a trustee and it refused to accept the gift with that condition. Again it seems to me that the condition would in a like case be treated as part of the original purposes of the gift,

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A alternatively as a direction, and again in either event falling within section 13(1)(a)(ii). I would add that despite the importance attached by the testatrix to the identity of the trustees as recognised by Buckley J., it does not seem to me to follow that for the purposes of section 13 the identity of the trustee in such a case is a purpose rather than a direction within section 13(1)(a)(ii). However, I would observe that though *In re Lysaght, decd.* related to the case of the will of a testatrix who died after section 13 of the Charities Act 1960 came into operation, it was not decided under the Act and it is not apparent from the report that any consideration was given to the statutory provisions.

B In my judgment, therefore, it does not follow that all conditions attached to gifts must be treated as “purposes” within section 13. Even if I am wrong on that, it still does not seem to me to follow that the requirement as to distribution should be treated as a condition of a character similar to those in the pre-1960 cases to which I have referred. Both counsel have stressed to me, with the assistance of the contemporary documents at the time of the gift, the lack of importance that the settlor attached to the requirement as to distribution, and Mr. McCall in particular rightly criticised the ground on which the Charity Commissioners had refused one of the plaintiff’s applications, that is to say, because the requirement as to distribution was, as they put it, “fundamental.” It cannot be right that any provision, even if only administrative, made applicable by a donor to his gift should be treated as a condition and hence as a purpose.

C I confess that from the outset I have found difficulty in accepting that it is meaningful to talk of a cy-près application of property that has from the date of the gift been devoted both as to capital and income to charitable purposes generally, albeit subject to a direction as to the timing of the capital distributions. No case remotely like the present had been drawn to my attention.

E In the result, despite all the arguments that have been ably advanced, I remain unpersuaded that such a gift is capable of being applied cy-près and, in particular, I am not persuaded that the requirement as to distribution is a purpose within the meaning of section 13. Rather, it seems to me to fall on the administrative side of the line, going, as it does, to the mechanics of how the property devoted to charitable purposes is to be distributed. Accordingly, I must refuse the application so far as it is based on section 13.

F That conclusion renders it unnecessary for me to answer the second question which had to be answered affirmatively if section 13 were to apply. Although that question has been fully argued I think it undesirable to express obiter views on it, the more so as both counsel have contended for the same answer and I have, therefore, heard no contrary argument. However, many of the submissions made by counsel on that question are of direct relevance to my consideration of the next question for me to answer, that is to say, whether the court, under its inherent jurisdiction, should direct the removal of the requirement as to distribution. To that question I now turn.

H On this question Mr. Picarda and Mr. McCall submit, and I accept, that the court is not fettered by the particular conditions imposed by section 13(1)(e)(iii), but can, and should, take into account all the circumstances of the charity, including how the charity has been distributing its money, in considering whether it is expedient to regulate the

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administration of the charity by removing the requirement as to distribution within ten years of the settlor's death.

The evidence before me shows that the settlor throughout his life was a man of strong religious convictions and particularly interested, and personally involved, in the activities of the religious group known as the Christian (or Open) Brethren. That group has never had any central organisation of the group's churches or their missionaries. There are approximately 450 such missionaries. The plaintiff company is now a charity. Although in 1922 it did not hold its property for exclusively charitable purposes, nevertheless it was founded to hold property for missionary purposes and for the transmission of funds for the missionary and other work of the Christian Brethren, and there can be no doubt that it was chosen by the settlor to act as trustee because of its connections with the Christian Brethren.

When the charity was founded in 1922 the 15,000 shares in John Laing & Sons Ltd. were worth little more than their par value, £15,000. No doubt because of a prudent failure to diversify the charity's investments, the assets of the charity, which largely consist of shares and loan stock in Laing companies (which are now public companies), had increased by June 30, 1982, to no less than £24 million. In August 1922 no one would have foreseen either that the settlor would live for more than half a century longer and attain the age of 98 before he died on January 11, 1978, or that the assets of the charity would increase so astonishingly. The income of the charity in the year to June 30, 1982, exceeded £1.2 million.

The settlor acted as agent of the plaintiff in effecting distribution until the end of 1964. He followed an income distribution policy which fostered Christian evangelical activities, and since then the plaintiff has, in the exercise of its discretion, continued an active distribution policy, financing home and overseas evangelism and the relief of poverty. Various Christian causes have come to depend on the charity for their continued support and, in the view of the plaintiff, they are in need of continued support from the charity in the manner adopted hitherto. By far the greater part of the distributions have been to individuals or bodies not well suited to receive large sums of capital to finance their future activities. There is a particular difficulty in relation to providing for the future work of the Christian Brethren because they do not accept any organisation as a governing or controlling body but operate on an individual basis. There would be severe practical inconveniences and difficulties in distributing the very large sums of capital now held by the plaintiff in a way that would ensure continuance of the causes which the settlor wished to support by the charity. The court should always be slow to thwart a donor's wishes, but in this case the settlor himself, as early as October 5, 1932, indicated to the plaintiff by letter that he wished the plaintiff to be at liberty to disregard the requirement as to distribution. On January 26, 1939, the settlor wrote again to the plaintiff, referring to the capital value of his gift as then worth £30,000, and saying:

"considering that the capital value is more, and in view of many Christian activities, I wish to withdraw the stipulation that the capital should be distributed within 10 years of my death."

It is clear that even then, after that comparatively modest increase in capital value in that comparatively short period of the charity's existence, the settlor appreciated that the requirement as to distribution was inexpedient.

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A The chairman of the directors of the plaintiff, Mr. Andrew Gray, in his affidavit, says of the plaintiff:

B “The plaintiff, itself a registered charity in its own right, has broad experience in the field of Christian ministry and (so far as not already covered by that concept) the relief of the poor. It considers that this experience makes it sensitive to the ever-changing needs of the modern world, and enables it to adapt to such changes by shifts in the emphasis of its giving. The plaintiff would not presume to claim that no other body has this capability, but having regard to its long association with the settlor, who remained a director of the plaintiff until his death, it considers that it may reasonably suggest that it may be better able than most to fulfil his wishes for the distribution of the funds he so generously provided.”

C The plaintiff has considered causing another charitable body to be set up to carry on permanently the work now conducted by the charity, but it took the view that it would be unacceptable for it to adopt such a device to circumvent the restriction as to distribution. For my part, I would have thought that the plaintiff could distribute the capital to any other charitable body or bodies if it thought fit, but that merely serves to emphasise the unimportance of the requirement as to distribution.

D In my judgment, the plaintiff has made out a very powerful case for the removal of the requirement as to distribution, which seems to me to be inexpedient in the very altered circumstances of the charity since that requirement was laid down 60 years ago. I take particular account of the fact that this application is one that has the support of the Attorney-General. Although the plaintiff is not fettered by the express terms of the gift as to the charitable purposes for which the charity's funds are to be applied, it is, in my view, proper for the plaintiff to wish to continue to support the causes which the settlor himself wished the charity to support from its inception, and which would suffer if that support was withdrawn as a consequence of the distribution of the charity's assets. I have no hesitation in reaching the conclusion that the court should, in the exercise of its inherent jurisdiction, approve a scheme under which the trustees for the time being of the charity will be discharged from the obligation to distribute the capital within 10 years of the death of the settlor. I shall discuss with counsel the precise form of order that is appropriate.

G *Order discharging trustees from obligation to distribute capital within 10 years of settlor's death.*

Attorney-General's costs from trust fund on common fund basis and plaintiff's costs on trustee basis.

Solicitors: *Freshfields; Treasury Solicitor.*

H [Reported by IAN SAXTON, Barrister-at-Law]

[1983]

[CHANCERY DIVISION]

A

TURNER AND OTHERS v. TURNER AND OTHERS

[1981 T. No. 3272]

1983 Feb. 14, 15, 16, 17;
March 1

Mervyn Davies J.

B

Power of Trusts—Advancement—Exercise of power—Trustees exercising power on direction of settlor—Trustees' failure to read or understand documents before signing—Whether valid exercise of power

C

By an irrevocable deed of settlement dated March 30, 1967, the settlor created a trust for the benefit of his wife, children and remoter issue and any spouse or former spouse of such issue. The settlement contained a discretionary power to distribute capital or income out of the trust fund to all or any of the beneficiaries. The settlor, contrary to his solicitors' advice, appointed his father, sister-in-law and her husband, none of whom had experience or understanding of trust matters, as trustees. By a deed dated June 1, 1967, the trustees purported to exercise their power of appointment in favour of such of the settlor's four children who attained the age of 21. In 1969 they purchased a farm from the settlor, raising the money by means of a mortgage. By a deed dated July 9, 1971, the trustees revoked the appointment of the settlor's eldest son in the 1967 deed and appointed the remaining three children as the sole beneficiaries of the trust fund. At the end of 1975 the legal executive responsible for the trust affairs retired, and his successor, who was unaware of the 1971 appointment, prepared a conveyance, on the settlor's instructions, dated March 30, 1976, by which the farm purchased in 1969 was conveyed to the eldest son for no consideration, the intention being that the conveyance, in addition to conveying the legal estate, should operate as a beneficial appointment under the settlement in favour of the eldest son. The trustees at no time appreciated their powers and duties in relation to the discretionary trust and had been wholly disregarded for the purpose of decision-making. The settlor was regarded as the solicitors' client and the trustees took no part in the preparation of the 1967, 1971 and 1976 appointments, which were merely put before them by the settlor for execution.

D

E

F

On the question whether the 1967 and 1971 appointments and the 1976 conveyance were valid exercises of the trustees' powers:—

G

Held, that the trustees when exercising their discretionary powers were under a fiduciary duty to consider all the issues pertinent to each proposed appointment prior to its execution, and since they were unaware that they had any discretion and did not read or understand the effect of the documents they were signing, it followed that they never had applied their minds to the exercise of their discretion and were in breach of that duty; and that, accordingly, the power to appoint had not been validly exercised and although the 1976 conveyance was effective as a conveyance of the legal estate subject to the rights of the mortgagee, all three purported appointments would be set aside (post, pp. 904E—905B, 906C).

H

In re Hay's Settlement Trusts [1982] 1 W.L.R. 202 applied.

In re Pilkington's Will Trusts [1964] A.C. 612, H.L.(E.) and *In re Abraham's Will Trusts* [1969] 1 Ch. 463 considered.

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The following cases are referred to in the judgment:

Abraham's Will Trusts, In re [1969] 1 Ch. 463; [1967] 3 W.L.R. 1198; [1967] 2 All E.R. 1175.

Hastings-Bass, decd., In re [1975] Ch. 25; [1974] 2 W.L.R. 904; [1974] 2 All E.R. 193, C.A.

Hay's Settlement Trusts, In re [1982] 1 W.L.R. 202; [1981] 3 All E.R. 786.

Pilkington's Will Trusts, In re [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A.; [1964] A.C. 612; [1962] 3 W.L.R. 1051; [1962] 3 All E.R. 622, H.L.(E.).

No additional cases were cited in argument.

ORIGINATING SUMMONS

By an originating summons dated December 8, 1981, the plaintiffs, Lionel Edward Turner, Henry William Nutland and Janet Ida Nutland, the trustees of a settlement dated March 30, 1967, created by the fourteenth defendant John Lionel Turner, applied, inter alia, to the court to determine whether, under the powers of appointment granted to them in respect of the discretionary trust contained in the settlement, a deed of appointment dated June 1, 1967, a deed of revocation and new appointment dated July 9, 1971, and a conveyance dated March 30, 1976, were valid exercises of their power. The discretionary objects of the trust comprised the first to twelfth and fifteenth defendants and the Attorney-General was the thirteenth defendant.

The facts are stated in the judgment.

Peter Horsfield Q.C. and *Andrew Lloyd-Davies* for the plaintiffs.

J.M. Henty, W. D. Ainger and *David A. Lowe* for the first to seventh, ninth to twelfth and fourteenth and fifteenth defendants.

The eighth defendant did not appear and was not represented.

The Attorney-General took no part in the proceedings.

Cur. adv. vult.

March 1. MERVYN DAVIES J. read the following judgement. This is an originating summons in which the trustees of a settlement ask whether all or any of three successive deeds effectively exercised certain powers of appointment created by the settlement. As will appear the circumstances are highly unusual. In 1958 the fourteenth defendant John Lionel Turner ("the settlor") acquired Manor Farm of about 2,000 acres in Winterbourne Stoke, Wiltshire, from his father and mother. In May 1966 he considered buying more land but was unable to borrow. An acquaintance suggested that rather than buy more land he should plan to save estate duty. The settlor discussed the matter with his legal adviser Mr. Edwin William Tipper. Mr. Tipper was a legal executive in the firm of Sylvester & Mackett of Trowbridge. The settlor has no clear recollection of what was discussed but it seems that in one way or another the settlor and Mr. Tipper had available some documents that they believed had been used by another farmer in the course of an estate duty saving scheme. It was plain that any scheme would involve a settlement and so at an early stage there was discussion about who were to be trustees. I understand the settlor was advised to appoint professional trustees but unfortunately that advice was not taken. Mr. Tipper also advised that counsel's advice be taken, but that advice was not accepted. The settlor's father, Mr. Lionel Edward Turner, the first plaintiff, agreed to be a trustee. This Mr. Turner

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is now 80 years old and resident in Australia. He went there in December 1976. He is a retired farmer and quite unfamiliar with trusts and the like. Mr. Henry William Nutland, the second plaintiff, also agreed to be a trustee. He farms at Wilsford in Wiltshire just across Salisbury Plain from the settlor's Manor Farm. A little later it was thought wise to have a third trustee and Mrs. Janet Ida Nutland, the third plaintiff, agreed to act. Mrs. Nutland is the wife of Mr. Nutland and the sister of the settlor's wife, the settlor's wife being Mrs. Monica Josephine Turner, the fifth defendant. Mr. and Mrs. Nutland are, like the Turners, without any experience or understanding of trust matters. Mr. Tipper in his affidavit evidence said that he prepared four documents: (i) a settlement with discretionary trusts; (ii) a conveyance of Manor Farm to the settlement trustees; (iii) a partnership agreement between the settlor, his wife and his elder son John Gregory Turner, the first defendant, constituting the partnership of J. L. Turner & Co.; (iv) a tenancy agreement between the settlement trustees and the partners.

As I have indicated the plaintiffs are the three trustees, i.e., Mr. Lionel Edward Turner the settlor's father, and the Nutlands. It will be convenient now to mention the defendants. The first four defendants are the settlor's four children, all of whom are of age. They are John Gregory Turner, Mrs. Sarah Tate, Mrs. Ruth Turner and Robert Lionel Turner. The fifth defendant is, as I have said, the settlor's wife. The sixth defendant is Frances, the wife of John Gregory Turner. The seventh defendant is Jonathan Philip Herbert Tate, the husband of Mrs. Tate. Then as eighth defendant there is Peter Herbert Turner. He is now divorced from Mrs. Ruth Turner and now has no part in this action. Defendants nine, ten and eleven are the children of Mr. and Mrs. John Gregory Turner, namely Benjamin John Farrell, Bruce Charles Farrell and Jessica Frances Farrell. They are minors, as are Rebecca Margaret Clare Tate, the twelfth defendant, and Lucy Elizabeth Tate, the fifteenth defendant, the two last-named being children of the Tates. The settlor is, as I have said, the fourteenth defendant. The Attorney-General is the thirteenth defendant by reason of some ultimate charitable trusts in the settlement but I understand that he does not desire to take any part. Of course I had the benefit of a family tree which makes the above facts very much more clear.

The draft settlement I have mentioned was before the settlor, the Nutlands and Mr. Tipper at a meeting at Manor Farm in or about March 1967. The draft together with the other three drafts mentioned above were executed by those present. Lionel's signature was procured at about the same time. The settlement, conveyance and partnership agreement are all dated March 31, 1967. The tenancy agreement is dated April 1, 1967.

By the settlement it is recited that the settlor desired to make such irrevocable settlement as was thereafter contained for the benefit of the "beneficiaries" as thereafter appeared and that the settlor had transferred £100 to the trustees to be held by them upon the trusts thereafter declared; and additional property might be transferred to be held on like trusts. The settlement then contained a definition clause. There "the vesting day" was said to be the day on which should expire the period of 80 years after the settlement date or such earlier date as the trustees should appoint; "the beneficiaries" were said to be the wife, children and remoter issue of the settlor born or to be born before the vesting day, and any spouse or former spouse of any such issue.

Clause 2 of the settlement was in these terms:

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A

"The trustees shall stand possessed of the trust fund and the income thereof upon such trusts for the benefit of the beneficiaries or any or more of them to the exclusion of the other or others in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance education or advancement or for accumulation of income during minority or for the purpose of raising a portion or portions or for forfeiture in the event of bankruptcy or otherwise and with such discretionary trusts and powers exercisable by such persons as the trustees shall from time to time by deed or deeds revocable or irrevocable executed before the vesting day but without infringing the rule against perpetuities appoint."

B

C

Clause 3 reads:

"(a) In default of and subject to any such appointment as aforesaid the trustees shall until the vesting day pay or apply the income of the trust fund and may in their absolute discretion at any time or times before the vesting day pay transfer or apply the whole or any part or parts of the capital of the trust fund to or for the benefit of all or such one or more of the beneficiaries for the time being living in such shares if more than one and in such manner as the trustees shall in their absolute discretion think fit. (b) Without prejudice to the generality of the foregoing the trustees shall have power under the preceding subclause hereof to apply income for the benefit of any beneficiary for the time being living by paying or contributing towards the payment of the premiums or costs of the policy of insurance by the terms of which any sum or sums of money may in any contingency be payable to or applicable for the maintenance education or benefit of such beneficiary absolutely and to apply income for the benefit of any such beneficiary who is an infant by appropriating such income to such infant absolutely and investing the same and the resulting income thereof in any of the investments hereby authorised. (c) The trustees shall apply all or any part of such income not applied or contributed as aforesaid in or towards the discharge of all or any of the incumbrances for the time being affecting the said trust fund or any part thereof."

D

E

F

Then there are clauses 4 and 5:

"4. Subject as aforesaid the trustees shall stand possessed of the trust fund on the vesting day in trust as to income and capital for such of the beneficiaries as shall then be living or any one or more of them and in such shares as the trustees shall prior to or upon the vesting day determine and in default of such determination in trust for such of the beneficiaries as shall then be living in equal shares absolutely. 5. Subject as aforesaid the trustees shall stand possessed of the trust fund and the income thereof in trust for such charitable purposes as the trustees shall determine."

G

H

I need not read further.

By the conveyance the settlor conveyed Manor Farm to the trustees on the trusts of the settlement. The conveyance was in consideration of the payment of £500,000. That sum was paid by the trustees after the settlor had paid them £430,000 and with the aid of a £70,000 overdraft taken by the trustees on an account opened in their names.

With the settlement and other documents so executed there followed these events. (1) A deed of appointment dated June 1, 1967 ("the 1967 appointment"). This was executed by the trustees. Therein the trustees

"hereby irrevocably appoint and settle that the trust fund (as defined in clause 1(ii)(a) and (b) of the principal deed) shall henceforth be held upon trust for such of the above mentioned children of the settlor who shall attain the age of 21 years and if more than one in equal shares absolutely."

The children referred to are all four of the settlor's children. They were then all under 18. (2) The purchase of another farm namely Camel Hill Farm by the trustees. By a conveyance dated February 24, 1969, they acquired on the trusts of the settlement this farm of about 470 acres in Queens Camel and Sparkford, Somerset, for £95,000. There followed on June 20, 1969, a tenancy agreement of the farm in favour of J. L. Turner & Co. Camel Hill Farm was originally bought by Mr. L. E. Turner. Before it was conveyed to him he agreed that it should be taken by his son, the settlor. As I understood the settlor was to pay his father £95,000. The settlor then made Camel Hill Farm over to the trustees but the trustees had to borrow £60,000 from the Eagle Star in order to complete the purchase. There is a mortgage deed dated June 23, 1969. (3) A deed of revocation and new appointment dated July 9, 1971 ("the 1971 appointment"). This deed recites that it is supplemental to the 1967 appointment and that "in exercise of the power in this behalf reserved by" the 1967 appointment the trustees were desirous of revoking the said appointment in favour of John Gregory Turner and of making a new appointment in manner thereafter appearing. In the 1971 appointment it is then said that the trustees

"revoke and make void all the trusts and interests appointed by the [1967 appointment] in favour of the said John Gregory Turner and in lieu thereof in exercise of the said power vested in them by the said settlement and of every other power enabling them in that behalf the [trustees] hereby appoint that the said trust funds appointed by the said deed in favour of the said John Gregory Turner shall be held by the trustees . . . upon trust for the said Sarah Elizabeth Turner, Ruth Jane Turner and Robert Lionel Turner."

(4) On December 31, 1975, Mr. Tipper retired and the trust affairs passed into the hands of Mr. J. C. Lane another legal executive at Sylvester & Mackett. Mr. Lane was unaware of the execution of the 1971 appointment. It was not with the trust papers when he took over. (5) A conveyance dated March 30, 1976 ("the 1976 conveyance"). By this conveyance the trustees with the concurrence of Eagle Star (who required some adjustment in the matter of life policies) conveyed Camel Hill Farm to John Gregory Turner. The settlor and his wife joined in the conveyance to confirm their continuing personal liability to Eagle Star under the mortgage. The trustees conveyed Camel Hill Farm to John Gregory Turner for no consideration. It was intended, as I understand, that the conveyance should operate (as well as conveying the legal estate) as a beneficial appointment under the settlement in favour of John Gregory Turner. (6) On May 20, 1977, the trustees bought Eastfield Farm of 141 acres in Cheselbourne, Dorset, for £110,000. The money was borrowed from the National Westminster Bank. This farm was let to the Tates until its sale on May 26, 1981. The proceeds of sale £188,729.02 went towards buying

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A

Kennel Farm, Clarendon, Salisbury, for £195,000. The Tates are now the tenants of Kennel Farm.

B

Mr. Elliot is the senior partner in Sylvester & Mackett. In 1979 Mr. Elliot decided that his firm should no longer act in the matter of the settlement. That was principally because it came to his attention that Mr. Lane albeit in good faith had drafted the 1976 conveyance without knowing about the 1971 appointment. Mr. Elliot visited the Nutlands and told them that they should seek separate advice. In evidence Mr. Elliot said that was the only time that he met the Nutlands. He said it was clear to him that they were quite unaware of their responsibilities and duties under the settlement. By this time the third trustee was of course in Australia.

C

It is this question about the trustees' understanding of their rights, powers and duties that gives rise to question 1 in the originating summons. Question 1 asks, as respects (i) the 1967 appointment, (ii) the 1971 appointment and (iii) the 1976 conveyance, whether or not the trustees effectively exercised their powers of appointment. In effect the question is whether or not the trustees so far failed to direct their minds to the matter of their discretionary powers of appointment that the deeds of appointment ought not to be regarded as an exercise of the powers of appointment. To see such a question asked is at first sight surprising but the evidence given in this case shows good reason for it.

D

E

I proceed to mention some of the evidence. There was affidavit evidence (apart from some formal evidence from the trustees' new solicitor) from (i) Mr. Nutland, (ii) Mrs. Nutland, (iii) Lionel Edward Turner, (iv) John Gregory Turner, (v) the settlor, (vi) Mr. Tipper, (vii) Mr. Lane. All save Lionel Edward Turner and John Gregory Turner were cross-examined. It is plain that the Nutlands, unversed entirely in business affairs, became trustees to oblige the settlor as their friend with a family connection. They had no thought that they would be expected to do anything at all. It may be that the settlement was in some sense explained to them by Mr. Tipper. They saw Mr. Tipper in March 1967 when the settlement was executed. They did not see Mr. Tipper again or have any connection with him or his firm until the Elliot visit in 1979. Mr. Tipper said that at the 1967 meeting he explained to the Nutlands and to the settlor the effect of all the documents. He said he went through the documents clause by clause and explained to the Nutlands what their duties as trustees were. I accept Mr. Tipper's evidence without hesitation. I fully accept that he went through some form of words with the Nutlands. But I am quite certain that, whatever he said, the Nutlands did not understand. Mr. and Mrs. Nutland were clearly to be believed. Mr. Nutland said in his affidavit:

F

G

H

"I believe that Mr. Tipper went through the settlement with us, but we were not clear as a result of this what our duties were or what the effect of the settlement was. We did realise that it was intended to benefit the settlor's children but we really thought our duties would only arise if something happened to the settlor and his wife, in which case we would be responsible for looking after the interests of their children."

Mrs. Nutland said:

"I, like my husband, thought that we would only become concerned in any substantial sense if something happened to the settlor and his

wife, in which case we would be responsible for looking after the interests of the settlor's family."

Answers in cross-examination more than confirmed those statements. Mr. Nutland said he thought that his signatures were always required as a formality and that he had no business to look into the settlor's affairs. His phrase was that the settlor held the reins. He disagreed with Mr. Tipper's statement that Tipper explained to him the nature of the duties of a trustee. Mrs. Nutland when questioned spoke precisely to the same effect as her husband, but by no means as an echo. She used her own words.

From the execution of the settlement at the meeting in March 1967 one moves to consider the conduct of the trust affairs. I was shown 11 files of correspondence from the office of Sylvester & Mackett. There was a general file on trust and tax matters from July 26, 1966, to November 28, 1975. The other files related to particular items such as the purchase of Camel Hill Farm, the 1976 conveyance and the sale off of various small plots, e.g., for an electricity sub-station. It is quite evident from all this correspondence that the Nutlands and L. E. Turner were wholly disregarded for the purposes of any decision-making. Mr. Tipper wrote to the settlor and it was with him that all decisions were taken. The settlor, not the trustees, was regarded as the client. The signatures of the trustees were required from time to time. These were usually obtained by documents being sent to the settlor. He would obtain the Nutlands' signatures. They would sign without question at his request. Similarly L. E. Turner signed without any question. The settlor said in his evidence: "I did not discuss anything with the Nutlands. I considered myself captain of the ship." It is quite clear from the correspondence that the trustees were no more than ciphers. I must consider particularly the three documents that are in question. As to the 1967 appointment, Mr. Nutland said, in paragraph 10 of his affidavit:

"In any event neither I nor my wife were concerned in any way with the preparation of the 1967 appointment and we certainly never gave any instructions to Mr. Tipper or to anyone else at Messrs. Sylvester & Mackett for the preparation of this or any other document connected with the settlement. I am quite certain that neither of us knew what the document really meant nor appreciated how it might alter the trusts. We would not have concerned ourselves with its effect, since we did not realise at this time that the documents we were executing required any consideration or decision by us. We merely executed the documents which were placed before us by the settlor because he asked us to do so and because we believed that all decisions in connection with the settlement were a matter for him."

Mrs. Nutland confirmed that statement. No cross-examination affected these statements in the least degree. Mr. L. E. Turner's affidavit evidence is to much the same effect. I should add here that there was never ever any meeting between the three trustees although of course the Nutlands knew Mr. L. E. Turner in the locality reasonably well as the father-in-law of Mrs. Nutland's sister, i.e., the settlor's wife. As to the 1971 appointment the evidence shows that the trustees were again ciphers. In paragraph 11 of his affidavit Mr. Nutland said (and his wife confirmed):

"In any event I am confident that neither I nor my wife knew what the document really meant or appreciated how it might alter the trusts, and as I have already explained, we did not at this date realise

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A that any consideration or decision on our part was required or that our signatures were more than a formality."

Mr. L. E. Turner said, in paragraph 7 of his affidavit:

B "I have no particular recollection of executing the 1971 appointment but I am sure that nobody explained to me what it was for. Certainly I would not have signed if I had realised that it might have had the effect of cutting my grandson John out of all benefit under the settlement."

Speaking of the 1967 and 1971 appointments in his affidavit the settlor said:

C "It is quite clear that when I obtained the signatures of Mr. and Mrs. Nutland to the appointments, I would not have endeavoured to explain what the document did; I did not think this was a matter which really concerned them, and I could not have explained the documents anyway. I should add that I cannot think that they would have asked for any explanation of the documents: they never did on any other occasion when I obtained their signatures. I would also add that I do not recall whether they read the documents before they signed, but I think it most unlikely that they would have done so: they never did on any other occasion when I obtained their signatures."

E Mr. Tipper can throw little light on the matter of the 1967 and 1971 appointments because as he says in his affidavit after March 1967 he had no direct contact with the Nutlands. He relied upon the settlor to get all documents signed. Mr. Tipper said that he explained the appointments to Mr. L. E. Turner. It was Mr. Tipper who obtained Mr. L. E. Turner's signature to the appointments.

F The situation as to the 1976 conveyance is not quite the same because all three trustees realised that the purpose of the 1976 conveyance was to make over Camel Hill Farm to John Gregory Turner. Mr. Nutland said, in paragraph 12 of his affidavit:

G "I recollect that in 1976 the settlor told us that he would like his son John to have a farm of his own and that the idea was that Camel Hill Farm should be conveyed to him. My wife and I both thought that this was sensible enough and I recollect that a conveyance of the farm to John was subsequently executed by us. I have been shown a letter of February 9, 1976, from Messrs. Sylvester & Mackett to the investment manager of Eagle Star Group . . . in which it is stated that 'the trustees have consented' to the conveyance of the farm to John. In fact neither Messrs. Sylvester & Mackett nor the settlor ever asked for our 'consent' or suggested that our 'consent' was necessary. As I have already stated, the settlor mentioned the proposed conveyance to us, but there was no suggestion that the decision was one for us rather than the settlor himself. On the other hand we had indicated that we thought it a sensible idea and we understood that the document we signed was a conveyance of the farm to John. We had not previously been consulted in any way about the purchase of Camel Hill Farm or the way in which the purchase money was to be found."

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Mrs. Nutland confirmed what her husband said. Mr. L. E. Turner's affidavit stated that he had no recollection of executing the 1976 conveyance or of any discussion about it.

In cross-examination Mr. Nutland said that at the time he did not appreciate that it was his decision that Camel Hill should go to John Gregory. He thought it was a matter for the settlor but if he had known it was a matter for him he would have done the same thing, i.e., given the farm to John Gregory. But, as it was, he did not intend to pass the farm to anyone. He had no thoughts on it. Mrs. Nutland indicated that she never considered the farm in relation to the other beneficiaries. Mr. Tipper was not concerned with the 1976 conveyance. As I have said by that time Mr. Lane had taken over. Mr. Lane's evidence was that he had no contact with any of the trustees on the matter of the 1976 conveyance. He simply got the settlor to procure the signatures of the trustees.

One is naturally very reluctant to contemplate that documents admittedly executed by persons of intelligence may be ineffective by reason of the fact that the persons executing did not address their minds to the documents signed. To do so makes for uncertainty, confusion and dishonesty. On the other hand here there are two considerations which may justify that course in the particular circumstances of this case. First there is the consideration that all the persons involved in the administration of the trusts have been perfectly frank and are plainly to be believed. There has been no rancour or dispute. No one other than the Turner family and the Nutlands are concerned in the immediate difficulties that have arisen. There has been on all sides a straightforward assertion of misunderstanding and a desire to set right anything that is wrong. The second consideration is that it is not any ordinary document that is being examined but, in the case of all three documents under consideration, a document whereby a discretionary power appears to have been exercised. When a discretionary power is given to trustees they come under certain fiduciary duties. In a context removed from the present case Sir Robert Megarry V.-C. said in *In re Hay's Settlement Trusts* [1982] 1 W.L.R. 202, 209c:

"a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose."

The Vice-Chancellor said, at p. 210:

"If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me."

Accordingly the trustees exercising a power come under a duty to consider. It is plain on the evidence that here the trustees did not in any way "consider" in the course of signing the three deeds in question. They did not know they had any discretion during the settlor's lifetime, they did not read or understand the effect of the documents they were signing and what they were doing was not preceded by any decision. They merely

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A signed when requested. The trustees therefore made the appointments in breach of their duty in that it was their duty to “consider” before appointing and this they did not do.

B It is accordingly necessary to consider what is the effect of a deed of appointment, on the face of it effective, but executed by the appointors in breach of their duty, in so far as they have signed, in all good faith, without ever having given any attention to the contents of the deed. *In re Pilkington's Will Trusts* [1964] A.C. 612 was concerned with the exercise of a power of advancement conferred by section 32 of the Trustee Act 1925. In that case the trustees asked the court whether a proposed advance by way of sub-settlement could be made. So the case differs from this case where one is concerned with an appointment not an advancement and with an appointment “made” and not “to be made.” However that may be, some observations of Upjohn L.J. in the same case in the Court of Appeal [1961] Ch. 466, 488–490 seem to bear on the present situation. Upjohn L.J.’s words in the Court of Appeal were approved by Viscount Radcliffe [1964] A.C. 612, 641–642. Upjohn L.J. said [1961] Ch. 466, 489:

D “The effect, therefore, of the rule against perpetuities upon the proposed settlement is basic; it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, modified by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never addressed their minds, and, therefore, it cannot possibly be justified under section 32, for it has not been shown that the trustees think that the settlement, as so modified, is for the advancement or benefit of Penelope. On that ground too, therefore, I would think that the transfer to the trustees of this new settlement is entirely beyond the powers of the trustees.”

E Those words suggest that when trustees, in the course of exercising a power in a way that they suppose will effect a sub-settlement, fail to appreciate what they are doing in some important respect (in the *Pilkington* case the impact of the perpetuity rule), then the sub-settlement will be void.

F *In re Abraham's Will Trusts* [1969] 1 Ch. 463 is an instance of the court declaring a settlement wholly void when made in exercise of a power of advancement. The exercise of the power had been made without a due regard to the rule against perpetuities; so that the trustees had not had a right appreciation of their discretion. This case must now be treated as limited in its application: see *In re Hastings-Bass, decd.* [1975] Ch. 25, 41. However that may be, the words of Cross J. in *In re Abraham's Will Trusts* [1969] 1 Ch. 463, 485 show that when the facts fit the exercise of a power maybe set aside:

H “But here there is no doubt that the effect of the operation of the rule is wholly to alter the character of the settlement. In my judgment the result of that must be that there never was a valid exercise by the trustees of the power of advancement.”

The authorities I have mentioned, including *In re Hastings-Bass, decd.* permit the inference that, in a clear case on the facts, the court can put aside the purported exercise of a fiduciary power, if satisfied that the trustees never applied their minds at all to the exercise of the discretion entrusted to them. If appointors fail altogether to exercise the duties of

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consideration referred to by Sir Robert Megarry V.-C. then there is no exercise of the power and the purported appointment is a nullity. Applying those principles to this case I am satisfied on the evidence that all three purported appointments ought to be set aside. It was urged that the 1976 conveyance stood on a footing apart from the 1967 and 1971 appointments; in that in the case of the 1976 conveyance the trustees knew that their signatures would transfer Camel Hill Farm to John Gregory Turner and moreover that the trustees thought at the time that it was a "good idea" to make a transfer to John Gregory Turner, whereas in the case of the earlier appointment they did not know at all what was being done. In my view the 1976 conveyance as an instrument of appointment fails as well as the earlier appointments. At the time of the execution of the 1976 conveyance there was a total failure on the part of the trustees to consider whether or not in their discretion Camel Hill Farm ought to go to John Gregory Turner. They did not appreciate that they had a discretion to exercise.

The 1976 conveyance is of course effective as a conveyance of the legal estate and nothing I say affects the rights of the mortgagees. The 1976 conveyance is set aside in so far as it purports to operate as an exercise of the trustees' powers of appointment under the 1967 settlement. Subject to the mortgagees' rights John Gregory will hold the legal estate on trust for the trustees of the 1967 settlement.

The three appointments are set aside with effect from the dates that they bear. In the circumstances of this case I would have liked to set aside the 1976 conveyance (considered as an appointment) with effect from today. But since I regard the 1976 appointment as wholly void I do not think that that course is open to me.

Order accordingly.

Solicitors: *Burges Salmon, Bristol; Drewett Nalder & Co., Castle Cary; Jonas & Parker, Salisbury; Osborne Clarke, Bristol.*

[Reported by IAN SAXTON, Barrister-at-Law]

[COURT OF APPEAL]

ALCOM LTD. v. REPUBLIC OF COLOMBIA
FIRST NATIONAL BANK OF BOSTON AND ANOTHER,
GARNISHEES

[1982 A. No. 1501]

1983 Oct. 21, 24

Sir John Donaldson M.R., May and
Dillon L.JJ.

Conflict of Laws—Sovereign immunity—Diplomatic immunity—Expenditure in running diplomatic mission—Moneys in embassy bank accounts—Whether accounts used for "commercial purposes"—Whether subject to garnishee orders—State Immunity Act 1978 (c. 33), ss. 3(1)(3), 13(4), 17(1)

Execution—Garnishee proceedings—Diplomatic mission bank accounts—Whether "property"—Use in running mission—Whether garnishee orders valid—State Immunity Act 1978, ss. 3(1)(3), 13(2)(b)(4)

The plaintiffs obtained a default judgment for £41,690 for goods sold and delivered against the defendant, a foreign sovereign state. Subsequently garnishee orders nisi were granted to

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A the plaintiffs as the judgment creditor attaching sums covering the judgment debt and costs in the defendant's embassy bank accounts with the garnishees. The defendant's ambassador certified that the funds in the bank accounts were intended to be used only in the day to day running of the diplomatic mission. Hobhouse J., having considered the State Immunity Act 1978, in particular section 3(1) and (3) and 13(4),¹ held, inter alia, that a bank account used for an embassy was prima facie non-commercial and set aside the garnishee orders.

B On the plaintiffs' appeal:—

Held, allowing the appeal, (1) that the chose in action constituted by the credit balance on a bank account was "property" within the meaning of section 13(2)(b) and (4) of the State Immunity Act 1978 (post, pp. 910A, 913D-E).

C (2) That in the light of the definitions of "commercial transaction" and "commercial purposes" in sections 3(3) and 17(1) of the Act of 1978 the purpose of the moneys in the bank accounts with the garnishees was to pay for goods and services and to enter into other transactions which enabled the embassy to be run; and that, accordingly, the credit balances were "for the time being in use or intended for use for commercial purposes" within section 13(4) of the Act and the garnishee orders nisi should be restored (post, pp. 910A-B, H—911A, 912A-B, 913D-E).

D Dicta of Lord Bridge of Harwich in *I Congreso del Partido* [1983] 1 A.C. 244, 278-279, H.L.(E.) applied.

Per curiam. The wording of the Act of 1978 does not justify the distinction between commercial and consumer activities (post, pp. 912B, 913D-E).

Decision of Hobhouse J. reversed.

E The following case is referred to in the judgment:

Congreso del Partido, *I* [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.).

No additional cases were cited in argument.

APPEAL from Hobhouse J.

F By writ of May 7, 1982, the plaintiffs, Alcom Ltd., claimed against the first defendant, the Republic of Colombia, and the second defendant, Juan Manuel Santos, £41,690.56 for goods sold and delivered to the first defendant at the request of the first and the second defendant, the latter being alleged to have been acting as a party to the contract or alternatively as guarantor of its performance by the first defendant. On December 10, 1982, the plaintiffs signed judgment for £41,690.56 and £147.50 costs against the first defendant, no notice of intention to defend having been given by that defendant.

G On September 27, 1983, garnishee orders nisi were ordered by Master Topley on the application of the judgment creditor, the plaintiffs, directed to the garnishees, First National Bank of Boston and Barclays Bank PLC, ordering that all debts due or accruing from the garnishees to the judgment debtor, the first defendant, be attached to answer the judgment in the sum of £41,690.56 and £147.50 costs and specifying the institutions at which the debtors' accounts were believed to be held.

¹ State Immunity Act 1978, s. 1: "A state is immune from the jurisdiction of the courts . . . except as provided in . . . this Act."

S. 3(1)(3): see post, pp. 908H—909A, G-H.

S. 13(2)(4)(5): see post, p. 909B-E.

S. 17(1): see post, p. 909G.

By summons of October 19, 1983, the judgment debtor applied to set aside the orders.

On October 21, 1983, Hobhouse J. set aside the garnishee orders nisi.

The plaintiff judgment creditor appealed on the grounds that (1) the judge misdirected himself in holding bank accounts used by the judgment debtor for the purpose of the day-to-day running of their embassy in London were not used for a commercial purpose within the meaning of the State Immunity Act 1978; (2) that the applications for the garnishee orders nisi should have been made on evidence of such commercial purpose; and (3) in otherwise holding that the bank accounts were not liable to execution by reason of the provisions of the Act of 1978.

Stephen Desch Q.C. and *Richard Slowe* for the judgment creditor.

Anthony Thompson Q.C. and *Timothy Saloman* for the judgment debtor.

SIR JOHN DONALDSON M.R. This appeal raises a novel question: "Can you garnishee the London bank accounts of an accredited diplomatic mission?" The accounts concerned are those of the Colombian Embassy. The ambassador has certified that they are used and are intended to be used only to meet the expenditure necessarily incurred in the day to day running of the mission. Last Friday (October 21, 1983) Hobhouse J. on this evidence set aside garnishee orders nisi which had been granted to the plaintiffs, and the plaintiffs now appeal. For my part, I should very much have preferred to have been able to reserve judgment, but the matter is one of extreme urgency because, until this appeal is disposed of, the accounts remain frozen. Accordingly, it seems to me right that, whatever the imperfections of expression which will flow from taking that course, we should give judgment forthwith.

The history of the matter is that the plaintiffs issued a writ against the Republic of Colombia claiming £41,690.56 in respect of goods sold and delivered together with interest and costs. In due course they succeeded in signing judgment in default of a notice of intention to defend. We have been told this morning that the defendant Republic intends to apply to set that judgment aside on the grounds that leave to serve out of the jurisdiction should not have been given and that there were irregularities as to service. In fairness to the defendant, I should add that it has also been indicated that it will in due course be urging upon the court that it has merits in the sense that it will be contending that there never was a contract for the sale of these goods, that in any event no prices were agreed, and the prices which have been claimed are excessive. But those proceedings have not yet been issued—or, at all events, had not been issued before the short adjournment—and for the purposes of deciding this appeal it therefore has to be assumed that the judgment is regular.

We know very little about the contract for the sale of goods, which forms the basis of the judgment, although we were told it related to some security equipment required for the embassy. It is, of course, accepted that the Republic of Colombia is a friendly foreign sovereign state, but that of itself does not provide the state with immunity from proceedings since section 3(1) of the State Immunity Act 1978 provides that:

"A state is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the state; or (b) an obligation of the state which by virtue of a contract (whether a commercial

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A transaction or not) falls to be performed wholly or partly in the United Kingdom.”

So much is common ground. But, when it comes to levying execution upon a bank account, there are special provisions, and the defendant submits that there is no basis for issuing garnishee proceedings against these accounts. Again the issue turns upon the provisions of the State Immunity Act 1978. The key sections are as follows. Section 13 provides:

B “(2) Subject to subsections (3) and (4) below . . . (b) the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale. . . . (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a state party to the European Convention on State Immunity only if”

—and then two conditions are set out, (a) and (b). I need not read them because the Republic of Colombia is necessarily not a party to the European Convention:

D “(5) The head of a state’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the state any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the state for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.”

I next turn to section 14(4), which provides:

F “Property of a state’s central bank or other monetary authority shall not be regarded for the purposes of section 13(4) above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a state were references to the bank or authority.”

The credit balances on these accounts were not, of course, the property of the Central Bank of Colombia.

G Section 17(1) is a definition section, and it defines “commercial purposes” as meaning “purposes of such transactions or activities as are mentioned in section 3(3) above.” That takes me to section 3(3), which is in the following terms:

H “In this section ‘commercial transaction’ means—(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a state and an individual.”

In my judgment, there can be no real doubt that the chose in action constituted by a credit balance on a bank account is "property" within the meaning of that word in both subsection (2)(b) and (4) of section 13. Were it otherwise there would be no need for section 14(4), the section referring to central banks.

It follows that the issue is whether the plaintiffs can bring themselves within section 13(4). This in its turn depends upon whether the credit balances are "for the time being in use or intended for use for commercial purposes." Incorporating the relevant definitions derived from sections 17(1) and 3(3), this test can be re-written as follows: "Are these credit balances in use or intended for use for purposes (a) of any contract for the supply of goods or services, (b) of any loan or other transaction for the provision of finance, (c) of any guarantee or indemnity in respect of any such transaction, (d) of any other financial obligation, or (e) of any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority?"

Mr. Salomon does not accept this test because he submits that the word "otherwise than in the exercise of sovereign authority" govern paragraphs (a) and (b) as well as paragraph (c) of section 3(3). He supports this by reference to the words "any other transaction," arguing that since the other transactions are those which do not involve the exercise of a sovereign authority, the preceding transactions to which they are "other" must be subject to a similar restriction. He says that this is an application of the *ejusdem generis* rule.

For my part, I fear that I am quite unable to accept that construction. Had Parliament so intended, it would have cast the section in such a way as to remove the words "into which a state enters or in which it engages otherwise than in the exercise of sovereign authority" from paragraph (c) and put them in the same position as the words "but neither paragraph of subsection (1) above applies to a contract of employment between a state and an individual" so as to make it clear that they governed all three paragraphs. There would also have been other ways no doubt of achieving the same result as a matter of drafting, but that is the obvious way of doing it. Indeed, at one stage I did seriously wonder whether, acting without authority, Her Majesty the Queen's printer had wholly altered the sense of the Act by misplacing the words, but there has been no suggestion that that is the case and, indeed, it is an extremely unlikely hypothesis. I fear that we have to construe the section in the way in which it is printed.

I should have added that, in setting out this test in extenso, I have omitted the reference to the contracts of employment which is contained in subsection (3) since that part of the subsection is relevant only to section 3(1).

The plaintiffs have adduced no evidence to contradict the ambassador's certificate which was—in full—in the following terms:

"The funds deposited by the Colombian Embassy in its bank accounts at"—then he names the bank accounts—"are not in use nor intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day to day running of the Diplomatic Mission."

The plaintiffs submit that they have no need for such evidence, since the certificate contradicts itself. In their submission, expenditure incurred in

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A the day to day running of a diplomatic mission will always be intended for use for commercial purposes, giving that phrase the very wide meaning attributed to it by the Act, and bearing in mind that the words "commercial transaction" are used purely as a term of art in the Act and that accordingly their ordinary meaning is no reliable guide to the meaning which they are intended to bear in context.

B Hobhouse J. rejected this submission upon the following grounds, and I quote from counsel's note of his judgment. He said under the heading "My reasons":

"(1) One must construe the Act against the general background of general principles of international law which include [the] well-established distinction between state and trading activities.

C "(2) One must have regard not only to the sub-paragraphs of section 3(3) but also to the phrases 'commercial purposes' and 'commercial transaction.' If the activities are not ordinary commercial purposes but consumer activities one must not strain the language.

"(3) The examples given by Mr. Slowe are covered by section 3(1)(b)"—and I ought to add by way of explanation that the examples to which he is referring were paying people who supply goods and services to the embassy.

D "(4) In the light of section 13 one must consider the primary not the secondary purposes. The primary purpose of the account is running an embassy.

E "(5) The point made by the plaintiffs proves too much because it means nothing short of an act of state would take a transaction outside the section. If one pursues the plaintiffs' argument all the way all money is going to be used for commercial purposes and is subject to execution.

F "In my opinion a bank account used for an embassy is *prima facie* non-commercial. If I were wrong and buying services for the embassy is commercial: no one is entitled to assume the account is not used for non-commercial purposes, e.g., paying the ambassador, paying officials who come over from Colombia, helping stranded citizens of Colombia in the United Kingdom. None of those are commercial purposes.

G "Therefore it is not made out that the account is wholly or predominantly commercial. A garnishee order attaches to the whole account. The account does not distinguish between the two purposes. Therefore even on a construction favourable to the plaintiffs the garnishee orders must at least in part offend against the Act and therefore must be set aside. If hereafter evidence is placed before the court to show certain moneys are used for commercial purposes it may be possible for a court to make a garnishee order *nisi*."

H I agree that if the Act is ambiguous, a court is entitled to have regard to the general principles of international law and to resolve that ambiguity in the way most consistent with those principles. However, those principles appear to require a court to have regard to the transactions under scrutiny rather than to the reasons why the transactions were undertaken. This was pointed out by Lord Bridge of Harwich in *I Congreso del Partido* [1983] 1 A.C. 244, 278 where he gave as an example of a commercial, trading or private law transaction the ordering of uniforms for the maintenance of the army, the latter being a sovereign function. In any event, I can detect no ambiguity in the Act.

Hobhouse J.'s view that regard must be had to the primary purpose of running the embassy rather than the secondary purpose of paying for goods and services seems to me to involve falling into the very error to which Lord Bridge of Harwich drew attention and to be devoid of justification in fact or on the wording of the Act. The purpose of money in a bank account can never be "to run an embassy." It can only be to pay for goods and services or to enter into other transactions which enable the embassy to be run. Again I can find no trace of wording in the Act which could justify the distinction between commercial and consumer activities.

Hobhouse J. was clearly concerned with the width of the definition of "commercial transaction" for which the plaintiffs were arguing and thought that, if accepted, no diplomatic mission's funds would be free from attachment. I think that there are two answers to this comment. The first is that a mission could have drawing powers on a London account which was not that of the state, but of its central bank. That account would then have the protection of section 14(4). The second is that the real protection for missions lies in the jurisdictional provisions of section 3(1). If the state is amenable to the jurisdiction of the English courts in accordance with that subsection, there seems no logical reason why its money should not be attachable in satisfaction of a judgment. Protected property, such as the mission's buildings, is obviously in a different category, but such buildings are not used for commercial purposes.

There remains the alternative basis of Hobhouse J.'s judgment, namely that a garnishee order attaches to the whole of any credit balance and that the court accordingly needs to be satisfied that the whole balance is intended for use for commercial purposes. This seems to me to be correct in principle. Accordingly, all three members of the court pressed Mr. Saloman to give examples of expenditure incurred in the day to day running of the embassy which did not fall within the very wide definition of "commercial transactions" contained in section 3(3).

The examples given by Hobhouse J. do not seem to me to bear out his thesis. The payment of the salary of the ambassador or other embassy officials might indeed be outside the definition, although I can see an argument to the contrary, but it is conceded that they are not in fact paid out of these accounts. His other example, expenditure designed to help stranded citizens, would be incurred for the purpose of a commercial transaction, as defined, being either expenditure for the purpose of a contract for the supply of services, for example an air ticket, or a loan or, if a gift or grant to the person concerned, a transaction or activity otherwise than in the exercise of sovereign authority. Mr. Saloman added for our consideration the rebate of duty on hydrocarbon oil. This comes into the argument in this way. It is suggested that if the first secretary uses his car and buys petrol for it, the embassy can claim a rebate on the fuel duty and on the VAT. This rebate will be paid into the embassy account and then paid out to the first secretary. For my part I do not understand why this does not fall within paragraph (c) of section 3(3) as "any other transaction or activity . . . into which a state enters or in which it engages otherwise than in the exercise of sovereign authority."

Accordingly, I quite unable to accept the ambassador's certificate. Let me make it quite clear that when I say that I am not in any way impugning either the ambassador's integrity or the certificate itself. I fully accept that it was given in the utmost good faith and no doubt was given on the basis of advice. The ambassador quite clearly took the view that the running of an embassy was a non-commercial activity, and I am bound to say that I

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A entirely agree with him as a matter of common sense and looking at it broadly. However, we are constrained to look at it in terms of the definition contained in the Act of Parliament, and on that basis I have to reject his conclusion, which appears in the first part of the certificate, because of the reasons which appear in the second part of the certificate.

B Both the ambassador, in his affidavit, and Mr. Saloman, in his argument, have stressed the disruptive effect of the garnishee order. We have been told that the telex can no longer be used, because the ambassador cannot be sure when he will be able to pay for the service. Indeed, short of financing the embassy out of his own pocket or persuading the Government of Colombia to remit further funds to this country, I can quite see that the embassy may be brought to a standstill. This is a very remarkable result and one which may well not have been intended by C Parliament. Unfortunately we are bound to give effect to parliamentary intentions as expressed in the statute, and in my judgment, under the terms of the statute, the embassy's bank accounts are available to satisfy any regular judgment against the Republic of Colombia.

D For those reasons I would allow the appeal and would restore the garnishee orders nisi.

E MAY L.J. I too have been considerably concerned about this case. However, in the end I think that the wording of the relevant parts of sections 3, 13 and 17 of the Act of 1978 is clear and that its application to the facts of the case as they are before us has the result arrived at by Sir John Donaldson M.R.

I too would allow the appeal.

DILLON L.J. I agree.

F *Appeal allowed.*
Leave to appeal.

Solicitors: *William T. Stockler; Boodle Hatfield & Co.*

G A. H. B.

H

[1983]

[COURT OF APPEAL]

A

MERCURY COMMUNICATIONS LTD. v. SCOTT-GARNER AND
ANOTHER

[1983 M No. 443]

1983 Oct. 17, 18, 19; 21
Oct. 31;
Nov. 1, 2, 3; 9

Mervyn Davies J.
Sir John Donaldson M.R., May and
Dillon L.JJ.

B

Trade Dispute—Act in furtherance of—Procuring breach of contract—Telecommunications interconnection agreement between public corporation and private company—Union members employed by corporation objecting to agreement—Union instructing members not to effect company interconnections and to black company shareholders—Whether proper case for interlocutory injunction—Whether dispute “relates wholly or mainly to” jobs—Whether statutory defence likely to succeed at trial—Balance of convenience—Trade Union and Labour Relations Act 1974 (c. 52), ss. 13(1) (as amended by Trade Union and Labour Relations (Amendment) Act 1976 (c. 7), s. 3(2)), 17(2) (inserted by Employment Protection Act 1975 (c. 71), s. 125(1) and Sch. 16, Pt. III, para. 6), 29(1) (as amended by Employment Act 1982 (c. 46), s. 18(1)(2)(6))

C

D

The British Telecommunications Act 1981 established B.T. as a public corporation and transferred the operation of telecommunications within the United Kingdom from the Post Office to B.T. By a licence granted by the Secretary of State under the Act in February 1982, a private company, M., was authorised to establish a telecommunications system on the terms set out in the licence. In November 1982 an interconnection agreement was made between B.T. and M. which provided for interconnections between the two systems.

E

The defendant union, the vast majority of whose members were employed by B.T., waged a campaign against the licensing of competitors of B.T. and against the proposals, including the privatisation of B.T., in a Telecommunications Bill currently before Parliament. The stated objectives of the campaign included the seeking of the withdrawal of the Bill and the defence of jobs and job opportunities. In March 1982 the union's national executive committee had resolved to instruct the membership not to connect M. to the B.T. system. After a “day of action” in October 1982, a series of selective strikes took place in April 1983. In June 1983 B.T. ordered some of its members to effect interconnections. The union replied with a call to action and B.T. management themselves effected some interconnection. The union then instructed its members to “black” M.'s shareholders and B.T. services at M.'s premises. In September 1983 there was a threat of industrial action against M.'s customers.

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G

Following the issue of a writ against the union on October 5, 1983, M. applied for interlocutory injunctions restraining the union and its members from, inter alia, inducing or procuring a breach of the contractual relations between M. and B.T. and orders requiring the withdrawal of instructions by the union not to cooperate with M. The union relied upon section 13(1) of the Trade Union and Labour Relations Act 1974¹ as amended. The

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¹ Trade Union and Labour Relations Act 1974, as amended, s.13(1): see post, p. 938F–G. S.17(2): see post, p. 948E–F. S.29(1): see post, pp. 949G–950A

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judge held that there was a "trade dispute" within the meaning of section 29(1) of the Act of 1974 as amended, that the union was likely to succeed at the trial by virtue of section 13(1) of that Act and he dismissed the application.

On appeal by M. at the hearing of which additional affidavit evidence was filed:—

Held, (1) that although there appeared to be a dispute between B.T. and its employees who were members of the union, the amendment to section 29(1) of the Act of 1974 which had been made by section 18 of the Employment Act 1982 had substantially restricted the meaning of "trade dispute"; that the amended subsection requiring the dispute in the instant case to be one between workers and their employers which "relates wholly or mainly to" termination of employment required the court to look at the predominant purpose in the dispute; and that, since the risk to jobs did not on the available evidence appear to be the major factor in the dispute, it appeared unlikely that the union would be able to establish that there was a trade dispute between B.T. and its employees or that their defence under section 13(1) of the Act of 1974 as amended would succeed at the trial (post, pp. 939B–C, 942A, F, 943D–E, 944G–H, 945E, G–H, 950C, 951C–D, 952F, 955B–C, D).

British Broadcasting Corporation v. Hearn [1977] 1 W.L.R. 1004, C.A. and dicta of Lord Diplock in *Dupont Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 157–158, H.L.(E.) applied.

General Aviation Services (U.K.) Ltd. v. TGWU [1975] I.C.R. 276 C.A.; *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294, H.L.(E.); *Health Computing Ltd. v. Meek* [1981] I.C.R. 24 and *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, H.L.(E.) considered

Per Dillon L.J. It is the state of mind of the members of the union which the court has to consider in assessing for the purposes of section 17(2) of the Act of 1974 as amended whether there is a trade dispute (post, p. 960A–B).

(2) That, since the judge had misdirected himself on the construction of the amendment to section 29(1) of the Act of 1974 by section 18 of the Employment Act 1982 and relevant additional evidence had been produced, the court was required to exercise its own discretion as to whether interlocutory injunctions should be granted; and that, since M. had shown that there was a serious question to be tried and that it had a real prospect of succeeding in its claim at the trial in which case it would not be adequately compensated by damages whereas if the union succeeded at the trial the union would be adequately compensated, the balance of convenience lay in protecting M. pending the trial of the action and interlocutory injunctions should be granted (post, pp. 946A, B–E, 947C, 953A–B, 955H–956A, 961C–H).

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, H.L.(E.) applied.

Decision of Mervyn Davies J. reversed.

The following cases are referred to in the judgments in the Court of Appeal:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

British Broadcasting Corporation v. Hearn [1977] 1 W.L.R. 1004; [1977] I.C.R. 685; [1978] 1 All E.R. 111, C.A.

Dupont Steels Ltd. v. Sirs [1980] 1 W.L.R. 142; [1980] I.C.R. 161; [1980] 1 All E.R. 529, C.A. and H.L.(E.)

Garland v. British Rail Engineering Ltd. [1982] 2 W.L.R. 918; [1982] I.C.R. 420; [1982] 2 All E.R. 402, H.L.(E.)

General Aviation Services (U.K.) Ltd. v. TGWU [1975] I.C.R. 276, C.A.

Mercury Ltd. v. Scott-Garner (C.A.)**[1983]**

- Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] I.C.R. 114; [1982] 1 All E.R. 1042, C.A. and H.L.(E.)
Health Computing Ltd. v. Meek [1981] I.C.R. 24.
N.W.L. Ltd. v. Woods [1979] 1 W.L.R. 1294; [1979] I.C.R. 867; [1979] 3 All E.R. 614, H.L.(E.)
Roberts v. Cleveland Area Health Authority [1979] 1 W.L.R. 754; [1979] I.C.R. 558; [1979] 2 All E.R. 1163, C.A.

The following additional cases were cited in argument in the Court of Appeal:

- Acrow (Automation) Ltd. v. Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676; [1971] 3 All E.R. 1175, C.A.
Associated Newspapers Group Ltd. v. Wade [1979] 1 W.L.R. 697; [1979] I.C.R. 664, C.A.
Corry (John) v. National Union of Vintners, Grocers and Allied Trades Assistants [1950] I.R. 315.
Express Newspapers Ltd. v. McShane [1980] A.C. 672; [1980] 2 W.L.R. 89; [1980] I.C.R. 42; [1980] 1 All E.R. 65, H.L.(E.)
Gouriet v. Union of Post Office Workers [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.)
Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173; [1981] 3 W.L.R. 33; [1981] 2 All E.R. 456, H.L.(E.)
Stratford (J.T.) & Son v. Lindley [1965] A.C. 269; [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102, H.L.(E.)
Torquay Hotel Co. Ltd. v. Cousins [1969] 2 Ch. 106; [1969] 2 W.L.R. 289; [1969] 1 All E.R. 522, C.A.

The following cases are referred to in the judgment of Mervyn Davies J.:

- American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)
British Broadcasting Corporation v. Hearn [1977] 1 W.L.R. 1004; [1977] I.C.R. 685; [1978] 1 All E.R. 111, C.A.
Duport Steels Ltd. v. Sirs [1980] 1 W.L.R. 142; [1980] I.C.R. 161; [1980] 1 All E.R. 529, C.A. and H.L.(E.)
Express Newspapers Ltd. v. McShane [1980] A.C. 672; [1980] 2 W.L.R. 89; [1980] I.C.R. 42; [1980] 1 All E.R. 65, H.L.(E.)
Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] I.C.R. 114; [1982] 1 All E.R. 1042, H.L.(E.)
Health Computing Ltd. v. Meek [1981] I.C.R. 24.
N.W.L. Ltd. v. Woods [1979] 1 W.L.R. 1294; [1979] I.C.R. 867; [1979] 3 All E.R. 614, H.L.(E.)

The following additional cases were cited in argument before Mervyn Davies J.:

- Associated Newspapers Group Ltd. v. Wade* [1979] 1 W.L.R. 697; [1979] I.C.R. 664, C.A.
Beetham v. Trinidad Cement Ltd. [1960] A.C. 132; [1960] 2 W.L.R. 77; [1960] 1 All E.R. 274, P.C.
Conway v. Wade [1909] A.C. 506, H.L.(E.)
General Aviation Services (U.K.) Ltd. v. TGWU [1974] I.C.R. 35, N.I.R.C.; [1975] I.C.R. 276, C.A.
Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173; [1981] 3 W.L.R. 33; [1981] 2 All E.R. 456, H.L.(E.)
Merkur Island Shipping Corporation v. Laughton [1983] 2 A.C. 570; [1983] 2 W.L.R. 778; [1983] I.C.R. 490; [1983] 2 All E.R. 189, H.L.(E.)
R.C.A. Corporation v. Pollard [1983] Ch. 135; [1982] 3 W.L.R. 1007; [1982] 3 All E.R. 771, C.A.
Star Sea Transport Corporation v. Slater [1979] 1 Lloyd's Rep. 26, C.A.

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Mercury Ltd. v. Scott-Garner (Ch.D.)

MOTION

A Until 1981 the Post Office had a monopoly in the operation of telecommunications within the United Kingdom but by the British Telecommunications Act 1981 a public corporation, British Telecommunications ("B.T."), was established to take over from the Post Office its telecommunications functions, and by section 12 of that Act B.T. was given the exclusive privilege of running telecommunications systems throughout the British Islands. The Post Office's property rights and liabilities were transferred to B.T. by section 10 of the Act. By section 15, power was given to the Secretary of State for Trade and Industry, or to B.T. acting with the Secretary of State's consent, to grant licences to run telecommunications systems. On February 22, 1982, the Secretary of State, in exercise of that power, granted a licence to Mercury Communications Ltd. ("Mercury"), a private company which had been incorporated on June 22, 1981. On November 5, 1982, an agreement was made between B.T. and Mercury providing for interconnection into each other's telecommunications systems. Proposals were laid before Parliament in the Telecommunications Bill 1983, on June 27, 1983, to abolish B.T.'s exclusive privilege of running telecommunications systems, and transfer all its property rights and liabilities to a private successor company, whose shares would be put on sale. The Bill also provided for the renewal of the licence already granted to Mercury, and that both B.T. and Mercury should be obliged to permit interconnection between each other's telecommunications systems. In June 1983 orders were given by B.T. to certain of its employees who were members of the Post Office Engineering Union ("the union") to effect a connection between Mercury's telecommunications system and that of B.T. The members of the union refused to obey those orders and were suspended.

E By a notice of motion dated October 5, 1983, Mercury sought against the union's general secretary, Bryan Stanley (sued on his own behalf and as representing all the national executive council of the union), and against the union itself, (1) an injunction restraining the defendants and each of them whether by themselves, their servants or agents or otherwise howsoever from (a) inducing and/or threatening to induce and/or procure a breach of the contractual relations between Mercury and B.T. whether by inducing and/or threatening to induce and/or procure breaches of contract of employment or by any other unlawful means howsoever, so as to cause loss, harm or damage to Mercury, (b) interfering with the business of Mercury; (2) an order requiring the union to rescind the resolution of the national executive council in March 1982 whereby a decision was taken to instruct members not to co-operate with Mercury, and to rescind any other subsequent resolution or resolutions of a like nature relating to Mercury; and (3) an order requiring the union to withdraw the restrictions issued in or about May 1982, and any other such instructions of a like nature whereby the resolution or resolutions were implemented, by communicating in writing with its members that the instructions were withdrawn. By amendment, on October 27, 1983, John Scott-Garner, president of the union and a member of its national executive council, was substituted as defendant Stanley, who was not in fact a member of the national executive of the union.

H The facts are stated in the judgment of Mervyn Davies J. and Sir John Donaldson M.R.

*Alexander Irvine Q.C., Richard Field and Patrick Elias for Mercury.
Christopher Carr Q.C. and Cherie Booth for the union.*

Cur. adv. vult.

October 21. MERVYN DAVIES J. read the following judgment. This is a motion for interlocutory relief in an action by Mercury Communications Ltd. ("Mercury") against Mr. Bryan Stanley and the Post Office Engineering Union the ("union"). Mr. Stanley is sued on his own behalf and as representing the members of the national executive council of the union. Mr. Stanley is the general secretary of the union but it turns out that he is not in fact a member of the national executive council. This fact emerged at the hearing and by consent of the defendants it was agreed that Mr. Scott-Garner, the union president and a member of the national executive council be made a defendant in place of Mr. Stanley.

The writ is dated October 5, 1983, and claims:

"(1) An injunction restraining the defendants and each of them whether by themselves, their servants or agents or otherwise howsoever from, (a) inducing and/or procuring and/or threatening to induce and/or procure a breach of the contractual relations between the plaintiffs and British Telecommunications whether by inducing and/or procuring and/or threatening to induce and/or procure breaches of contract of employment or by any other unlawful means howsoever, so as to cause loss, harm or damage to the plaintiffs (b) interfering with the business of the plaintiffs whether by interfering with existing contractual relations or otherwise, and whether by inducing and/or procuring and/or threatening to induce and/or procure breaches of contract of employment or by any other unlawful means howsoever so as to cause loss, harm or damage to the plaintiffs. (2) An order requiring the defendants to rescind the resolution of the executive council in or about March 1982 whereby a decision was taken to instruct union members not to co-operate with the plaintiffs, and to rescind any other subsequent resolution or resolutions of a like nature relating to the plaintiffs. (3) An order requiring the defendants to withdraw the restrictions issued in or about May 1982 and any other such instructions of a like nature whereby the said resolution or resolutions were implemented, by communicating in writing with their said members that the said instructions are withdrawn. (4) Damages. (5) Such further or other order as this honourable court deems fit. (6) Costs."

The notice of motion bears the same date as the writ and seeks interlocutory orders in the terms of items (1) to (3) that I have read.

The evidence in support of the motion is an affidavit by Mr. Derek Evans sworn on October 5, 1983. There are 13 exhibits to the affidavit. Then there is a second affidavit sworn by Mr. Evans on October 17, 1983, with two exhibits and an affidavit of Mr. S. A. Bailey sworn on October 17, 1983. These two later affidavits were not made available to the defendants before the first day of the hearing before me. The evidence filed on behalf of the defendants consists of three affidavits by Mr. Bryan Stanley, the one sworn on October 14, 1983, with three exhibits, the second sworn on the same date showing one exhibit, and the third is an affidavit now sworn which was read to me in draft. Mr. Stanley's first affidavit says that he had been shown Mr. Evans's affidavit sworn on October 5, 1983, together with its exhibits.

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A Mr. Evans is the chief executive of Mercury. Mercury is a private company incorporated on June 28, 1981. Its capital is now £1 million divided into 1,000,000 shares of £1 each. Its shareholders are as to 40 per cent. a subsidiary of Cable and Wireless P.L.C., as to 40 per cent. a subsidiary of British Petroleum P.L.C. and as to the remaining 20 per cent. a subsidiary of Barclays Merchant Bank Ltd. On February 22, 1982, the Secretary of State, in exercise of powers conferred on him by section 15(1) of the British Telecommunications Act 1981, granted to Cable and Wireless P.L.C. a licence to run a telecommunications system in the United Kingdom on terms that Mercury would act as Cable and Wireless's agent in running the system.

B On September 10, 1982, the Mercury shareholders entered into a joint venture agreement for the design, construction, operation and commercialisation of a system called "the Mercury telecommunications system." C The system was to be owned by the shareholders proportionately to their shareholdings in Mercury. By another agreement also dated September 10, 1982, the shareholders appointed Mercury their managing agent for the purpose of effecting the realisation of the Mercury telecommunications system. This second agreement, recites the licence in favour of Cable and Wireless dated February 22, 1982, that I have already mentioned. So in effect, as I understand, the Mercury shareholders were to own the Mercury system and Mercury was to be an agent of the shareholders to operate that system.

D The activities I have mentioned took place against a background of change in the law relating to telecommunications. Until 1981 the Post Office had a monopoly in the operation of telecommunications systems within the United Kingdom. By the British Telecommunications Act 1981 E the public corporation, British Telecommunications (B.T.), was established. B.T. took over from the Post Office its telecommunications functions. By section 10 there was transferred to B.T. the property rights and liabilities comprised in that part of the Post Office's undertaking concerned with the provision of telecommunications and data processing services. By section 12, B.T. was given the exclusive privilege of running F telecommunications throughout the British Islands. Then by section 15 of the Act, a section I have already referred to, there is provision for the grant of licences for the running of telecommunication systems. A licence is granted by the Secretary of State for Trade and Industry or by B.T. acting with the consent of the Secretary of State.

G Not only has there been this ending of the Post Office monopoly and transfer of functions to B.T., but also there has been before Parliament the Telecommunications Bill 1983. The Bill will be before a standing committee of the House of Commons on October 25 next. It is a formidable document of 188 pages. Among other things it is proposed to abolish B.T.'s exclusive privilege of running telecommunications systems, and to provide for the transfer of all B.T.'s property rights and liabilities to a successor company. There are financial arrangements respecting the successor company, and provision for the sale of its shares: see Part V of H the Bill. In other words, there is contemplated "privatisation"—as it is now called—of B.T. The Bill also requires that, as a condition of any licence granted to B.T. and Mercury—the Bill providing for the renewal of the current Mercury licence—both B.T. and Mercury will be obliged to permit interconnection of each other's telecommunications systems.

Reverting to the Act of 1981, and the documents executed pursuant to that Act that I have already mentioned, I am told that Mercury is at

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liberty to compete fully with B.T. in providing telecommunications services, subject to certain restrictions imposed by the licence dated February 22, 1982. In any event Mercury has embarked on establishing within the United Kingdom a digital communications network. In paragraph (9) of his first affidavit Mr. Evans says:

“... the network is primarily intended to offer a choice to business users of telecommunications for whom digital transmission is particularly suitable in facilitating high speed transfer of large volumes of data, for instance between computers, as well as carrying voice and video traffic. For trunk transmission between business centres, the network will be based primarily upon optical fibre cable laid alongside British Rail tracks; for local distribution of Mercury services to and from customers' premises within business centres, a mixture of cable and microwave radio facilities will be used, supplemented by interconnection with the B.T. network, details of which I will deal with later in this affidavit.”

There is an intention, as well, to provide international connections with use being made of communications satellites.

A new Mercury network within the United Kingdom requires a degree of interconnection between the Mercury and B.T. networks. On November 5, 1982, an agreement was made between B.T. and Mercury, providing for interconnection in various ways.

The position of the defendants in this situation is that they take objection to Mercury being allowed to use the B.T. network and to the proposals to privatise B.T. The defendant union has, I understand, about 130,000 members. The work of interconnection depends on the union members, in the course of their employment by B.T., helping or at any rate not obstructing that work. The union is anxious both to prevent further interconnection and to oppose the privatisation proposals. The union has been active in pursuing these objectives.

Mr. Evans referred to several documents which illustrate the union's activities. They are (i) The union journal for December 1982, in the course of an article referring to the interconnection agreement dated November 5, 1982, that I have already mentioned, which sets out a resolution of the national executive council of the union. It reads:

“The N.E.C. have resolved that it is the union's intention to instruct P.O.E.U. members not to connect any of the Project Mercury traffic through the public switched network and the interface of the international network.”

(ii) An extract from “Computer Weekly” dated May 6, 1982, which reports the general secretary of the union, Mr. Stanley, as saying that the national executive have decided to take any action necessary to oppose the connection of Mercury to B.T.'s network and any further liberalisation of telecommunications. (iii) An extract from “The Guardian,” dated May 6, 1982, which indicates that Mr. Stanley in April or May 1982 sent a circular to all branches of the union. Therein members were instructed not to make any connections for the time being between the public telephone cable system and the alternative network. Connection between the Mercury network and the international telecommunications network was also banned. (iv) The P.O.E.U. journal for October 1982 in which the deputy secretary of the union is reported as saying:

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"We have opposed Mercury from the first time it was suggested and we shall oppose it in the future, and any form of alternative network which is set up to compete with British Telecoms by selling services to third parties."

(v) A letter on March 31, 1983, in which Mr. Stanley wrote to "The Daily Telegraph." He said:

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"Sir. Your leader of March 28 referred to action being taken by the Post Office Engineering Union against the new private business telecommunications company, Mercury. I am sure you would agree that it is important for our view to be correctly stated in your newspaper. Mercury, on its own admission, is not going to provide any new service. It will dilute British Telecom's future profitability by competing on the most lucrative business routes currently available. Mercury is, therefore, an unnecessary duplication and waste of national resources. Although we remain firmly of the view that it will not be for the benefit of the community as a whole, competition is an established fact. We believe that British Telecom will compete and be effective against its rivals. However, we do object to the fact that British Telecom is being forced to give up its own telecommunications network for use by these rivals. This is the purpose of our industrial action against connecting Mercury to British Telecom's network. Mercury was created to establish an independent alternative network to British Telecom. Although we do not support this, we acknowledge the fact that it is going to happen. However, we do not intend to see Mercury exploiting the network which British Telecom has created over very many years, and which is based upon the work of our members, in order to do this. This is especially so as this exploitation will reduce British Telecom's business and hence the job opportunities for these members. No respectable business should be forced to hand over the use of its assets in this way, British Telecom included."

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There is then a paragraph that I need not read and the letter is signed: "Bryan Stanley, general secretary." (vi) Going back a little in time, there is then a document dated October 13, 1982, and headed, "Campaign against privatisation." This is a newsletter issued, as I understand, by a committee representing 250,000 B.T. trade union employees, including those employees who are members of P.O.E.U. The newsletter announces a meeting on October 15, 1982, at which the case against privatisation would be outlined, and a march from Tower Hill on October 20, 1982—"the day of action." The day of action was said to be only "the start of the campaign against privatisation." Some demonstrations followed and then on April 6, 1983, a series of selective strikes was launched in the London area. On April 5, 1983, Mr. Stanley wrote to Sir George Jefferson, who is the chairman of B.T., saying:

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"Further to my letter of March 31, 1983, I now write to let you know that as from today, Tuesday, April 5, 1983, the National Executive Council of the Post Office Engineering Union has instructed staff maintaining the Bank of England telecommunications installations and the staff employed in Whitehall Repair Services Centre, to withdraw their labour to further demonstrate the union's total opposition to the proposed privatisation of British Telecom. This action is in defence of the future of telecommunications in Britain and the jobs of the staff employed by British Telecom. The action would

cease immediately if the government were to withdraw their ill thought out proposals.”

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So one has a withdrawal of labour to show the union's opposition to privatisation. In fact the action mentioned in this letter dated April 5, 1983, was called off on May 12, 1983. This was in consequence of the announcement of a general election. It will be remembered that in the letter dated March 31, 1983, that I have referred to, Mr. Stanley states that the union's industrial action was against interconnection. So it appears that industrial action was contemplated both against further interconnection and further privatisation. Mr. Evans states in paragraph 15 of his affidavit that on June 22, 1983, B.T. management effected some interconnection between B.T.'s and Mercury's systems. Mr. Evans goes on:

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“In addition B.T. suspended certain workers who had refused to obey instructions to effect the connection. Following this action the national executive council of the union decided on a meeting on June 23, 1983, to take selective strike action in retaliation against B.T. management because of latter's action in carrying out work which union members had refused to do.”

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On July 27, 1983, there was a special meeting of the national executive council. It was decided to escalate industrial action against Mercury by going against the Mercury shareholders, that is, Cable and Wireless, B.T. and Barclays Bank. Action is apparently determined by a committee of the general purposes committee of the union called the industrial strategy sub-committee. The action then determined is set out in a bulletin dated August 15, 1983. I need not read it all. It includes the statement:

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“It is the N.E.C.'s intention to carefully monitor and develop the industrial action and to ensure that our policy of no interconnection for Mercury is successful.”

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I now come to September 18, 1983. On this date there was a special conference of the union. The purpose was to discuss privatisation. It was resolved to set up opposition to privatisation by steps including selective industrial action. Mr. Evans referred to a report in the “Financial Times” of October 4, 1983, and, as well, in his second affidavit he was able to give some more information about this special conference. He produced a copy of the report which the national executive council presented to the conference. The chairman in the conference agenda states that the subject matter of the conference was privatisation. The report is headed, “Privatisation.” It is in three sections:

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“Section A—The situation faced by the union. Section B—The union's response. Section C—The publicity campaign against privatisation. Section D—Telecommunications Bill.”

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Mr. Irvine for Mercury referred me to several paragraphs in this report. First, there is paragraph 23 which sets out “Proposition 42,” passed at the annual conference in June 1982. It reads:

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(23) Proposition 42. That in the event of British Telecom being privatised the P.O.E.U. will continue to oppose the principles of privatisation by the following programme. (a) To continue to use the whole spectrum of opposition, including industrial action against any private company, or individual speculator who attempts to connect to, or hive off any part of British Telecom for financial gain. (b) To

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A continue the fight for the return of British Telecom to public ownership, without compensation to those speculators who used the established resources of British Telecom for their own financial gain. (c) Upon the return of a Labour government, seek the removal of national management whose connivance with the Tory government was a betrayal of B.T. staff and greatly enhanced the chances of the privatisation of B.T.”

B The report also contains these paragraphs:

C (24) In summary, these propositions instruct the national executive council that, in order to safeguard our industry, jobs and working conditions the union continues to oppose the government's privatisation policies using a campaign of industrial action against financial and business institutions and any other bodies seeking to make financial gain from the privatisation of British Telecom. . . (31) The national executive council will seek to carry through a flexible campaign that will be capable of meeting the developing nature of the opposition to our policies. Having re-examined all the actions undertaken so far by the union against privatisation, the national executive council has set out the following strategy to achieve the objectives above: (i) To re-invigorate and step up the publicity campaign against the privatisation of British Telecom with respect to the members, other B.T. trade unions, the public and the Labour movement. This is covered in paragraphs 33 to 37 of this report. (ii) To develop forms of industrial action in pursuit of these objectives. This is covered in paragraphs 38 to 40 of this report. (iii) To press for co-ordination of action of—all B.T. unions through the British Telecoms Union Committee.—Other public sector unions confronting privatisation both directly and through the T.U.C. This is covered in paragraphs 34, 35 and 37 of this report. (iv) To pursue a vigorous parliamentary campaign using all means possible to defeat the proposals contained in the 1983 Telecommunications Bill. This is covered in paragraphs 41 to 49.”

F Then there is paragraph 32:

G “Timing. (32) The timing of the union campaign against privatisation will evolve over a number of months. It will be related to (i) developments surrounding the Mercury interconnect issue. (ii) the build up to, and the passage of, the Telecommunications Bill through Parliament. (iii) If the Bill is successful, the floatation of B.T. P.L.C. (iv) No major changes on the strategy of the anti-privatisation campaign will be taken without reference to conference.”

Finally, paragraph (38):

H “Industrial action. Project Mercury. (38) The union's policy to prevent any interconnection between Project Mercury and the B.T. network was endorsed by the 1982 conference of the union. Instructions were issued to branches at the beginning of 1983 that no member should undertake any work which would entail making a physical connection between the B.T. network and Mercury. Prior to annual conference in June, we were warned by the London north central area and London city branches that an instruction to carry out such connection was imminent. Area management eventually issued those instructions in the week commencing June 20. The

members involved loyally followed the union's policy and refused to carry out management's instructions and as a consequence, were suspended from duty. A few days later it was discovered that senior members of management had gone into a building in the north centre area where the work was being blacked and had carried out work proper to P.O.E.U. members in an attempt to undermine the action. Retaliatory action in the form of withdrawal of key groups of members in selected locations was therefore taken by the branches in the area, with the backing and authority of the national executive council, to make plain to management that we would not allow them to undermine our action. Where such members of management have been proven to be members of the Society of Telecommunications Executives, they have been subjected to disciplinary action by their organisation. At the time of preparing this report, the action on Mercury is confined to the Central London area, but reports received from a number of branches appear to indicate that instructions to provide connections for Mercury are imminent in a number of other parts of the country and it now seems almost certain that the dispute will widen in the very near future."

Mr. Irvine relied on the report and these paragraphs in particular, as showing that it cannot be said that the union is campaigning merely against the Telecommunications Bill. The union, he says, is opposed both to privatisation and liberalisation, i.e. allowing competition. As well, paragraph 32, it is said, makes clear that Mercury is part of the privatisation issue; so that the union activity is not in furtherance of a dispute with B.T., but rather one campaign embracing both opposition to Mercury and to privatisation. I am told that the whole of the national executive council report was accepted in principle although section C was subject to some amendment.

In his second affidavit, Mr. Evans brings up to date the position as respects the industrial action taken against the Mercury shareholders. In short, he says that no maintenance work was carried out at some of the principal premises of British Petroleum, Barclays Bank and Cable and Wireless from August 15, 1983, to October 11, 1983. Service was resumed on this latter date, a date subsequent to the issue of the writ.

These events, I understand, have not in any way reassured Mercury. It is feared that the union's intention is to prevent interconnection. The position is in general, so it is said, that on the orders of the union the employees of B.T. who are members of the union will refuse to co-operate with Mercury either by refusing to touch Mercury installations or by carrying out their duties to B.T. in so obstructive a fashion that Mercury's activities will be seriously hindered.

Mr. Evans gave evidence of the damage that is being done to Mercury by the union action. Potential customers are being deterred not only because they suppose that Mercury may not be able to function, but, even if it does function, that there may be retaliatory action against customers of Mercury. Mr. Bailey's affidavits amplifies this aspect of Mercury's case. He is the sales and marketing director of Mercury. In the course of his affidavit Mr. Bailey says:

"(7) The effect of the P.O.E.U. action against Mercury has had the most serious consequences. Actual orders taken so far have fallen several million pounds short of the targets which we realistically believed would have been achieved by this stage; and Mercury can ill

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A afford those consequences given the massive capital investment which
has been made. My overall assessment is that, as a result of the
P.O.E.U.'s action, Mercury has irretrievably lost orders worth about
£.5 million and £1.5 million per annum from customers who have
now gone elsewhere and a further £4 million per annum is directly in
jeopardy. The longer term loss stands to be much greater because, in
B the normal course of events, Mercury could reasonably expect sub-
stantial further orders from these 'lost' customers as new Mercury
services are introduced."

I now turn to Mr. Stanley's evidence. Mr. Stanley is, of course, the
general secretary of the union. He says he is authorised to make his
affidavit on behalf of the union and he makes it on his own behalf as a
defendant. In paragraph 6 of the affidavit Mr. Stanley says he wishes to
C state: "as clearly and as emphatically as I am able the purpose and object
which underlies the industrial action which my union is taking." It is then
explained in paragraph 9, that the reason why the union opposes the entry
of competing organisations into the market in which B.T. operates is the
risk of redundancy among union members. Mr. Stanley goes on, and I
will quote him at length:

D "(9) . . . Where, as in this case, the traditional monopoly of British
Telecommunications is being broken and the market opened up to
competition, it would be nothing less than astonishing if my members
were not extremely alarmed about the prospects for their future
employment which would result from entry in the market of a rival
organisation. (10) I therefore wish to state unequivocally and with all
E the emphasis at my command that the purpose and object of the
industrial action complained of by the plaintiffs is to prevent the risk
of job losses arising from the entry into the market of an unwelcome
competitor. (11) I have stated above the reason why my union and its
members do not welcome the opening up of the market to a
competitor organisation. However, we recognise that it is not within
F our power to prevent the enactment of legislation which does precisely
this. We may do our best to seek to persuade and to lobby by the
normal democratic processes. We may argue that competition would
be a bad thing in the national interest. And these are, indeed, steps
we have taken. But we recognise that, at the end of the day, if the
government is determined that the traditional monopoly of B.T. shall
be ended and if its policy commands parliamentary support, we are
G compelled to accept, with whatever degree of reluctance, the fact that
we cannot ensure the maintenance of the monopoly. (12) However,
in so far as the entry of a competitor organisation into the market is
to be facilitated by the use by this organisation of B.T.'s facilities, my
members are in a position to prevent those facilities being made
available to such a rival organisation. Of course, if a rival organisation
were to start to trade in the field of telecommunications and were to
H acquire or create its own facilities independently of those owned or
operated by B.T., we could not prevent this occurring. But so long
as any such competitor organisation depends upon being able to draw
upon facilities owned by B.T. and serviced and manned by my union's
members, they are in a position to prevent that organisation from
trading in the way it would wish. Similarly, by emphasising and
underlining that they will decline to co-operate with any such organ-
isation, my members are in a position to create a disincentive to any

potential future rival organisation which might be considering seeking to enter the market in the way the plaintiffs have done. (13) The industrial action which is currently taking place and which is directed against B.T. for agreeing to provide to the plaintiffs facilities represents an attempt by my union's members to do what lies within their power to prevent the risk of redundancies to which I referred above from arising. I should add that it is particularly galling to my union's members to be asked to assist the plaintiffs in connecting the plaintiffs to B.T.'s network. In effect, they are being asked to undertake duties the fulfilment of which will be the very act which puts their own jobs in jeopardy. This is a dimension of the situation which is plainly likely to be a sensitive one. However, the issue upon which the members of my union stand firm is that they do not support the creation of rival organisations which may put their own jobs at risk and they are prepared to refuse to interconnect the B.T. network which will bring this about. The reason for their action is quite clearly their fear for their jobs."

Mr. Stanley refers in paragraph (18) of his affidavit to Mr. Evans's assertion in paragraph (14) of the Evans affidavit that the union's action is aimed at Mercury and the government because of the union's intransigent opposition to government policy. This assertion, he says, is fanciful. He reiterates the aim of the industrial action is to protect members' jobs.

There is then a reply to Mr. Evans's assertion in paragraph 13(v) of the Evans affidavit that the union is really in dispute with Mercury and the government and not with B.T. at all. I must again quote at length from Mr. Stanley's affidavit:

"(21) The first of the two points made by Mr. Evans to which I referred above was his assertion that the union are really in dispute with Mercury and the government and not with B.T. This is a complete misconception on his part. The present dispute has certain unusual features. In 1981, both the union and the management of B.T. were opposed to liberalisation. The management of B.T. obviously appreciated that their own position might be deleteriously affected. There is now produced and shown to me marked 'B.S.2' a true copy of two press releases issued by Sir George Jefferson, the chairman of B.T., dated April 15, and July 2, 1981. These press releases indicate the nature of apprehensions felt at the senior levels of B.T. in 1981 concerning the policy of liberalisation. Needless to say, the anxieties of senior management were shared within union circles. At that stage, therefore, there was a similarity of thought and attitude on the part of management and union. There is also produced and shown to me marked 'B.S.3' a true copy of a letter dated July 22, 1981, which I sent to the branches of the union together with the two annexes. In the last paragraph of my letter I drew attention to the need to consider the implications of the government's proposals for the future security of our members' employment. I also drew attention to the final paragraph of annex B. My union is not opposed to private industry playing a part in telecommunications so long as this does not put at risk the operations of B.T. and hence the jobs of the union's members.

"(22) In due course, B.T. held discussions with the government and entered into the interconnection agreement with the plaintiffs referred to in the affidavit of Mr. Evans. It is not for me to say with

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A what degree of reluctance on the part of the senior management of
B.T. this might have been done. But the fact is that the criticism of
allowing alternative networks manifested by the press releases to
which I have referred above and which were issued in 1981 did not
win the day. In due course liberalisation became a reality and B.T.
have entered into an interconnection agreement with the plaintiffs. It
is over this that the union are in dispute with B.T. Whatever might
B have been the wish or preference of B.T. they have in fact allowed
a rival organisation to interconnect with its network. It is this fact
which puts them at odds with my union. The fact that many executives
of B.T. may nurture attitudes and opinions not dissimilar from those
of my members is beside the point. The action which B.T. is taking
is inconsistent with the desire of my members to retain the traditional
C monopoly over telecommunications facilities within B.T. Once B.T.
embarked upon a course of seeking to facilitate and implement
liberalisation, they embarked upon a course which could only lead to
a dispute between them and the union. This is in fact what has
occurred. The current position is that my members are being required
by the management of B.T. to carry out certain operations which will
involve connecting the plaintiffs with B.T.'s facilities. My members
D are not prepared to do that. Accordingly, they are not prepared to
carry out the instructions of management in that regard. There is,
accordingly, a dispute between my members and B.T. The cause of
this dispute lies in the fact that B.T. wish my members to take a step
which my members regard as putting their jobs at risk. To suggest
that there is no dispute between the union and B.T. or that the
dispute is 'really' with the government or the plaintiffs is quite wrong.
E The industrial action that is being taken is in pursuance of a dispute
with B.T. over whether members of the union should be required to
act in a way which they see as placing their jobs in jeopardy. The
subject matter of the dispute is the risk to jobs. The precise form that
risk takes is the connection of Mercury to B.T.'s network. The parties
to the dispute are B.T. and their employees, although the action of
F the employees is, of course, directed and co-ordinated by the union
acting on their behalf.

G "(23) While it is not easy to single out any particular moment in
time at which the similarity of posture between B.T. and the union
was replaced by a state of dispute, a number of significant meetings
took place between the senior management of B.T. and union
representatives. The proceedings of these meetings are confidential
and I am extremely reluctant to betray such confidences. Effective
industrial relations depend upon management and unions being able
to trust one another in confidential matters. I am anxious to respect
that confidence. However, I regard it as perfectly proper for me to
disclose the facts that show how the dispute developed. At a meeting
on September 14, 1981, with the chairman and senior management of
H B.T. I warned them that if interconnection between the private
network and B.T.'s network were allowed there would be serious
repercussions from the union. On December 21, 1981, at another
meeting with the chairman and senior management of B.T. I made
it clear that the union was totally opposed to interconnection with
Mercury. It was at this meeting that B.T. estimated that the loss of
revenue if Mercury were introduced would be in the range of £150
million to £600 million per annum. On January 19, 1983, at a meeting

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with senior management of B.T. I stated that a state of dispute between B.T. and their employees was developing. I said at that meeting that although the union had succeeded in persuading their members to co-operate in providing exchange lines for the plaintiffs, the interconnection of Mercury with the B.T.'s public switched network could be the point at which active staff resistance was encountered. This warning proved to be well-founded. The membership of the union employed by B.T. have declined to connect Mercury to the B.T. network.

"(24) The position between B.T. and the union is, therefore, that they have moved from their initial stance of a shared dislike of alternative networks. B.T.'s management is now attempting to effect liberalisation in the form of connecting Mercury to its network. Employees of B.T. are declining to participate in that work. B.T. and their employees are, in my respectful submission, therefore in a state of dispute. The basis of the dispute and the circumstance that has brought it about and which pervades it is the fear of job losses if Mercury are connected to the network."

I asked Mr. Carr, who appeared for the union, whether or not the union had informed B.T. that the union was in dispute with B.T. and was told that B.T. had not been expressly so informed.

Mr. Stanley's second affidavit merely exhibited 14 letters from branches of the union throughout England and Wales. The letters voiced the greatest anxiety about the effect of the changes and proposed changes that are taking place in the realm of telecommunications law in England.

Mr. Stanley's third (draft) affidavit did not appear until the second day of the hearing before me, when Mr. Irvine was already engaged on his submissions. In this third affidavit Mr. Stanley says that at the special conference on September 18, 1983, the union faced two separate issues, namely, (1) the question of the liberalisation of the telecommunications industry and in particular the Mercury competition and (2) privatisation. As to (1), while recognising that the battle against loss of monopoly was lost the union nevertheless continued to oppose interconnection. That is to say, as I understand, the union would not seek to stop Mercury operating a network that was not dependent upon any interconnection with the B.T. network. Mr. Stanley's third affidavit then goes on to deal with the discussion between B.T. and the union concerning interconnection. It will be remembered that the interconnection agreement is dated November 5, 1982. In paragraph 8 of the affidavit Mr. Stanley says that the chairman of B.T. was warned on January 19, 1983, of industrial action if any attempt was made to order union members to connect Mercury into the B.T. network. There followed a meeting on February 15, 1983. Mr. Stanley states that the attempt at that meeting to find an accommodation between B.T. and the union with regard to Mercury broke down. The union concluded that a confrontation with B.T. over Mercury was imminent. I was referred to a letter sent by the strategy committee to members of the national executive council. This letter deals separately with Mercury and privatisation. In the Mercury section of the letter the committee reported to the national executive council that it was agreed that London north central area branch be advised that the national executive council instruction not to connect Mercury to the public network be reaffirmed. In the privatisation section of the letter it is requested that the strategy committee give consideration to the timing of the selective industrial

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A action against privatisation already agreed in principle by the national executive council in February. It is recommended that the action should begin on April 5, 1983, in London; that is the day of action that I have referred to. As I have said, the action did not go far because the general election intervened. Mr. Stanley goes on to say that it was not until June 10, 1983, that B.T. ordered interconnection. The union members so ordered refused to do the work and were sent home. It was then that B.T. management itself effected some interconnection. This is, of course, a cause of complaint for the union. On June 22, 1983, Mr. Norman, the assistant general secretary, wrote to Sir George Jefferson as follows:

C "As you are aware, the P.O.E.U. remains implacably opposed to any interconnection between the B.T. network and Project Mercury. It is our view that such interconnection is detrimental to the interests of our members and B.T. as a whole. We believe that Mercury is unnecessary and is an unfair competitor with no commitment to provide a public service. We see no reason why such an organisation should be allowed to steal our business. Members of the P.O.E.U. are therefore under instruction not to carry out any work which would lead to such an interconnection. I therefore wish to express, on behalf of my national executive council, the strongest possible objection to the use of management staff in the London north centre area to carry out work proper to P.O.E.U. members involving the provision of service to Mercury. Any action of this kind by management, which is clearly designed to undermine our union's continued opposition to Mercury, can only serve to inflame the situation and strengthen the union's resolve. Our executive is therefore left with no alternative but to consider what steps it should take to retaliate in response to what we regard is a total provocative act by management."

Sir George Jefferson replied on June 29, 1983, as follows:

F "Thank you for your letter of June 22. The question of interconnect between B.T.'s inland network and others, including Mercury, is an integral part of government policy for the liberalisation of telecommunications which was introduced under the 1981 Telecommunications Act; Mercury has been licensed under that Act. There was no doubt that government intended to implement that policy and we have taken the view that it was in the best interests of B.T. to make a proper commercial arrangement with Mercury. As you are aware, it is the government's policy to make arrangements for payments by licensed telecommunications operators, such as Mercury, who connect to B.T.'s network, to contribute appropriately through access charges to the costs, borne by B.T., of facilities of a public service nature. Under our present agreement with Mercury preliminary payments of this nature are already provided. It is not, therefore, correct to say that Mercury is an unfair competitor. Should it at any time appear to be so, we have the right to refer the facts to the Office of Fair Trading, or in due course to O.F.T.E.L. [Office of Telecommunications]. The board cannot accept that the P.O.E.U. have any justification for issuing instructions to its members to refuse to comply with the instructions of management in pursuance of a proper commercial contract between B.T. and Mercury, particularly when that contract actually brings business and work to B.T. as this does. Actions of this sort, already taken by some of your members, will damage the confidence of customers in the reliability of British Telecom as a

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supplier of telecommunications services, and it is possible as a result that both government and customers may themselves take action detrimental to B.T.'s ability to maintain employment in its work force. It is the board's clear view that this action by the union is contrary to the interests of job security for our employees. I therefore must ask your national executive council to withdraw the instruction to your members not to carry out any work which would lead to interconnection with the Mercury system, and to request your members to work normally."

Mr. Stanley's affidavit then stated in paragraph (14):

"In my respectful submission, it is plain beyond argument that by this stage a dispute had arisen between B.T. and the union. On the one hand the union had given instructions to its members that they should not interconnect Mercury. On the other hand, Sir George Jefferson had written to say that this instruction was given without any justification. It is also noteworthy that Sir George Jefferson ended his letter by requesting that the instruction issued by the union should be withdrawn. I contend that there was the clearest possible dispute between B.T. and its employees by that stage."

Mr. Stanley, of course, accepts that the union has campaigned and will campaign against privatisation, but he says that it is a matter of common sense that the union should try to co-ordinate its activities in relation to both disputes, i.e., as to interconnection and as to privatisation, albeit that the two questions raise two separate issues.

I have now mentioned the principal items of evidence before me. I bear in mind that it is not now my task to decide the final rights of the parties to this dispute, but merely to decide whether or not in all the circumstances it is appropriate to make some interlocutory order at the behest of Mercury or to dismiss the motion.

I am to be guided by the principles laid down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407, to be applied in the light of section 17(2) of the Trade Union and Labour Relations Act 1974 as amended by the Employment Protection Act 1975. Section 17(2) reads:

"It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13 . . . or 15 above, afford a defence to the action."

Section 17(2) is material in this case, because the defendants claim that the acts complained of by Mercury were acts done in contemplation or furtherance of a trade dispute.

The other statutory provisions which I have to have in mind are sections 13(1)(a) of the Act of 1974 (amended by section 3(1) of the Trade Union and Labour Relations (Amendment) Act 1976) and section 29(1) and section 29(6) of the Act of 1974 as amended by the Employment Act 1982. Section 13(1) reads:

"(1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—(a)

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that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; . . .”

Section 29(1) and section 29(6) as amended by section 18(1) of the Employment Act 1982 read:

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“(1) In this Act ‘trade dispute’ means a dispute [between workers and their employer] which [relates wholly or mainly to] one or more of the following, that is to say—(a) terms and conditions of employment, or the physical conditions in which any workers are required to work; (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; (c) allocation of work or the duties of employment as between workers or groups of workers; (d) matters of discipline; (e) the membership or non-membership of a trade union on the part of a worker; (f) facilities for officials of trade unions; and (g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures. . . . (6) In this section—‘employment’ includes any relationship whereby one person personally does work or performs services for another; [‘worker’, in relation to a dispute with an employer, means—(a) a worker employed by that employer; . . .”

E

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The statutory provisions must be read with in mind the cautionary words of Lord Diplock that are in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 156–158. Mercury’s case begins from the assertion that the defendants’ activities in preventing interconnection between the B.T. and Mercury networks are tortious at common law. Mr. Carr for the defendants accepted that assertion. There are, it is said, two torts involved, (1) indirectly inducing a breach of the intercommunication agreement by unlawful means and (2) interference with Mercury’s business by unlawful means. What the plaintiffs complain of is that the defendant union is inducing its members to break their contracts of employment. That would be “unlawful means” at common law for the purposes of the two torts. But section 13(1) of the Act of 1974 as amended confers immunity in inducing a breach of contract including a contract of employment when done in contemplation or furtherance of a trade dispute. It was common ground between Mr. Irvine and Mr. Carr that the effect of the decision in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 is that if the inducement is of the character now complained of it is not capable of constituting unlawful means as a necessary ingredient of either of the two torts complained of. So the basic question emerging is whether or not the defendants have acted in contemplation, etc., of a trade dispute. But, having so far agreed, Mr. Carr then parts company with Mr. Irvine. The defendants’ case was in outline this: (a) There is in existence a trade dispute between B.T. and its employees who are members of the defendant union. (b) The subject matter of the dispute is fear of job losses. (c) The action taken by B.T. employees in refusing to connect and the defendants’ action in advising this course is action taken in furtherance of that dispute. (d) Accordingly, the defendants are within the statutory immunity conferred by section 13(1)(e). In any event the court’s discretion having regard to section 17(2) ought to be exercised in the defendants’ favour.

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In light of Mr. Carr's concession I am justified in regarding the union's instructions to its members not to connect up the two networks as being actionable in tort at common law. But there is this possibility of the statutory defence, section 13(1)(a), saying that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only (a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance.

On this interlocutory application I have to have regard to the likelihood of the union succeeding at the trial in establishing a section 13 defence. That results from section 17(2).

So it comes to this: What is the likelihood of the union at the trial establishing that, in ordering its members not to connect up, it was acting in furtherance of a trade dispute as defined in section 29(1)? This question involves considering (a) whether or not there is, in the situation before me, a "trade dispute" within section 29(1) and if so, (b), whether or not the acts as shown in the evidence amount to acts done in contemplation, etc., of that dispute.

As to (a) the union's case was that, while they were opposed to and would continue to campaign against privatisation and liberalisation in the telecommunications industry, they and their members were, as well, in dispute with B.T. in consequence of B.T.'s orders in June 1983 to its employees to connect up with the Mercury network. B.T. said, "Connect." and the men said, "We will not." The reason for the refusal, so it was said, was that to connect to Mercury would lead to Mercury—and later other companies—doing work now done by B.T. so that connection was the first step towards possible job losses. So there was a dispute over B.T.'s co-operation with Mercury. On this analysis there is, it is said, a trade dispute within section 29(1). The dispute is between the engineers and their employer B.T. It relates wholly or mainly to termination of employment. No doubt it relates as well to a dislike of privatisation, but the concern expressed by members as shown in the documents in exhibit B.S.5 shows that the concern has in great measure been about job losses. The exhibit shows concern in letters from Bishops Stortford, Leeds, Purley and many other parts of the country. It appears, too, in Mr. Stanley's evidence: see paragraph (10) of his first affidavit, which I have already quoted.

I had supposed that fear of future job losses could not be prayed in aid at this early stage. One would suppose that some real threat of dismissal would have to be shown before it could be said that a dispute relates to termination of employment. The authorities show that this supposition may be wrong: see *Hadmor Productions v. Hamilton* [1983] 1 A.C. 191, *per* Lord Diplock at p. 226b-g, and *Health Computing Ltd. v. Meek* [1981] I.C.R. 24. So, if there is a dispute it may be a dispute relating to termination within section 29(1)(b). The phrase has been "is connected with" rather than, as now, "which relates," but I do not see in the circumstances of this case that it matters which phrase is taken.

There is then the consideration that B.T. was obliged to enter into the interconnection agreement with Mercury, so that B.T. has now no justification vis-à-vis Mercury for failing to afford the facilities to Mercury. There is then the further consideration that B.T. is obliged to do its duty under the statute and is powerless to negotiate with the union in any true fashion over the interconnection issue. I read some words of Lord Diplock in *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294, 1304-1305:

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A “My Lords, if a demand on an employer by the union is about terms
and conditions of employment the fact that it appears to the court to
be unreasonable because compliance with it is so difficult as to be
commercially impracticable or will bankrupt the employer or drive
him out of business, does not prevent its being a dispute connected
B with terms and conditions of employment. Immunity under section
13 is not forfeited by being stubborn or pig-headed. Neither, in my
view, does it matter that the demand is made and the dispute pursued
with more than one object in mind and that of those objects the
predominant one is not the improvement of the terms and conditions
C of employment of those workers to whom the demand relates. Even
if the predominant object were to bring down the fabric of the present
economic system by raising wages to unrealistic levels, or to drive
Asian seamen from the seas except when they serve in ships benefi-
cially owned by nationals of their own countries, this would not, in
my view, make it any less a dispute connected with terms and
conditions of employment and thus a trade dispute, if the actual
demand that is resisted by the employer is as to the terms and
conditions on which his workers are to be employed. The threat of
D industrial action if the demand is not met is nonetheless an act done
in furtherance of that trade dispute.”

The words spoken relate to a dispute over conditions of employment, but they may well apply to disputes over possible job losses: see also *per* Lord Diplock in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 161D.

Mr. Irvine submitted that there was no trade dispute within section 29(1). He said that the union's and the members' activities in refusing to connect up Mercury was not related to any dispute between B.T. and its employees. The refusal was part of a single campaign by the union against the government and Mercury. Any suggestion that there was one campaign against privatisation and another against liberalisation was, he said, pedantic and unrealistic. Certainly there are documents in the exhibits which support this view. A reading of the national executive council's
E report on the special conference, from which I have quoted, suggests that: see paragraphs 32 and 38. The engineer's conduct in refusing to connect was, it was said, “all of a piece” with action that is part of a single anti-government campaign calculated to cause the government to change its privatisation proposals. I have no doubt that some union members oppose with fervour the government's proposals for changes within the telecom-
G munications industry. But this was largely, if not wholly, a matter of words until B.T. in June 1983 ordered connection. Opposition then took the form of deeds in the form of disobedience to the orders of B.T. It seems to me that a particular dispute then crystallised. It was a dispute with B.T. as to whether or not B.T. installations should be made available to Mercury. It was a dispute which related (according to the authorities I have mentioned) wholly or mainly to termination of employment, i.e.
H job losses. Accordingly there is, in my view, in existence a trade dispute within section 29(1).

The plaintiffs referred to *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004. I do not think it assists them. That case shows that, under the industrial law prevailing in 1977, a union acting coercively may be without the protection of section 13(1). I infer that the protection does not extend to a dispute that is not related to anything that is itemised

in the current law, i.e. (a) to (g) of section 29(1). But, as I have said, the dispute here does seem to be related to section 29(1)(b).

The next question, there being a trade dispute, is whether or not the union, in ordering its members to disobey B.T. orders, was acting "in contemplation or furtherance of" the dispute. I was referred in this connection to *Express Newspapers Ltd. v. McShane* [1980] A.C. 672. On the facts before me I answer this question in the affirmative.

I now turn to section 17(2) of the Act of 1974 as amended. I see that in exercising my discretion whether or not to grant an injunction I am to have regard to the likelihood of the union succeeding at the trial in establishing a section 13(1) defence. At the trial when there is oral evidence and cross-examination there may emerge impressions that differ considerably from those arising from the affidavit evidence before me. However that may be, my view on the affidavit evidence is that the defendants are likely at the trial to establish a section 13(1) defence.

The discretion in the matter of interlocutory orders is governed by the principles of *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407. How section 17(2) fits into these principles is explained in *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294; see *per* Lord Diplock at p. 1305, *per* Lord Fraser of Tullybelton at p. 1308 and *per* Lord Scarman at p. 1314; see also *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 163, 166 and 171. Those cases were decided when unions themselves could not be sued. That is not now the position: see section 15 of the Employment Act 1982. Lord Diplock in the *N.W.L. Ltd.* case [1979] 1 W.L.R. 1294, 1306, took into account the character of the individual defendants before him in that case. While that is so, the principles laid down are clearly still for guidance. I have to bring into the *Cyanamid* "balance of convenience", the "additional element" of section 17(2). I note that the section 17(2) element is not an "overriding" or "paramount" factor: see the *N.W.L. Ltd.* case at p. 1307. I do not now set out any attempt to assess the financial possibilities that Lord Diplock refers to in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 408B-E. In a case of this kind it is impractical, if not impossible, to assess the financial consequences of making or not making an order. On the other hand, proceeding further with the *Cyanamid* principles, there is something to be said for Mr. Carr's submission that the status quo should remain. Mr. Irvine drew attention to Lord Fraser of Tullybelton's words in the *Duport* case [1980] 1 W.L.R. 142, 166, including the statement:

"If the court considers, on the available evidence, that the threatened act would probably have an immediate and devastating effect upon the applicant's person or property—for example by ruining plant which could not be replaced without large expenditure and long delay—the court ought to take that into account."

That consideration has weighed with me, but I do not think its weight goes so far as obliging me to make an order in this case.

Taking all the relevant considerations into account, including my view that the defendants are likely to succeed at the trial by virtue of section 13(1), I decline to make any order on the motion. I add that Mr. Irvine before me reserved a point. It was that he desired to contend that union members refusing to carry out B.T.'s instructions to connect are in breach of section 45 of the Telegraph Act 1863, and as such are, despite section

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A 13(1), resorting to "unlawful means" for the purposes of both the torts he complains of.

Motion dismissed.
Defendant's costs in cause.
Order for speedy trial.

B Solicitors: *Bird & Bird Lawford & Co.*

T. C. C. B.

C INTERLOCUTORY APPEAL from Mervyn Davies J.

D The plaintiffs, Mercury Communications Ltd. ("Mercury"), appealed against the order of Mervyn Davies J. on October 21, 1983, dismissing their application for interlocutory injunctions and orders against the defendants, John Scott-Garner (sued on his own behalf and as representing all the members of the national executive council of the Post Office Engineering Union ("the union") and the union.

E The grounds of appeal were that the judge (1) wrongly concluded upon the basis of the evidence before him that the union was likely to establish at trial that its conduct in bringing about a refusal to connect Mercury's telecommunications system to the B.T. system and/or in failing to provide normal subscriber services to Mercury was not actionable by virtue of section 13(1) Trades Union and Labour Relations Act 1974 (as amended); (2) ought to have held that the union was unlikely to establish its statutory immunity, alternatively that the union had not shown that it was likely to establish it, in particular because there were the following issues to be determined at trial: (a) whether the union's dispute was with Mercury and/or the government rather than B.T., so that there was no trade dispute "between workers and [B.T.]" as required by section 29 of the Act of 1974 as amended and/or; (b) whether any part of the union's object and purpose was the destruction of Mercury's business and/or the defeat of government intentions to "privatise" telecommunications so that the union's actions did not "relate wholly or mainly" to one or other of the subject matters of a trade dispute permitted by section 29 of the Act of 1974 as amended; (c) whether the union had been and/or was acting in contemplation or furtherance of a trade dispute between B.T. and their employees; (3) further or alternatively, the union's actions at least arguably amounted to an offence under section 45 of the Telegraph Act 1863, as amended, alternatively to counselling or procuring an offence under that provision; accordingly the union was unlikely to establish any statutory immunity because section 13(1) of the Act of 1974 as amended did not operate to protect it when the "unlawful means" used by the union in committing the torts alleged included breach of the criminal law; (4) even if the judge was correct in concluding that the union was likely to establish the statutory immunity at trial, he failed to exercise his discretion whether or not to grant an injunction upon proper principles, namely, those set out in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396; in particular the judge wrongly held that it was "impracticable if not

impossible" to assess the financial consequences of making or not making an order; (5) further or alternatively, the judge ought to have held that justice required the grant of an injunction because (i) the loss to Mercury would be great and presently unquantifiable without an injunction to protect them pending trial and/or, (ii) the union would suffer no loss and/or no jobs would be lost by B.T.'s employees as a consequence of an injunction being granted pending trial.

Robert Alexander Q.C., Alexander Irvine Q.C., Patrick Elias and Timothy Charlton for Mercury.

Christopher Carr Q.C. and Cherie Booth for the union.

Cur. adv. vult.

November 9. The following judgments were handed down.

SIR JOHN DONALDSON M.R. This is an appeal from a decision of Mervyn Davies J. refusing to order a halt to certain industrial action by the Post Office Engineering Union ("the union"). The appeal is both important and urgent. It is important because this is the first occasion upon which this court has been called upon to consider the changes made in the Trade Union and Labour Relations Act 1974 by the Employment Act 1982. Accordingly our decision may well affect other industrial disputes. It is urgent since the plaintiffs', Mercury's, claim—and it may well be the fact—that as a result of this industrial action they are suffering huge losses which imperil the future of their business.

The role of the court

Disputes of this nature give rise to strong, and indeed passionate, feelings on each side. This is understandable and it makes it all the more important that everyone should know where the courts stand. They are on neither side. They have an independent role, akin to that of a referee. It is for Parliament and not for the courts to make the rules which determine what action is and what is not permissible in the course of an industrial dispute. It is for the courts, and not for Parliament, to interpret those rules and to uphold the freedom of both sides to take whatever action they consider appropriate within those rules, whilst restraining both sides from taking action which, however appropriate it might otherwise be, is outside those rules. In a word, Parliament makes the law and is solely responsible for what the law is. The duty of the courts is neither to make nor to alter nor to pass judgment on the law. Their duty is simply to apply it as they understand it. Mervyn Davies J. approached his task upon this basis and this court will do the same.

The background to the dispute

For many years the Post Office enjoyed a monopoly in the operation of telecommunications systems within the United Kingdom. Then, in 1981, Parliament passed the British Telecommunications Act. This established British Telecommunications ("B.T.") and transferred to it the telecommunications business of the Post Office. It also empowered the Secretary of State to license rival telecommunications systems. This latter provision met with very strong disapproval from the union and many of its members, the vast majority of whom are employed by B.T. It was probably also

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A unwelcome to the management of B.T. However, neither the union nor B.T. were or are in a position to prevent the Secretary of State issuing such licences and on February 22, 1982, he issued a licence the effect of which was to authorise Mercury to establish a telecommunications system within the United Kingdom on the terms set out in the licence.

B The process of licensing competitors of B.T. and thereby eroding its monopoly is known in the industry as "liberalisation". This is to be contrasted with the process of altering the nationalised status of B.T. by converting it into a public limited company and issuing its shares to the public. The latter process is known as "privatisation". The machinery for liberalisation already exists in the shape of the British Telecommunications Act 1981. That for privatisation is contained in the Telecommunications Bill at present before Parliament. Whether and when and in what form this Bill will become law must be a matter for speculation by others than the courts, but the existence of the Bill and the union's attitude towards it are part of the background to this appeal.

C The effective operation of the Mercury system requires a degree of interconnection with the B.T. system, if B.T. subscribers are to be able to communicate with Mercury subscribers and vice versa. It also requires connection with what is described as the "interface" of the international system, this (United Kingdom) interface being at present part of the B.T. system. Such a right and duty of interconnection is really inherent in the grant of the licence to Mercury, but was formalised in an interconnection agreement made between B.T. and Mercury on November 5, 1982. The duration of the agreement is the subject of a somewhat complicated clause, but, unless replaced by another similar agreement, it will last until November 1997.

E The union is opposed to liberalisation in general and the grant of a licence to Mercury and the setting up of the Mercury communications system in particular. It is also opposed to privatisation. It has pursued its policy of opposition by argument and by industrial action. The first industrial action took place in March 1982, when the union's national executive committee resolved to instruct the membership not to connect Project Mercury to the B.T. system. This was followed by a "Day of Action" in October 1982 and a series of selective strikes in April 1983. Thus far B.T. had not in fact required their employees to connect the two systems and this phase, with which we are not directly concerned, ended in May 1983 when the general election campaign began and the strike action was called off.

G The second phase, with which we are directly concerned, began on June 10, 1983, when B.T. ordered certain employees to interconnect the two systems. The union replied with a call to action in the form of a letter to branches and an "Industrial Action Bulletin", both dated June 20, 1983. B.T. management replied by themselves effecting some interconnection. The union thereupon instructed its members to "black" Mercury shareholders and B.T. services at Mercury's own premises. This was followed in September by a threat to take industrial action against any customers of Mercury.

H The writ in the present proceedings was issued on October 5, 1983, and it appears that the industrial action against the shareholders of Mercury and the threat of action against Mercury subscribers has been lifted, at least pending the outcome of the present interlocutory proceedings.

The issues

It is important to remember that what Mervyn Davies J. had to decide, and what this court has to decide, is what orders, if any, should be made pending the trial of the action. Furthermore it appears that, contrary to the usual situation, there will be a full trial of the action and matters will not rest with the grant or refusal of an interlocutory order. It follows from the interim nature of the proceedings that it is no part of our function to reach any definitive decision upon the issues between the parties. We have to apply the well known principles enshrined in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, modified to accommodate the special provisions of section 17(2) of the Trade Union and Labour Relations Act 1974. That subsection requires the court to

“have regard to the likelihood of [the defendant’s] succeeding at the trial of the action in establishing the matter or matters which would, under any provisions of section 13 . . . above, afford a defence to the action.”

But I stress that we are concerned with degrees of likelihood, not with whether the defendants will undoubtedly succeed.

Immunity

It is common ground that, for the purposes of these proceedings, we can assume that there is a serious issue to be tried as to whether the union have committed the torts of inducing breach of contract and interference with business by unlawful means. It follows that we can proceed to examine the only defence which is relevant at this stage, namely, that under section 13(1) of the Act of 1974, as amended by section 3(2) of the Trade union and Labour Relations (Amendment) Act 1976. If we were of opinion that that defence was *prima facie* likely to succeed, we should then have to consider a separate argument by Mercury based upon section 45 of the Telegraph Act 1863. This latter point was reserved before Mervyn Davies J. and I will return to it hereafter.

Section 13(1) of the Act of 1974, as amended, is in the following terms:

“Acts in contemplation or furtherance of trade disputes.”

“13(1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—
(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or to interfere with its performance.”

The essence of this defence is that the acts complained of shall have been done in contemplation or furtherance of a trade dispute. Clearly the first stage in considering this defence is to concentrate on whether the defendants are likely to establish that there was a trade dispute as defined.

“Trade dispute” defined

“Trade dispute” is defined by section 29(1) of the Act of 1974, as amended by section 18 of the Employment Act 1982. Prior to the amendment it read:

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"In this Act 'trade dispute' means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following, that is to say— . . ."

and then various subject matters of disputes are set out. For present purposes we are only concerned with "termination of employment." As amended, section 29(1) reads:

"In this Act 'trade dispute' means a dispute between workers and their employer which relates wholly or mainly to one or more of the following, that is to say— . . ."

It will be seen that this revision considerably narrows the scope of "trade dispute." Disputes between workers and workers—demarcation disputes—no longer qualify. Nor do disputes between workers and an employer, unless the employer is *their* employer. Finally it is no longer sufficient that the dispute should be "connected with" one of the specified subject matters. It now has to "relate wholly or mainly to" that subject matter.

Was there a trade dispute?

This is a mixed question of fact and law, but primarily one of fact. Mervyn Davies J. in his very full and careful judgment has set out most of the relevant evidence adduced before him. I see no advantage in reproducing the relevant parts of his judgment and content myself with saying that his judgment and this judgment must be read together. Before us the evidence was supplemented by two further affidavits from Mr. Stanley, the general secretary of the union. They were his fourth and fifth affidavits. Mercury also filed an affidavit by their company secretary, Mr. R. de L. Holmes.

In essence Mr. Stanley's fourth affidavit states that at a meeting in February 1983 between B.T. and the union, it was made clear to B.T. that if management gave any instruction to interconnect with the Mercury system "conflict" would result. This is relevant to an inquiry by the judge as to whether the union had ever informed B.T. that it was "in dispute" and the answer which he was given, namely, that B.T. was never expressly so informed. Mr. Stanley's answer is that under the accepted procedures operating in the industry, there was no provision for a formal declaration of "dispute" and that the equivalent situation had been reached by February 1983. I wholly accept this evidence.

Mr. Holmes' evidence was rather more important and startling. Those who have referred to the judgment of Mervyn Davies J. will be aware that the union's case, supported by Mr. Stanley's evidence, was that, and I quote from paragraph 22 of his first affidavit which is set out in the judgment, ante, p. 927A-F:

"In due course liberalisation became a reality and B.T. have entered into an interconnection agreement with the plaintiffs. It is over this that the union are in dispute with B.T. Whatever might have been the wish or preference of B.T. they have in fact allowed a rival organisation to interconnect with its network. It is this fact which puts them at odds with my union. The fact that many executives of B.T. may nurture attitudes and opinions not dissimilar from those of my members is beside the point. The action which B.T. is taking is inconsistent with the desire of my members to retain the traditional monopoly over telecommunications facilities within B.T. Once B.T.

embarked upon a course of seeking to facilitate and implement liberalisation, they embarked upon a course which could only lead to a dispute between them and the union. This is in fact what has occurred. The current position is that my members are being required by the management of B.T. to carry out certain operations which will involve connecting the plaintiffs with B.T.'s facilities. My members are not prepared to do that. Accordingly, they are not prepared to carry out the instructions of management in that regard. There is, accordingly, a dispute between my members and B.T. The cause of this dispute lies in the fact that B.T. wish my members to take a step which my members regard as putting their jobs at risk. To suggest that there is no dispute between the union and B.T. or that the dispute is 'really' with the government or the plaintiffs is quite wrong. The industrial action that is being taken is in pursuance of a dispute with B.T. over whether members of the union should be required to act in a way which they see as placing their jobs in jeopardy. The subject matter of the dispute is the risk of jobs. The precise form that risk takes is the connection of Mercury to B.T.'s network. The parties to the dispute are B.T. and their employees, although the action of the employees is, of course, directed and co-ordinated by the union acting on their behalf."

Mr. Holmes makes two comments. The first is that it is surprising that the union should be so apprehensive as to the effect of the arrival of Mercury upon the job prospects of the union members, when the terms of the licence restrict Mercury to a gross turnover not exceeding 3 per cent. of the gross turnover of B.T. The second is that if job security was at the root of any dispute, it is more than a little surprising that no one ever mentioned the existence of a formal Job Security Agreement between B.T. and the union which was executed in September 1980. This had come to the notice of Mercury on October 27, nearly a week after judgment had been given by Mervyn Davies J., by the pure chance that they heard the chairman of B.T. refer to it in the course of a radio interview. That Job Security Agreement, which has now been produced, provides as follows:

"3. The Post Office and the P.O.E.U. accept the following principles as being central to the operation of this agreement.

"3.1 In keeping with the spirit of the agreement and to ensure its full and effective implementation the union and the Post Office will continue the longstanding policy of free and flexible co-operation based on consultation and negotiation at all appropriate levels.

"3.2 The parties accept that retraining, and/or reasonable relocation, and/or redeployment should continue and are necessary requirements in order to maintain job security.

"3.3 The provisions of this agreement are binding in all negotiations covered by it.

"4. Given adherence to the provisions and obligations of this agreement the Post Office undertakes that no one covered by this agreement will be compelled to leave its service on redundancy grounds.

"5. In the event of a major manpower problem arising from causes outside the control of the Post Office which after the application of the terms of this agreement would still result in a manpower surplus, the Post Office Engineering Union acknowledges that the

A Post Office reserves the right to withdraw, after consulting the union, the undertaking given in paragraph 4 above and that there would be immediate national consultation about the further measures to be taken."

This was no casual agreement which could be forgotten or overlooked. It had been carefully negotiated over a period of months. It appears as a printed booklet, which presumably had a wide circulation, and the agreement with its appendices and notes of guidance runs to 60 pages.

B Mr. Stanley in his fifth affidavit stated that the issues of liberalisation and privatisation had not emerged when this Job Security Agreement was negotiated and that it contemplated only technological change. Accordingly he had never appreciated its relevance. He had no doubt that there was a

C "strong and widespread belief amongst my members that the Job Security Agreement will not protect their jobs if Mercury succeeds in creaming off the most profitable parts of B.T.'s business traffic."

Mr. Stanley went on to suggest that if, as a result of the advent of Mercury, B.T. found themselves to be overmanned, they would claim to invoke the right to withdraw from the agreement, which is contained in paragraph 5, upon the ground that a major manpower problem had arisen from causes outside its control.

D The evidence proves beyond doubt that there were major disagreements between the union and the government about its policy of liberalisation and privatisation and its action in licensing Mercury, between the union and Mercury about its attempt to set up a competing telecommunications system and between the union and B.T. about its decision to enter into a long term interconnection agreement and its instruction to employees to interconnect the B.T. and Mercury systems. However Mr. Alexander, for Mercury, submits that there is no "dispute" between B.T. and the union. The importance of this submission lies in the fact that under the amended law only a dispute between B.T. and its employees can constitute a trade dispute and attract immunity for the industrial action being taken.

E On the face of it, this is a somewhat startling proposition. However, on examination, there is something to be said for it. The argument goes like this. If you have a true trade dispute between workers and their employers, a common form of industrial action is to picket the entrance of their place of work. If suppliers wish to deliver goods and are turned away, there can fairly be said to be a disagreement between the suppliers and the union about whether the supplies should be delivered, but there is no "dispute" between them. A dispute, so the argument goes, has to be what might be described as a primary disagreement capable of being resolved by negotiation and, if resolved, ending all matters in dispute. Workers or employers have to be seeking action or inaction or a change of action on the part of the other and this must be the purpose of the industrial action. To be a trade dispute there must be a "purposive dispute." By contrast, a disagreement which is not a purposive dispute as between the immediate parties, but is purely an appendage to a dispute between different parties, is not itself a separate dispute.

H Whilst I would accept that it may be possible to have what might be described as "a satellite disagreement" which does not constitute a "dispute" between the parties to the disagreement, but is part of a dispute

between one of those parties and a third party. I do not think that it is in the least likely that this will be held to be the case here. The likelihood, approaching certainty, is that it will be held that there is a dispute between B.T. and some or all of its employees who are members of the union. Mervyn Davies J. so held and I agree with him.

Assuming that there is such a dispute, the next question is whether it relates wholly or mainly to one or more of the matters specified in section 29(1) of the Act of 1974. For present purposes the only such matter which is claimed to be relevant is "termination of employment."

The judge dealt with this aspect his judgment, ante, p. 932F-G. [His Lordship read the passage and continued:] I hope that I do him no injustice when I say that I do not understand how the authorities which he mentioned enabled him to jump from a finding that the dispute was as to whether B.T. installations should be made available to Mercury to a finding that it was a dispute which related wholly or mainly to termination of employment. He had mentioned four authorities. *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 and *Health Computing Ltd. v. Meek* [1981] 1 C.R. 24, both of which indicate that future termination of employment is as much within section 29(1) as an immediate termination. They do not however assist at all in deciding to what any particular dispute wholly or mainly relates. Still less do they suggest that it is immaterial whether one uses the phrase "is connected with" or "which relates." Indeed *Hadmor* decides in terms that the latter phrase, when coupled with "wholly or mainly," is narrower. *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294 decides that under the old law, where the test was "in connection with," it did not matter that the dispute was being pursued with more than one object in mind and that the predominant one was outside the section if the other was within it. The position is manifestly different under the amended section. *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142 is quite immaterial to a determination of whether there is a trade dispute, relating as it does to whether action is taken in furtherance of an established trade dispute and, if there are two such disputes, how one decides which dispute is being furthered.

Thinking, as I do, that the judge misdirected himself, I must now ask myself whether on the evidence presently available, which is more extensive than that available to the judge, the dispute between the union and its members on the one hand and B.T. on the other is likely to be held to be a trade dispute. In so doing, I have to follow the instructions given to me by Parliament as expressed by the words used in the statute: see *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 158, *per* Lord Diplock.

The starting point must be the meaning of the phrase "wholly or mainly relating to" the matters specified in section 29(1). As I have already mentioned, prior to the coming into force of the Employment Act 1982, section 29(1) was wider in that a dispute could be a trade dispute if it was only "connected with" the specified subject matters and in that trade disputes were not confined to workers and *their* employer. Consistently with this amendment, the word "worker" has also been redefined (see section 18(6) of the Act of 1982) by section 29(6) as meaning, in relation to a dispute with an employer:

"(a) a worker employed by that employer; or (b) a person who has ceased to be employed by that employer where—(i) his employment was terminated in connection with the dispute; or (ii) the termination

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A of his employment was one of the circumstances giving rise to the dispute."

This latter amendment narrows the specified subject matters wherever the word "worker" appears, e.g. "allocation of work or the duties of employment as between workers or groups of workers." The dispute must therefore not only be between workers and their employer, but must relate wholly or mainly to matters which are specific to that employment. Thus there can be no trade dispute between employer A and his workers relating to the pay and conditions of workers employed by employer B.

B In context the phrase "wholly or mainly relates to" directs attention to what the dispute is about and, if it is about more than one matter, what it is mainly about. What it does *not* direct attention to is the reason why the parties are in dispute about this matter. Thus a situation can arise in which company A's workers will accept a particular rate of pay and company B's workers will not, the difference being that those who work for company B know that for one reason or another they will become redundant within the next year or so and think, perhaps not unreasonably, that they have little to lose and something to gain in terms of immediate remuneration and in the rate of redundancy payment by pressing for higher wages meanwhile. A contributory cause of the dispute and possibly the main cause is the belief that redundancy ("termination . . . of employment" in the words of the section) is just around the corner, but the dispute is not about that or, if it be preferred, relates wholly or mainly to pay ("terms and conditions of employment").

E The view that the words of the statute "relating to" mean "about" (in the sense of course of "concerning" rather than "approximately") is supported by a decision of this court in *Roberts v. Cleveland Area Health Authority* [1979] 1 W.L.R. 754 and by the decision of the House of Lords in *Garland v. British Rail Engineering Ltd.* [1982] 2 W.L.R. 918, although in each case the words were used in a different context. *Garland's* case also draws attention to the fact that "relating to" or "about" can receive a broader or a narrower application according to context—i.e. "broadly speaking about" or "actually about" to use popular rather than legislative language. In the context of an admittedly restrictive amendment to the statute, I incline to the view that Parliament intended a relatively restrictive meaning to be given to the phrase, but this probably does not matter since the words "wholly or mainly" themselves indicate and provide a degree of restriction.

G In this context we were referred to *General Aviation Services (U.K.) Ltd. v. TGWU* [1975] I.C.R. 276, but I have not been able to derive any assistance from that decision, since the legislative context was so different. In particular it was sufficient to establish in an industrial dispute that any employer and any workers should be in dispute about future job losses and that the respondent to the complaint of unfair industrial practice should, in furtherance of that dispute, have knowingly induced a breach of contract.

H For Mercury it was submitted that the dispute between B.T. and its employees was an example of coercive interference with the performance of the interconnection agreement between Mercury and B.T. and so wholly outside section 29 and we were referred to *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004. There is, it is true some resemblance. Lord Denning M.R. pictured the union in that case as telling the B.B.C. "Stop this televising by the Indian Ocean satellite, stop it

yourself. If you don't, we will ask our own people to stop it for you." This is not so very different, *mutatis mutandis*, from the present case where, according to Mr. Stanley's fourth affidavit, the union asked B.T. not to implement the interconnection agreement and told them that if any instruction was given to interconnect there would be conflict, i.e. the union would instruct its members to disobey the instructions. In neither case has there been the slightest suggestion that the terms and conditions of employment are such that an instruction to televise or to interconnect was not a proper instruction. In neither case has any attempt been made to request an alteration in the terms and conditions of employment which would make such an instruction improper. This is thus a possible conclusion and one which would negative the existence of a trade dispute.

However I think that the same result is reached by a different route. The most obvious way of finding out what a particular dispute is wholly or mainly about is to inquire what the men concerned—in this case primarily those who refuse to interconnect—said to management at the time. Unfortunately we have no evidence, but it is a fair inference from what we do know that they said that the interconnection was contrary to their union's instructions. This throws one back to what the dispute between the union and B.T. was wholly or mainly about. That was not, of course, a relevant dispute because the union is neither an employer nor a worker in this context, but the subject matter of the dispute between B.T. and its employees can legitimately be taken to be the same as that between the union and B.T.

What the union's dispute with B.T. is about is the subject matter of paragraph 22 of Mr. Stanley's first affidavit which I have already quoted:

"... B.T. have entered into an interconnection agreement with [Mercury]. It is over this that the union are in dispute with B.T. ... B.T. ... have ... allowed a rival organisation to interconnect with its network. It is this fact which puts them at odds with my union. ... The action which B.T. is taking is inconsistent with the desire of my members to retain the traditional monopoly over telecommunications facilities within B.T. Once B.T. embarked upon a course of seeking to facilitate and implement liberalisation, they embarked upon a course which can only lead to a dispute between them and the union."

Mr. Stanley goes on to say that the *cause* of the dispute is that B.T. wished his members to take a step which his members regarded as putting their jobs at risk (my emphasis) and a few sentences later this suffers a further change when he states that the subject matter of the dispute is the risk to jobs.

Well; which is the subject matter—facilitating and implementing liberalisation, agreeing to interconnect, ordering interconnection or the risk to jobs? Only the latter would enable the dispute to qualify as a trade dispute. The evidence has to be looked at as a whole, but I find it impossible to conclude on the evidence at present available that the risk to jobs was a major part of what the dispute was about. I say that because I find it inconceivable that if the dispute was wholly or mainly about jobs, the union would not have approached B.T. asking for a guarantee of job security or a strengthening of the Job Security Agreement. Yet nothing of the sort appears to have happened and the union did not even think that this agreement was relevant to the present proceedings. On the other hand there is massive evidence that the union was waging a campaign

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A against the political decisions to liberalise the industry and to privatise B.T. In this context one has but to refer to the documentation for the Special Union Conference held in September 1983 from which we learn that

B “The National Executive Council have set out the following objectives—(1) To seek the withdrawal of the 1983 Telecommunications Bill and the philosophy behind it. (2) Our intention is not to bring down the government but to defend the jobs and job opportunities, protect and enhance the conditions of service, pay and pensions of our members in both British Telecom and the Post Office. (3) To maintain the integrity, unity and strength of the union. (4) To prevent the breaking up of British Telecom and the Post Office. (5) To protect and enhance the services offered to the public. (6) To work for the return of a government committed to restore to public ownership without compensation any public sector industry or part thereof privatised by this government. In addition to restore the public monopoly over telecommunications and the postal service.”

D Lest it be thought that all this relates to privatisation rather than liberalisation, it is right to mention that a paragraph under the heading “Timing” is in the following terms:

“The timing of the union campaign against privatisation will evolve over a number of months. It will be related to: (1) Developments surrounding the Mercury interconnection issue. (2) The build-up to and the passage of the Telecommunications Bill through Parliament. (3) If the Bill is successful, the flotation of B.T.P.L.C.”

E The liberalisation and privatisation issues were thus interconnected as is indeed clear from much of the other documentation.

My conclusion on the evidence, provisional though it has to be, is reached without any doubt or hesitation. It is that it is most unlikely that the union will be able to establish that there was at any material time a trade dispute between B.T. and its employees.

F *Furtherance*

In order to make good the defence under section 13 of the Act of 1974 it is, of course, necessary for the industrial action complained of to have been taken in contemplation or furtherance of the trade dispute. This question does not arise if I am correct in concluding that there was no trade dispute.

G *Conclusion on the likelihood of the section 13 defence prevailing*

H For the reasons which I have given, I think it highly unlikely that the section 13 defence will prevail when the action is fully heard, but it is always possible that different evidence will by then be available to the court or that, as a result of cross-examination, the existing evidence will take on a different complexion.

Discretion

In considering whether this court should substitute its own view of how the discretion to grant interlocutory relief should be exercised for that of the judge, I have reminded myself of the guidance afforded by the speech of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983]

1 A.C. 191, 220. Having concluded that the judge misdirected himself and that additional evidence had been produced which was highly relevant to the issues of fact which he had to determine, it seems to me that this court is bound to exercise that discretion afresh.

I have also reminded myself of the later passage in Lord Diplock's speech at p. 223 on the interrelationship of section 17(2) of the Act of 1974 and the guidance given by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, 407. Proceeding by the appropriate stages, the questions and my answers are as follows:

- (i) Q. Has Mercury shown that there is a serious question to be tried?
A. Yes.
- (ii) Q. Has Mercury shown that it has a real prospect of succeeding in its claim for a permanent injunction at the trial?
A. Yes.
- (iii) Q. If Mercury succeeded, would it be adequately compensated by damages for the loss which it suffered as the result of the union being free to continue to take industrial action pending the trial?
A. No. Mercury is in a relatively frail condition as a newcomer to the field and has very large sums invested in the project. New customers cannot be attracted whilst industrial action is threatened and the losses will vastly exceed the maximum liability which can be imposed upon the union, namely £250,000 (see section 16 of the Employment Act 1982).
- (iv) Q. If the union were to succeed at the trial in establishing its defence under section 13 of the Act of 1974, would it be adequately compensated by an award under the cross-undertaking?
A. Yes. The union would suffer no loss since, on this hypothesis, the dispute is wholly or mainly about redundancy and there is no suggestion that a temporary cessation in the industrial action would cause or hasten any redundancy.
- (v) Q. Where does the balance of convenience lie?
A. It lies in protecting Mercury pending the trial of the action.

Section 45 of the Telegraph Act 1863

I mentioned earlier that Mercury also relies upon section 45 of the Telegraph Act 1863 (26 & 27 Vict. c.112). This provides, so far as is material:

"If any person in the employment of the company—. . . by any wilful or negligent act or omission prevents or delays the transmission or delivery of any message; . . . he shall for every such offence be liable to a penalty not exceeding £20."

This has been applied to persons in the employment of B.T. by paragraph 2(1)(a) of Schedule 3 to the British Telecommunications Act 1981.

The submission made on behalf of Mercury is that the employees of B.T. who refuse to maintain the B.T. installations of Mercury and its shareholders as part of the "blacking" and who refuse to interconnect the Mercury system with the B.T. system were guilty of offences against section 45. It is then submitted that the statutory prohibition contained in this section creates a public right which, exceptionally, is enforceable by particular members of the public who suffer damage as a result of the breach of the statutory prohibition.

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A With the agreement of both parties, we decided to defer hearing the union's answer to this submission. We did so because Mr. Carr, for the union, had had inadequate time in which to study it in detail and because a decision would be unnecessary if, having considered the arguments on the trade dispute defence, we concluded that an interim injunction should be ordered.

B If it ever becomes necessary to decide this point, the matter will be of the very greatest importance because, so far as I can see, if Mercury is right, the effect of section 45 is to impose far stricter limits on the industrial action which can be taken by the employees of B.T. than apply to most other workers. Indeed it might make most industrial action by them unlawful. However, not having heard the counter-arguments of the union, I am in no position to form any view and have formed no view as to the soundness of Mercury's arguments.

C For the reasons which I have given, I would allow the appeal.

D MAY L.J. The judge below and Sir John Donaldson M.R. have set out the facts of this case about which there is no dispute and have referred to the relevant parts of the evidence presently before the court about facts which are in dispute. I need not burden this judgment, therefore, with any repetition.

E At the start of his judgment Sir John Donaldson M.R. stated and explained the role of the court in relation to the issues between the parties in this, and indeed in all litigation. Not only do I respectfully agree with and reiterate what he has said but I also quote certain passages from the speech of Lord Diplock in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 157–158, to which we were referred by Mr. Carr in respectful submission about the approach which the court should adopt. Lord Diplock said:

F “My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates . . . the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities. . . . In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount. . . . So in relation to section 13(1) of the Acts of 1974 and 1976 . . . The legitimate questions for a judge in his role as interpreter of the enacted law are: ‘How has Parliament, by the words that it has used in the statute to express its intentions, defined the category of acts that are entitled to the immunity? Do the acts done in this particular case fall within that description?’”

H It must also be remembered that the present proceedings are interlocutory. Neither this court nor Mervyn Davies J. seeks or is able to express final decisions on the issues between the parties. Those will have to wait until the trial when witnesses will give oral evidence and be subject to cross-examination. Mercury's present applications are merely for interim

injunctions to last until trial: whether they are then continued, amended or rescinded will be a matter for the trial judge on the evidence that is adduced before him.

I shall have to analyse the nature and substance of the litigation in which this appeal is brought, against the relevant statutory provisions, a little later in this judgment. For the present it is sufficient for me to record that the union accept for present purposes that there is a serious issue to be tried as to whether they have committed the torts of inducing breach of contract and interference with business by unlawful means, within paragraph (a) or (b) of section 13(1) of the Trade Union and Labour Relations Act 1974, as amended by the Trade Union and Labour Relations (Amendment) Act 1976. They nevertheless submit that the acts complained of by Mercury and which are alleged to have constituted those torts were acts done in contemplation or furtherance of a trade dispute and that the union are therefore immune from liability pursuant to section 13(1) as amended. Mercury in their turn accept that if the acts complained of were done in contemplation or furtherance of a trade dispute, then the union did enjoy statutory immunity by virtue of that section so amended.

The general principles which should govern a court's exercise of its discretion whether or not to grant an interlocutory or interim injunction were of course laid down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, to which also I shall have to return later in this judgment. At this stage, however, it is necessary for me to set out the provisions of section 17(2) of the Act of 1974 as amended by the Employment Protection Act 1975:

“(2) It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14(2) or 15 above, afford a defence to the action.”

It was therefore for the judge below and is now for this court, subject to the question whether in the end we can or should interfere with the exercise of the former's discretion, to consider the likelihood of the union succeeding at the trial to establish what I shall hereafter refer to as the “section 13” or “trade dispute” defence.

Now this action has been brought by Mercury Communications Ltd. (Mercury) against Mr. Scott-Garner (by amendment) as the President and a member of the national executive council of the Post Office Engineering Union (the union) and the latter itself. The union may be so sued by virtue of section 15(2) of the Employment Act 1982 which, in so far as is material, is in these terms:

“Where proceedings in tort are brought against a trade union—(a) on a ground specified in paragraph (a) or (b) of section 13(1) of the 1974 Act; . . . then, for the purpose of determining in those proceedings whether the union is liable in respect of the act in question, that act shall be taken to have been done by the union if, but only if, it was authorised or endorsed by a responsible person.”

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A Whatever else may be in issue in this case, there is no doubt that all the acts of which complaint is made by Mercury were authorised or endorsed by a responsible person, as defined in later subsections of section 15 of the Act of 1982.

B Nevertheless it is I think important to bear in mind that it is acts of the union of which Mercury complain. These were instructions from its national executive council to its members, employees of British Telecommunications (B.T.), not to comply with their employers' instructions to interconnect Mercury and B.T. equipment and to refuse to comply with their employers' instructions, as and when given, to carry out maintenance and installation work on B.T.'s own telephone equipment and lines at and to Mercury's offices and at and to various buildings belonging to the shareholders of Mercury. The "blacking" of maintenance and installation work on B.T.'s own services to Mercury and its shareholders was lifted by C the union in the middle of October 1983. We were told by Mr. Carr that he was instructed that the union had no present intention of reimposing this blacking, but he could give no undertaking about it in so far as the future was concerned.

D As I have said, it is accepted by the union that there is a serious issue to be tried whether these acts of the union were tortious. Without referring to the relevant material in detail, because I think it unnecessary, in my opinion it shows that at the least it is very likely that unless the section 13 defence is made out the acts of the defendants will at the trial be held to have been wrongful.

I turn therefore to consider that defence. Section 13(1) as amended by section 3(2) of the Act of 1976 is in these terms:

E "(1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a F contract or to interfere with its performance."

Two questions then arise. First, was there in existence at the material time a relevant trade dispute? Secondly, were the acts of the union of which the plaintiffs complain done by the union in contemplation or furtherance of that trade dispute? For the meaning of "trade dispute" in the relevant legislation, I turn to section 29 of the Act of 1974 as amended G by section 18 of the Employment Act 1982. The subsections of section 29 with which we are concerned are subsections (1) and (6) which are in these terms:

H "(1) In this Act 'trade dispute' means a dispute [between workers and their employer] which [relates wholly or mainly] to one or more of the following, that is to say—(a) terms and conditions of employment, or the physical conditions in which any workers are required to work; (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; (c) allocation of work or the duties of employment as between workers or groups of workers; (d) matters of discipline; (e) the membership or non-membership of a trade union on the part of a worker; (f) facilities for officials of trade unions; and (g) machinery for negotiation or consultation, and other procedures, relating to any

of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures. . . . (6) . . . ['worker,' in relation to a dispute with an employer, means—(a) a worker employed by that employer; or (b) a person who has ceased to be employed by that employer where—(i) his employment was terminated in connection with the dispute; or (ii) the termination of his employment was one of the circumstances giving rise to the dispute.]"

Section 18 of the Act of 1982 makes it clear, first, that the amendments of section 29 of the Act of 1974 were intended to limit the ambit of what is a "trade dispute" to disputes only between workers and their own employer. Secondly, the words "relates wholly or mainly to" were substituted for the words "is connected with." In my opinion the words "trade dispute" in the relevant legislation now bear a substantially more restricted meaning than they did before December 1, 1982, when the amending section came into force.

In the instant case the dispute relied on by the union before the judge and before us was the one which it was contended existed between B.T. and its engineers when the latter complied with their union's instructions to black the interconnection of the Mercury and B.T. equipment, and the maintenance and installation work at Mercury's offices and the other shareholders' buildings, thus disobeying the lawful and reasonable instructions of their employer, B.T. Indeed on the facts of this case there was no other dispute upon which the union could rely.

Mr. Alexander nevertheless first argued that the disobedience by B.T.'s employees of their employer's instructions could not properly be described as a "trade dispute" at all. In the more usual industrial dispute between an employer and its employees, for instance, the union of which the employees are members organises pickets on the gates to the employer's premises and tries to prevent not only employees entering to do their work but also suppliers of goods or services who seek to deliver to those premises. Whether or not the pickets successfully deter the supplier's lorry, counsel contended that no one could say that their union was in dispute, or had a dispute with that supplier. The present case he suggested was the obverse of this example. Here the union's primary dispute is with Mercury and in furtherance of that dispute it is doing the equivalent of stopping suppliers of goods and services to Mercury. Thus there is no dispute, properly so called, between B.T. and the union, still less between B.T. and its employees.

In this connection he referred us to *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004 where the essential facts were that the union in that case threatened to instruct its members not to work on the transmission of the Cup Final by satellite to South Africa, to demonstrate its disapproval of apartheid, unless the B.B.C. agreed to its request not to broadcast the Cup Final to South Africa. It was held that there was no trade dispute because the difference of view between the B.B.C. and the union was not connected with the latter's terms and conditions of employment or any other of the matters listed in section 29(1) of the Act of 1974—which fell to be applied in its unamended form in that case. As Lord Denning M.R. said at p. 1011—of the union's activity—"It was coercive interference and nothing more."

A In the context of industrial relations, Mr. Alexander submitted that a
“dispute” must involve acts done by employees in disagreement with their
employer with the object of achieving something which they want from
the employer. Picking up a phrase which no doubt unwisely I proffered
in the course of argument, he argued that to have a dispute there must be
“purposive disagreement, not merely coercive interference.” In the instant
case the blacking undertaken by B.T.’s employees on the instructions of
B the union was merely coercive interference with B.T.’s business.

With all respect to Mr. Alexander’s argument, although I do not think
that it can be dismissed outright, on the material before us I think that it
is wrong and I do not think that when all the evidence is before the trial
judge it is likely to prove acceptable to him. In each of the three judgments
in *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004, there
are one or more references to the “dispute” between the union and the
C B.B.C. The case is merely authority for the conclusion that that dispute
was not a trade dispute within the legislation then in force. Almost ex
hypothesi there will always be at least an element of coercive interference
in any industrial dispute; in my opinion if one asked any reasonable man
in the street whether at the material times in the present case there was
a “dispute” between B.T. and its employees who were refusing to carry
D out the former’s instructions, his answer would almost certainly be in the
affirmative.

The next question that I must consider, therefore, is how likely is it
that at the trial of this action the union will be able to satisfy the judge
that the dispute between B.T. and its employees at the material times was
a “trade dispute” within the amended provisions of section 29(1). In my
E opinion the words “which relates wholly or mainly to” mean “is predom-
inantly about.” Next, of the various subject matters of potential trade
disputes listed in paragraphs (a) to (g) of section 29(1) the only relevant
one on the evidence, and the only one relied on by the union is
“termination . . . of employment of one or more workers.” The question
at this stage thus becomes—how likely is it that at trial the union will be
F able to satisfy the judge that the dispute between B.T. and its employees
was predominantly about possible job losses, or redundancies? In the
passage from his judgment which Sir John Donaldson M.R. has quoted,
the judge below concluded that it was likely that the union would be able
to do so.

With all respect to the judge, I find myself driven to the opposite
conclusion: partly because at two points in this part of his judgment I
G think that he erred in his approach; and partly because we have had the
benefit of having put before us important additional evidence to that
which was before him.

First, as I have already said, I think that the amendments to section
29(1) made by section 18 of the Act of 1982 have restricted the scope of
the former substantially. Thus, after referring to the two cases of *Hadmor*
H *Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 and *Health Computing*
Ltd. v. Meek [1981] I.C.R. 24, in which the courts had to consider section
29(1) in its unamended form, I think that the judge erred when he said
ante, p. 932G–H:

“The phrase has been ‘is connected with’ rather than, as now, ‘which
relates,’ but I do not see in the circumstances of this case that it
matters which phrase is taken.”

Before considering further the two authorities I have just mentioned, I should deal with another upon the same point to which we were also referred and in which the phrase under consideration was "industrial dispute" as defined by section 167(1) of the Industrial Relations Act 1971 in which the material phrase was "relates wholly or mainly to," as it is again now in the amended section 29(1) of the Act of 1974. The authority is *General Aviation Services (U.K.) Ltd. v. TGWU* [1975] I.C.R. 276. There industrial strife broke out when, without consultation, the British Airport Authority introduced a Canadian company at London Airport to provide a comprehensive ground-handling service for any airline that desired it. Not surprisingly those already employed on this work at the airport took the view that the introduction of the new company posed a threat to their jobs. In my view the only aspect of the decision in that case which is relevant for our purposes is that this court there held that a dispute can certainly relate wholly or mainly to "termination or suspension of employment" even though the cause of it is merely the fear of future redundancies. This decision was approved by the House of Lords in *Hadmor's case* [1983] 1 A.C. 191 to which I shall refer again hereafter.

What then was the dispute between B.T. and its employees in this case wholly or mainly about? The judge's finding on this point was that it was a dispute which on the authorities to which he referred related wholly or mainly to termination of employment, that is to say—job losses. However in each of the three authorities upon which the judge relied the relevant phrase was "is connected with" rather than "which relates wholly or mainly to" and, as I have already said, I think that the judge erred in concluding that in the circumstances of the case it did not matter which phrase was taken. That this is so is in my opinion clearly demonstrated by the passage from Lord Diplock's speech in *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294, 1304, which the judge quoted. In that passage Lord Diplock pointed out that it mattered not in that case that the predominant subject of the dispute was not one of the matters set out in section 29(1) of the Act of 1974 provided that one could say that one of the subjects of the dispute, with which it could be said to be connected, at least in part, was one of such matters. In the instant case the change in the wording of the statute is clearly of importance: the amended subsection now does require the court to look to the predominant purpose.

Of the other authorities upon which the judge relied, in my judgment two were not directly relevant to the question of what was the predominant subject of the dispute. On the issue of job losses, that is to say "termination or suspension of employment . . . of one or more workers," which are the relevant words in paragraph (b) of section 29(1), the ratio of the decision in the House of Lords in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 was that a fear of future redundancies was fully within the meaning of the paragraph and that the argument that there could not be a trade dispute based upon this ground until redundancy notices had already been issued or threatened by the employer was unsustainable. This was again the basis of the decision in *Health Computing Ltd. v. Meek* [1981] I.C.R. 24, to which also the judge referred.

Finally, the decision in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142 was in my judgment one upon the meaning of and correct approach to the phrase—"in contemplation or furtherance of a trade dispute." In the *Duport Steels* case the essential decision of the House of Lords was that a trade union which proposed to call out on strike employees of companies in the private sector of the steel industry to increase pressure on the public

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A authority, the British Steel Corporation, whose employees who were members of the union were already on strike, was acting in contemplation or furtherance of that latter dispute. Respectfully, I do not think that the decision in the *Duport Steels* case was relevant to the determination of the different issue before the judge in the instant one.

B In the result, therefore, in my opinion the judge's approach to the question whether or not the dispute between B.T. and its employees referable to Mercury was a trade dispute within section 29(1), and thus more particularly whether the union were likely to succeed on the section 13 defence at trial, cannot be supported. This does not mean that the ultimate exercise of discretion by Mervyn Davies J. not to grant interlocutory injunctions was wrong, but it does not only entitle but requires this court to exercise an original discretion in the case itself.

C I turn then to consider, on all the evidence now before us, what was the sole or main matter about which the employees of B.T. were in dispute with the latter when they refused to interconnect Mercury and blacked the work at the premises of Mercury and its shareholders. In my opinion this has to be decided on an ordinary common-sense approach, analogous to that which is adopted when a court has before it a question of causation. A reasonable starting point for the inquiry in the instant case is the fact that the employees of B.T. disobeyed their employers as they did because they were instructed to do so by the union. There is no question in this case, for instance, of original unofficial action by some employees being taken up and made official for all by the union. Further, although it would be unfair to suggest that B.T.'s employees acted as they did merely because they were told to do so by their union and without applying their own minds at all to the reasons why they were disobeying instructions as they were, when an industrial dispute is created by a trade union's instructions it is surely right to ask why the union gave them when one is attempting to discover what the dispute, which flowed from compliance with those instructions, was wholly or mainly about. I have no doubt that the union gave those instructions because B.T. attempted to implement the interconnection agreement with Mercury. Nevertheless it would of course be wrong to hold that this was in itself the sole or indeed a main cause of the dispute. The union saw the attempt to interconnect Mercury as the thin end of the wedge which could ultimately lead to the failure of their campaign against liberalisation and then privatisation. If this campaign failed, there was, it was said, a serious risk of redundancies and, amongst other things, the likelihood that B.T. would become less profitable, which would also reduce the scope for improvement in the terms and conditions of employment of its employees. In the various affidavits sworn by Mr. Stanley and filed on the defendants' behalf in these proceedings this is repeated and emphasised—for instance in paragraph 10 of his first affidavit:

H "I therefore wish to state unequivocally and with all the emphasis at my command that the purpose and object of the industrial action complained of by the plaintiffs is to prevent the risk of job losses arising from the entry into the market of an unwelcome competitor."

Mercury's claim necessarily involves an attack on the genuineness of these contentions of Mr. Stanley. Their case in brief is that the blacking of Mercury and its shareholders was part of the union's relatively long-standing campaign against Mercury and the government and the policies of liberalisation and thereafter privatisation for which they stand. Of

course Mr. Stanley has to base himself upon an alleged risk of redundancies, because under the relevant legislation as now enacted this is the only defence that the union can have in this action, and in particular against the interlocutory injunctions now sought. Be that as it may, I remind myself, on the one hand, that I should not lightly disregard Mr. Stanley's sworn evidence, particularly at the interlocutory stage. On the other hand, section 17(2) of the Act of 1974 does require me to have regard to the likelihood of the defendants succeeding on this point at trial. Thus, so far as I think legitimate, I must make an attempt to look forward to trial, to use my experience of conducting litigation, to anticipate that the contents of Mr. Stanley's present affidavits will perfectly properly be filled out at the hearing and further witnesses called, no doubt amongst them the writers of some of the letters exhibited to Mr. Stanley's second affidavit sworn on October 14, 1983. Equally, there is no doubt that Mr. Stanley will be cross-examined about his evidence at trial and I have looked in the material presently before us for aspects of the case upon which such a cross-examination might be mounted and tried to reach some conclusion, without speculation, about the likelihood that any such cross-examination might weaken the effect of his evidence as he has presently deposed. I remind myself, for instance, of some of the matters to which Mr. Alexander referred in his submissions—of the fact that Mr. Stanley did not exhibit the report of the union's special conference of September 18, 1983, until his third affidavit was filed; of the fact that he did not refer to nor exhibit the Job Security Agreement between the union and B.T. until his fifth affidavit, although I also have well in mind the evidence about B.T.'s insistence in negotiations that the Job Security Agreement should contain what was described as the force majeure clause, paragraph 5, about what is said by Mr. Stanley to be the views of his union members about the efficacy of the Job Security Agreement, and about the reference already said to have been made to paragraph 5 by a senior member of B.T.'s management to two senior officials of the union on August 10, 1983.

On the other hand, there was no evidence before the judge nor before us that there had been any discussion between the union and B.T. about the effect that the arrival of Mercury on the telecommunications scene might or would have on redundancies, nor about the effect of the Job Security Agreement in these circumstances.

Further, although I fully appreciate that we live in a time of high unemployment with fears of redundancy prevalent throughout industry, the evidence that we presently have leads me to the conclusion that to the knowledge of the union B.T. clearly anticipated being able to accommodate any job losses that might result either from competition or from technological advance by natural wastage and retirement.

Finally, in my opinion all these matters have to be considered in the context that there is no doubt that the union is and has for some time been conducting a campaign against liberalisation and privatisation, in which the defence of its members' jobs and conditions of service has only been one of the issues. I think that from the union's own documents which are before us this has been and is in substantial degree a political and ideological campaign seeking to maintain the concept of public monopoly against private competition. I have no doubt that those who strenuously contend for the continuation of a monopoly in the postal and telecommunications fields honestly and fervently believe that this is in the best interests of the jobs and conditions of service of those working in the

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A industry. It does not however follow that industrial action taken to further that campaign amounts to a dispute which is wholly or mainly about fears of redundancies if that monopoly is not maintained. Doing the best I can, I have come to the conclusion that it is unlikely that the defendants in this case will succeed in satisfying a court at trial that the dispute between B.T. and its employees over the blacking of Mercury and its shareholders was a "trade dispute" within the relevant legislation as now enacted. If I were wrong and the dispute were truly one which was wholly or mainly about the fear of redundancies, then I would have no doubt that the union, in instructing its members to take the action that they did, was acting in contemplation or furtherance of the trade dispute which then ex hypothesi was in being.

B
C In the result, however, I think that it is unlikely that the defendants will succeed at the trial of this action in establishing the section 13(1) defence.

D I turn therefore to the general principles upon which courts should exercise or decline to exercise their discretion to grant interlocutory injunctions laid down in the well-known *American Cyanamid* case [1975] A.C. 396. I do so having well in mind the passage from Lord Diplock's speech in *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294, 1305c, and in particular the necessity to consider the practical realities of industrial situations to which Lord Diplock referred at p. 1305f of the report. However in the present case the real dispute, as I think, is not between B.T. and the union but between the latter and Mercury and between the union and the government. The industrial action is no doubt being used as a bargaining counter in the dispute between the union and the government; it is not in reality being so used in any dispute between the union and B.T. or Mercury. In this particular case there is no good reason why the industrial action now being taken cannot, if temporarily postponed, be revived if the union does succeed at trial and revived effectively. I do not think that the grant or refusal of an interlocutory injunction will dispose finally of this action; both counsel told us that there is likely to be a trial and this is my opinion also.

F In the *American Cyanamid* case [1975] A.C. 396, 408B–E, Lord Diplock laid down that a court should first consider whether the plaintiff is likely to be adequately compensated by damages were he to succeed at trial but not be protected by an interlocutory injunction in the meantime. If damages would not provide an adequate remedy for the plaintiff, then mutatis mutandis one must undertake a similar inquiry in so far as the defendant is concerned. It is only where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises—and with it such considerations as the maintenance of the status quo. In his judgment the judge below expressed the view that in a case of this kind it is impractical, if not impossible, to assess the financial consequences of making or not making an order. With respect, I disagree.

H On the evidence before us I have no doubt that damages will not be an adequate alternative remedy to Mercury if interlocutory injunctions are not granted. The evidence satisfies me that if the union's blacking continues the loss which Mercury will sustain will be very substantial, difficult to assess, but certainly in excess of the limit of £250,000 on the union's potential liability imposed by section 16(1) and (3) of the Employment Act 1982. On the other hand, in the particular circumstances of the present case, I think that such loss, if any, to the union from a postpone-

ment for something of the order of three or four months, which we were told is what the parties contemplate under the order for a speedy trial made by the judge below, will be small indeed and well within the capacity of Mercury to reimburse.

For these reasons I would allow this appeal and grant the interlocutory injunctions sought.

DUNN I.J. In the judgment under appeal, the judge, after a careful summary of the principal items of evidence which he considered to be relevant, examined first the requirement of section 17(2) of the Trade Union and Labour Relations Act 1974 that the court must on an interlocutory application for an injunction such as this consider the likelihood of the union succeeding at the trial in establishing the matters which would under section 13 of the Act afford them a defence to the action. He held on the affidavit evidence that the defendants were likely at the trial to establish a section 13 defence. He recognised, however, that the section 17(2) element, as he called it, was not an "overriding" or "paramount" factor and he accordingly went on to consider the application of the principles of *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.

At this stage he commented that it was impossible to assess the financial consequences of making or not making an order, and he thought that there was something to be said for a submission for the union that the status quo should remain. Since the preservation of the status quo comes at the very end of an *American Cyanamid* exercise, his comments may be open to the criticism that he has not given sufficient weight to the absence of financial detriment to the union or their members if an injunction is granted for the short time until trial or to the factor that on the balance of convenience the non-financial detriment to the union if an injunction is granted (in that their members will lose some of the advantage of their industrial muscle) is far outweighed by the loss to Mercury if no injunction is granted. It does appear however that the judge did have in mind the devastating effect on Mercury's business which continuation of the union's industrial action will have, and on the whole I take the view that the basis of his decision was that in his view the prospects of the union's succeeding at the trial by virtue of section 13(1) were so great as to outweigh all other factors.

We have therefore in this appeal to consider primarily whether the judge was right in his assessment of the union's prospects of success by virtue of section 13(1). We have however fresh evidence before us, and so we have additionally to consider whether the fresh evidence invalidates the reasons given by the judge for his conclusion. In relation to the fresh evidence, it is in my judgment pertinent to bear in mind the comment of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, 224, that the greater the likelihood of a section 13 defence succeeding, the greater the weight to be attached to it. The converse must also apply. If the effect of the fresh evidence is significantly to reduce the defendant's prospects of success by virtue of section 13, then, if I am correct in my interpretation of the basis of the judge's decision, it may be a legitimate conclusion for this court that that reduction in the union's prospects of success is sufficient to invalidate the judge's conclusion after his balancing exercise.

I turn to consider the judge's assessment of the union's prospects of success under section 13 on the evidence which was before the judge. But it is necessary first to say a little about some of the authorities. *General*

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A *Aviation Services (U.K.) Ltd. v. TGWU* [1975] I.C.R. 276, a decision of this court, *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 where the House of Lords approved the *General Aviation Services* case and *Health Computing Ltd. v. Meek* [1981] I.C.R. 24, a decision of Gouling J.

B The present definition of "trade dispute" is to be found in section 29(1) of the Act of 1974 as amended by the Employment Act 1982. One of the amendments made by the Act of 1982 was to substitute the words "which relates wholly or mainly to one or more of the following" for the words "which is concerned with one or more of the following." The words so substituted were part of the definition of "industrial dispute" in the Industrial Relations Act 1971 and the *General Aviation Services* case [1975] I.C.R. 276 was a decision on that definition in the Act of 1971. In that case baggage handlers at Heathrow had objected, because of fear of job losses, to the introduction by the Airport Authority at Heathrow of an aircraft handling company to provide ground handling services for airlines using the airport. The dispute was not between the workers and their own employers and so because of a different amendment in the definition of "trade dispute" would not now be within the definition; that is not for present purposes relevant. An independent inquiry found that the workers' fears of job losses were groundless, but on the evidence in the case there was a clear finding that these fears were genuine and widely entertained; see the judgment of Orr L.J. at p. 294. In those circumstances the court held that there was an industrial dispute within the definition because the dispute related wholly or mainly to the termination of employment of workers, even though the redundancies feared lay wholly in the uncertain future and there had been no actual threat of a redundancy notice being served.

E *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 was a decision on the definition of "trade dispute" in section 29 of the Act of 1974 in its unamended form, i.e. with the words "which is concerned with one or more of the following." What had happened was that the union of which the defendants were officers had blacked the showing by a television company of films made by Hadmor Productions, an independent production unit, because they had not been made in the television company's own studios. The reason for the union's action was plainly a fear of job losses among the union's members employed in the television company's own studios. Lord Diplock, who regarded the case as a classic instance of a trade dispute in a period of recession, found significant parallels in the *General Aviation Services* case [1975] I.C.R. 276, although the wording "which is concerned with one or more of the following" was wider than the wording "which relates wholly or mainly to one or more of the following." The important point for present purposes is however that, as no other explanation for the union's action but fear of job losses was found and as the words "wholly or mainly" were not included in the definition of "trade dispute" which the court had to apply in the *Hadmor Productions* case [1983] 1 A.C. 191, the court did not have to consider those words "wholly or mainly" at all.

H *Health Computing Ltd. v. Meek* [1981] I.C.R. 24 was another decision on the definition of "trade dispute" in section 29 of the Act of 1974 in its original form, with the words "which is connected with one or more of the following." The plaintiffs were endeavouring to sell computer systems and equipment to hospitals and the union of which the defendants were officials had instructed its members employed in the Health Service to

have no dealings with the plaintiffs. The reason put forward was fear of job losses. Goulding J. applied the *General Aviation Services* case [1975] I.C.R. 276 and dismissed a motion for an interlocutory injunction on the ground that the defendants were likely to succeed at the trial in their defence under section 13. He said [1981] I.C.R. 24, 33G: "I am of opinion that a dispute about job security, a dispute motivated in whole or in part by the fear of redundancy, is a trade dispute." That of course, though no doubt correct at the time, would be a misdirection now under the amended definition of "trade dispute"; to qualify the dispute must now be motivated wholly or mainly by the fear of redundancy.

In the present case the union's members are in dispute with Mercury and B.T. over the interconnection of Mercury's equipment with the B.T. exchanges. But, prima facie, that dispute is only an aspect of a wider dispute between the union and their members on the one hand and Mercury, B.T. and the government on the other hand over the breaking, whether by liberalisation or privatisation, of the telecommunications monopoly hitherto enjoyed by B.T., or its predecessor the Post Office, as a nationalised industry. Other possible reasons have been mentioned in argument, but the main question for the trial is likely to be whether the union's members' actions in refusing interconnection are wholly or mainly due to fear of job losses or, even if partly due to fear of job losses, are mainly due to political objection to the breaking of the monopoly of a nationalised industry. This is a question on which the words "wholly or mainly" in the statutory definition are of fundamental importance, but it does not seem to me that the judge has addressed his mind to those words at all.

At the start of the relevant passage in his judgment, the judge says, ante, p. 932F-G:

"I had supposed that fear of future job losses could not be prayed in aid at this early stage. One would suppose that some real threat of dismissal would have to be shown before it could be said that a dispute relates to termination of employment. The authorities show that this supposition may be wrong. . . ."

He then refers to *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 and *Health Computing Ltd. v. Meek* [1981] I.C.R. 24 and he continues:

"So, if there is a dispute it may be a dispute relating to termination within section 29(1)(b). The phrase has been 'is connected with' rather than, as now, 'which relates,' but I do not see in the circumstances of this case that it matters which phrase is taken."

It seems to me, with all respect, that it does matter very considerably which phrase is taken, because of the words "wholly or mainly," unless the judge is only concerned with the point that a dispute may relate to termination of employment even though there has been no real threat of dismissal (as in the *General Aviation Services* case [1975] I.C.R. 276 and the *Hadmor Productions* case [1983] 1 A.C. 191). The judge then turned to discuss a different point, and stated a little later in his judgment that when B.T. in June 1983 ordered connection "a particular dispute then crystallised." He concluded ante, p. 933G-H:

"It was a dispute with B.T. as to whether or not B.T. installations should be made available to Mercury. It was a dispute which related (according to the authorities I have mentioned) wholly or mainly to

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A termination of employment, i.e. job losses. Accordingly there is, in my view, in existence a trade dispute within section 29(1)."

B The authorities which the judge had mentioned were not however concerned with the words "wholly or mainly" at all. They were only concerned to show that a dispute may relate to or be concerned with job losses even though no real threat of dismissal had been made. As I see it, the judge has been so concerned with the question of remoteness—that on the authorities a dispute could be said to relate to fear of job losses even though no threat of dismissal had been made—that he did not address his mind to the difficult and different question whether this dispute did not in truth mainly relate to a political objection to the breaking of the monopoly of a nationalised industry or to some other causes than fear of job losses.

C The finding that a particular dispute crystallised when in June 1983 B.T. ordered connection does not answer that question either way since so far as the finding goes it does not indicate either way whether the particular dispute related to the fear of job losses. Moreover on the facts of this case the particular dispute which crystallised in June 1983 cannot be looked at in isolation from the wider dispute mentioned above, which D had been going on for many months before. The court has no doubt to consider whether the particular dispute which crystallised is a trade dispute within the statutory definition, but, in considering that, the court is bound to consider what was said earlier in relation to the wider dispute. Mr. Stanley in the first of his affidavits invites the court to draw a clear distinction between the reason for the adoption of the union policy and the arguments that are advanced in an attempt to persuade others of the correctness of that policy. That however begs the question; the court has E to consider—albeit only provisionally for the purposes of section 17(2)—what is the reason for the adoption of the union's policy and on that question the arguments advanced by the union are obviously relevant evidence.

F In considering whether a dispute relates wholly or mainly to any of the matters listed in section 29 it is necessary to consider not merely the occasion which caused the dispute to break out but also the reason why there was a dispute. It tells one nothing to say in the *General Aviation Services* case [1975] I.C.R. 276 that the dispute was about the introduction of the aircraft handling company or to say in *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004 that the dispute was about the instruction given by the B.B.C. to transmit film of the Cup Final to G South Africa or to say in the present case that the dispute was about the instruction to interconnect. Mr. Alexander accepts, for Mercury, that it is necessary to go a stage further and ask why the union's members objected to the instruction to interconnect. He says that the answer to that question is that the members wanted to destroy competition and he submits that it is not permissible to go further and ask why they wanted to destroy competition. I do not agree. In both the *General Aviation Services* case [1975] I.C.R. 276 and in the *Hadmor Productions* case [1983] H 1 A.C. 191 the answer to the question why the union members objected to some course of action—the introduction of the aircraft handling company or the showing of films made by an independent unit—could have been that the members were afraid of competition; but the court went on to hold that the real reason was fear of job losses. Indeed, rather than asking what the dispute is about, which can produce a variety of

answers of different degrees of helpfulness, it is better to turn the question round, and, having isolated "fear of job losses" as the only factor within section 29 relied on by the union, to ask "Is this dispute wholly or mainly about fear of job losses?"

To be within the definition in section 29 as it now stands the dispute has to be a dispute between the workers, the union's members, and their employer, B.T., and not a dispute between the union and B.T. It is therefore the state of mind of the members which the court has to consider in assessing for the purposes of section 17(2) whether there is a trade dispute.

Mr. Stanley asserts in categorical terms in his first affidavit that the purpose and object of the industrial action taken to prevent interconnection and indeed the reason why in the wider dispute the defendants oppose the liberalisation or privatisation of B.T. is to prevent the risk of job losses arising from the entry into the market of an unwelcome competitor. He says that the reason for the members' action is quite clearly their fear for their jobs. Mr. Carr submits, as a general proposition, that workers will not take industrial action unless they are really afraid that their jobs are at risk or their pockets will be affected.

Obviously there is a considerable element of truth in Mr. Carr's submission. There are many instances where workers have declined to come out on strikes for solely political objectives. There are also, however, instances where workers have taken industrial action because their union had instructed them to do so even though they may themselves have had no desire to do so, or where, as in *British Broadcasting Corporation v. Hearn* [1977] 1 W.L.R. 1004, industrial action has been taken where there was no threat to jobs or to the members' pockets.

Whether the dispute between the union's members and B.T. and Mercury is a trade dispute has to be considered objectively. The court has to consider all the evidence and it is not concluded by the ipse dixit of Mr. Stanley. Where industrial action has been taken by the members at the behest of the union, the court must very often be entitled to infer that the members are by their action endorsing proclaimed objectives of the union, and that, conversely, the union is by its public statements about the dispute speaking on behalf of the members.

In the present case there can be no doubt that the union has for many months opposed with fervour the government's proposals for changes within the telecommunications industry. That is part of the wider dispute already mentioned. The judge seems in his judgment to have dismissed all this as a matter of words only until B.T. in June 1983 ordered connection. I do not think he was right to do that. The background to the particular dispute, and the attitude of the union which required the workers to take the industrial action and which professes to speak for the workers, must in my judgment be relevant in assessing, as required by section 17(2), whether the dispute between the workers and B.T. and Mercury relates wholly or mainly to fear of job losses.

If the attitude of the union is relevant, then the further evidence adduced in this court is also relevant to the assessment. The judge was never told of the Job Security Agreement. In this court Mr. Carr has sought to brush it aside because it is not a binding contract in law or on the ground that paragraph 5 enables B.T. to withdraw the undertaking about redundancies whenever B.T. finds the undertaking inconvenient. But that is to ignore the realities of industrial relations. The union pressed for a job security agreement even though the union knew that it would

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Dillon L.J.

A not constitute a binding contract, and the union was overall well content to have the Job Security Agreement with paragraph 5 in it, rather than nothing, when it became clear that it was not possible to negotiate a formula more favourable to the union than paragraph 5. In addition the new material put before the court by the union themselves in order to explain the context of the Job Security Agreement shows that the union were well aware of the prospects of growth and expansion in the telecommunications industry and well aware that natural wastage and the Job Security Agreement would avoid redundancies from technological advances. Mr. Stanley's assertions that the particular dispute and the wider dispute are all about jobs have to be set against the fact that the union have not, in their campaign against Mercury, liberalisation, privatisation and interconnection, ever mentioned or invoked the Job Security Agreement.

C The ultimate decision whether there is a trade dispute will be made at the trial and will be made on evidence, including no doubt the cross-examination of Mr. Stanley, which is not before us. Because, however, the judge has in my judgment misdirected himself in important respects which I have endeavoured to indicate and because of the relevance and importance of the fresh evidence, I take the view that this court is required in this case, exceptionally, to make its own assessment under section 17(2) of the likelihood of the union establishing the matters which under section 13 would afford a defence to the action, and especially of the likelihood of the union establishing that the dispute is a trade dispute. (If there was a trade dispute, the refusal to connect Mercury was, I do not doubt, in furtherance of that dispute.)

E On the material before us, I would not regard the union's prospects of success in establishing that there is a trade dispute as overwhelming, as in the *Hadmor Productions* case [1983] 1 A.C. 191, or as the judge may have thought in the present case. My assessment is that the union may succeed at the trial, but if it does it will have been a close run thing.

F It follows, in my judgment, that I am entitled to exercise my own discretion as to the grant or refusal of an injunction and I am not bound, in this case, by the judge's exercise of his discretion. Apart from the union's prospects of success under section 13, assessed as above, the relevant factors on an *American Cyanamid* [1975] A.C. 396 exercise are, as I see them, on the one hand that on the evidence Mercury are likely to suffer enormous, irrecoverable, and possibly crippling damage if no injunction is granted, and on the other hand, so far as the union are concerned, that, to put it colloquially, the horse will not have bolted between now and the trial. The work of interconnection which is in issue over the short period until the trial is not, as I understand counsel for Mercury, an immediate, once and for all connection of Mercury's system to the B.T. network, but is at this stage merely a question of connecting up each individual customer of Mercury to the B.T. network as and when Mercury have made an appropriate arrangement with that customer and installed their equipment in his premises. While some customers may be connected up between now and the date of trial, the connection of future customers thereafter will depend on the outcome of the trial, and it seems highly unlikely that such connections as are effected in the next few months until the trial takes place will cause any loss of jobs among the union's members. In the light of these factors I would grant Mercury the interlocutory injunctions they seek.

It is unnecessary to comment on the industrial action which the union have taken against Mercury's shareholders, since that action has now happily ceased. It is also unnecessary to comment on Mercury's alternative case, on which we have not heard full argument, under section 45 of the Telegraph Act 1863 as amended.

Appeal allowed.

Injunction in terms of notice of motion.

Costs in Court of Appeal and below reserved.

Liberty to apply.

*Leave to appeal granted provided application made to Judicial Office within 48 hours.**

Solicitors: *Bird & Bird; Lawford & Co.*

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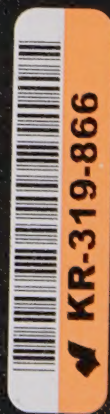
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* No application was made.

END OF VOLUME 3

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